In 2018, strikes appeared to be everywhere: from fast food restaurants to Google, statehouses to schoolhouses. After decades of declining strike activity, workers took to the streets on a magnitude not seen in recent memory. Workers in the public and private sector were eager to bring as much attention as possible to their demands: higher wages, a change in working conditions, and union status. By and through such conduct, unions capitalized on the existing contentious political climate to advance their narrative.

**Episode One: The Strike Defined**

As the U.S. Supreme Court acknowledged in the 1963 case of *NLRB v. Erie Resistor*, strikes are the “ultimate weapon in the labor arsenal for achieving agreement upon its terms.” Strikes occur when a group of employees engage in a work stoppage to bring pressure to bear on their employer.

Strikes take two forms: “economic” and “unfair labor practice.” Economic strikes are work stoppages to protest wages, hours, working conditions, or other mandatory subjects of bargaining. By contrast, unfair labor practice strikes are a work stoppage to protest an unfair labor practice committed by an employer. Regardless of the type, striking employees are not fired. However, an employer may continue to operate during a strike using replacement workers.

**Episode Two: Who Can Strike**

The right to strike is not limited to employees who are represented by a union. Section 7 of the National Labor Relations Act (NLRA) protects all private-sector workers who engage in lawful concerted
activity for the purposes of mutual aid and protection. Section 7 applies to unionized and non-
unionized workforces alike. Any worker who takes or seeks to initiate an action—including a strike—
among a group of employees about work-related issues, or brings complaints about the workplace
to management, is covered by the NLRA.

In the public sector, an employee’s right to strike is governed by state law. Many states have adopted
language similar to Section 7, giving public employees the right to engage in lawful concerted
activity. However, unlike the NLRA, some state laws contain prohibitions or limitations on an
employee’s right to strike. In Oregon, for example, public safety and public transportation bargaining
units are “strike-prohibited.” Other states allow public employees to strike, but require the parties to
satisfy impasse procedures—mediation, “cooling off” periods—prior to striking.

Public and private employers should therefore be cautious to not discipline employees who engage
in such protected activity. It is likely unions and worker advocates are encouraging—and financially
supporting—the strike. They are therefore looking to trip up unprepared employers, who would
discipline employees for engaging in protected conduct. They will capitalize on such conduct by filing
an unfair labor practice charge, while also making affected worker[s] into martyrs to garner further
support for their cause celebre.

Employers should not despair: this right to strike is not absolute. If employees are unionized, they
may be covered by a collective bargaining agreement which limits the right to strike. The NLRA and
many state laws also prohibit “intermittent” strike activity, where employees engage in a series of
short-term strikes. Should strike-prohibited public employees engage in unlawful strike activity,
they may be subject to discipline up to and including termination. Moreover, Section 8(g) of the NLRA
requires a 10-day written notice of the intent to strike or picket a health care organization.

**Episode Three: The Decline Of Strikes**

Without question, strikes have played a significant role the development of labor law in the United
States. Indeed, the Railway Labor Act and the National Labor Relations Act were promulgated to
promote “labor peace” and “eliminate the causes of substantial obstructions to the free flow of
commerce” caused by work stoppages. Employers have long feared strikes, both because of the
disruption to business operations and the violence which accompanies them.

Yet, as union density has declined over the last 50 years, so has the frequency of union strike activity.
Union density peaked at 34.8 percent in 1954. In 1952, there were 470 major strikes (defined as those
involving more than 1,000 workers). More than 2.7 million employees participated in those work
stoppages. 30 years after its peak, union density had dropped to 21.6 percent by 1984. That year,
there were 62 major strikes, with only 376,000 employees participating. By 2017, with union density
at 11.9 percent, there were only seven major strikes, involving only 25,000 employees.
Episode Four: The Revenge Of The Strike?

In 2018, union density again hit an all-time low of 11.7 percent. Yet, unlike previous years, it saw a surge of strike activity. At the forefront were actions by employees not represented by a labor organization, including the October “Fight for $15” walkouts to demand a $15/hour minimum wage, and the November walkout at Google to protest the company’s response to sexual harassment accusations.

In many ways, 2018 represented the culmination of years of work by labor organizations. What started in November 2012 as the “fast food strikes” in New York City had coalesced into a fight for a $15 minimum wage by 2015. This represented a strategic choice by unions over the last decade, an effort to maintain some relevance.

Unions have pivoted toward organizing employees in historically unrepresented industries, including childcare facilities, the home healthcare industry, airports, gas stations, convenience stores, retail stores, new media, and tech start-ups. While it has not reversed the downward trajectory of union membership, it has arguably increased awareness of the labor movement and collective action generally.

These efforts have been amplified by the existing political climate. Over the last five years, there has been a national spotlight on collective action, through the work of Black Lives Matter, #MeToo, and March for Our Lives. The large-scale Women’s Marches in early 2017, following the inauguration of President Trump, also invigorated broad swaths of a previously disengaged public.

This confluence of organized labor and political activism reached its apex in 2018’s unprecedented statewide education workers strikes. Frustrated with stagnant pay, educators walked out in three states: West Virginia, Arizona, and Oklahoma. Smaller-scale protests occurred in numerous counties in North Carolina and Colorado. Through this collective action, educators could bring political pressure to bear in an election year and extract the concessions they desired. Labor organizations, in turn, got positive publicity nationwide for their involvement in the efforts.

Episode Five: A New Hope For Unions?

It is likely unions will continue to take advantage of the contentious political climate to mobilize workers. The 2018 strikes gave unions a platform to demonstrate their effectiveness in a variety of industries. As union density has declined, so has overall public consciousness of their purpose in the workplace. Not surprisingly, unions have latched onto worker frustrations in an attempt to win back some relevancy in the modern workplace.

Employers should therefore anticipate the threat of strikes for the foreseeable future. For non-unionized employers, this will likely take the form of walkouts, for either a few hours or a few days. At the bargaining table, unionized employers will likely see a greater willingness by unions to push
negotiations to impasse and an increased threat of strikes. When faced with threatened strike activity, it is best to consult with your labor counsel to develop a lawful strategy to address it. The best defense is a good offense: an employer can engage in strike preparations to minimize their economic impact.

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