

SAYING “YOU’RE FIRED” COULD BRING LABOR PAINS

Further Advice On Hiring Permanent Strike Replacements

Insights
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An Ohio employer recently learned the hard way that employers need to be cautious when it comes to communicating with striking employees about permanent replacements. By mistakenly telling them that their employment had been “terminated,” the employer has been ordered to pay out a large sum of money to the striking workers, and – worse yet – hire them back. The lessons learned from this case can help you avoid the same fate (*Tri-State Wholesale Building Supplies v. NLRB*).

Strike Replacement Law In An Unsettling State

Earlier this summer, employers received a labor shocker when the National Labor Relations Board (NLRB) held for the first time that an employer violated the National Labor Relations Act (NLRA) by hiring permanent replacements during an economic strike to punish striking employees and to avoid future strikes (read more [here](#)). By delivering this holding in the *American Baptist Homes of the West* case, the Board overturned decades of precedent allowing employers to hire permanent replacements during an economic strike, regardless of motive. To avoid this same consequence, you should focus on your operational need to continue to operate during the strike when replacing workers.

According to a new decision from the 6th Circuit Court of Appeals, there is also another maneuver you should shun if you want to stay out of hot water: telling the striking workers that they have been fired.

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Holiday Pay Confusion Leads To Walkout

Tri-State Wholesale Building Supplies, located in Cincinnati, Ohio, manufactures building parts such as doors and windows. At the time this dispute arose in late 2013, it employed 20 manufacturing employees, **none of whom belonged to a union.**

The trouble began during the 2013 holiday season. According to the Tri-State handbook, employees receive a paid week of holiday time after Christmas Day, during which time the facility is shut down. The handbook was silent, however, about whether this “week” of pay included New Year’s Day itself (an open question, because January 1 occurs **eight** days after Christmas).

The company president told the plant manager that she would pay holiday pay for New Year’s Day if the employees worked on Friday, January 3, 2014 to catch up on lost production (workers typically had Fridays off). The manager told the employees, who agreed to work that day.

A week later when paychecks were being drawn up, the company changed course and chose not to give holiday pay for New Year’s Day. The president characterized the problem as a “mistake,” but the manager claimed that the president “changed her mind.”

When the manager relayed the news to his work crew, 11 of them walked off the job and went “on strike” to protest the situation. The president immediately went to action to keep manufacturing going and made the decision to hire replacement workers.

“Your Employment Has Been Terminated”

Within a matter of days, the president called each of the striking employees and read a prepared statement to them. She also mailed them a letter repeating her statement. The letter said that the company had “replaced” them in order to continue operations. She instructed them not to report to work “as your position has been filled and **your employment terminated.**” The letter concluded by informing them that they would be receiving standard separation information from the company, thanking them for their service, and wishing them success in their future endeavors.

Even though they were not unionized, the workers were still protected by the NLRA and filed an unfair labor practice charge against Tri-State alleging that the statute had been

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violated. The Board upheld their challenge in an April 2015 decision, but the company appealed the decision to the 6th Circuit Court of Appeals. On August 11, 2016, the 6th Circuit issued a ruling upholding the NLRB's decision and granting the striking workers a complete victory.

Court: Pay Them Back And Hire Them Back

The court decision is rather straightforward. It begins by confirming that the striking workers were engaged in protected activity under the NLRA when they walked off the job, despite the fact that they were not members of any organized union. It then addresses Tri-State's main defense: that it permanently replaced the employees in accordance with acceptable labor law practices but did not actually discharge them.

The court rejected this argument out of hand. It noted that the legal test to be applied in this situation is whether the workers could draw reasonable inferences leading them to conclude that they had been terminated. It then pointed to the letters delivered to each worker and noted that there were four portions of the letter from which the strikers could reasonably have inferred that they had been discharged: the use of the word "terminated," the announcement of "standard separation information," thanking them for their service, and wishing them success in future endeavors. This led to an award of backpay compensating the terminated employees from the date of termination to the present day.

In a bid to overturn the NLRB's order requiring reinstatement to the strikers, Tri-State also tried to point out that it had hired permanent replacement workers. But the court also rejected this argument. It pointed out that Tri-State could not prove that it told the replacement workers whether they were permanent or temporary, or in fact even informed them about the strike at all. Consequently, the court ordered reinstatement to the workers who had walked out.

Lessons To Be Learned

There are two main lessons to be learned from this case, which should be especially significant given recent attention paid to replacement workers by both the NLRB and the courts. First and foremost, avoid informing striking workers that they have been "fired" or "terminated" or "discharged." Stick with the basics. This is true because striking workers are never to be terminated due to the hiring of replacement workers. Instead, striking workers can be permanently replaced and may only be returned to work if a vacancy in

their former position, or one that is substantially equivalent, becomes available.

Inform them in writing that they are being permanently replaced in order to continue business operations, and, in order to comply with *American Baptist*, avoid any indication that your decision is motivated by any animus against the workers themselves.

Second, with respect to the permanent replacement workers, make sure you inform them about the current situation but inform them about their status as permanent workers (but still subject to at-will employment policies). Document this delivery of information so that, in case you find yourself in the same boat as the employer in *Tri-State*, you can demonstrate definitively that the replacements were aware of their status.

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