Despite unions touting their ability to assist health care employers with patient care issues, unions representing health care institutions are increasingly resorting to tactics that can substantially interfere with a health care providers' ability to deliver patient care. In particular, certain unions are engaging in short duration strikes, often only one or two days, or a series of one day strikes, in order to improve their bargaining position in negotiation situations or in recognition strikes. During such work stoppages, health care providers face difficult and costly staffing issues in responding to patient care needs.

Such short duration strikes often limit an employer's staffing options, not only due to the general lack of available qualified and licensed health care workers, particularly registered nurses, but also due to the brief, intermittent and stressful nature of such work stoppages. Indeed, finding qualified individuals who are willing to cross union picket lines, work for only brief periods of time and work in unfamiliar patient care units, is extremely challenging. Thus, health care employers frequently seek temporary workers through a staffing agency. Such staffing contracts, however, often require a minimum number of hours commitment or a minimum number of days commitment that is greater than the duration of the strike. Accordingly, following the end of the strike--or in many situations at the end of a series of short strikes--the health care provider must decide what to do with its two available staffs: the striker replacements and the returning strikers. In addition to the obvious cost implications of this double staff situations, health care providers must also act within the legal framework set forth by the National Labor Relations Act (NLRA) and the decisions of the National Labor Relations Board (NLRB).

The Right of the Employer to Remain Operational

An employer has the right to remain open and operational during a work stoppage. In order to accomplish its operational goals, such an employer may hire replacement workers. If the strike is an economic strike (a strike attempting to persuade an employer to accept certain terms and conditions of employment, including wage and benefit demands), an employer has the option of using temporary and/or "permanent" replacements. But, during an unfair labor practice strike (a strike in response to an

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1 G. Roger King is a partner with the law firm Jones, Day, Reavis & Pogue at its Columbus, Ohio office. Mr. King wishes to thank Kerstin Sjoberg-Witt for her assistance in writing this article.


3 Strikers "permanently" replaced, however, must be kept on a preferential hiring list and offered comparable jobs if and when such jobs become available or open. Consequently, before hiring from various alternative external services, the employer has a continuing duty to reinstate a striking worker whenever a position becomes available for which the striker is qualified.
employer's unfair labor practices), the employer may only use temporary replacements to continue operations during the strike, and the temporary replacements will be displaced by returning strikers.\footnote{Unions frequently allege strikes are unfair labor practice strikes and employers vigorously argue that the strike in question was not the result of any improper activity. Ultimately, the NLRB and the Courts decide this issue on a case-by-case basis. As noted, such a determination is important since a finding that the strike is an unfair labor practice strike prohibits an employer from permanently replacing striking employees and may result in back-pay liability if an employer refuses to reinstate strikers after they have made an unconditional offer to return to work.}

Finally, pursuant to a recent decision of the Federal Court of Appeals for the Sixth Judicial Circuit, an employer cannot permanently replace employees who strike over objectively-based health and safety conditions.\footnote{TNS, Inc. v. NLRB, 2002 WL 1467633, at *7-8 (6th Cir. July 10, 2002).}

Under § 8(g) of the NLRA, unions must provide health care employers with a ten-day strike notice.\footnote{Employees who engage in a work stoppage and who are not represented by a union, are not required to give a ten-day strike notice. See, e.g., Montefiore Hosp. & Medical Center v. NLRB, 621 F.2d 510, 514-15 (7th Cir. 1980); NLRB v. Long Beach Youth Center, 591 F.2d 1276, 1277 (9th Cir. 1979); Kapiolani Hosp. v. NLRB, 581 F.2d 230 (9th Cir. 1978).} This notice affords health care providers some preparation time to make staffing or other arrangements to provide uninterrupted patient care.

The Ability to Deny or Delay Reinstatement of a Striking Worker

When the union makes an unconditional offer to return to work at the conclusion of a work stoppage and the striking employees have not previously been notified that they have been permanently replaced, the striking employees generally become eligible for reinstatement. While an unconditional offer to return to work is effective when made, the employer's obligation to reinstate the strikers may not be immediate. An employer may be able to justify delaying or even denying reinstatement to strikers if it has a legitimate and non-discriminatory business reason. The NLRB has recognized several situations, including permanent replacement, general administrative burdens, and temporary staffing contracts, as legitimate business reasons for delaying reinstatement.

First, in an economic strike, the employer can delay, and even deny, reinstatement of a returning striker if the position is unavailable due to the elimination of the job or because the striker has been permanently replaced. Where the striking worker has been permanently replaced, this constitutes a legitimate business reason for refusing reinstatement unless another position becomes available for which the striker is qualified. It is important to note, however, that an employee who elects to strike his/her employer cannot be terminated--the NLRA provides workers the right to strike. Further, replaced employee strikers must be placed on a first-preference hiring list over other non-employee job candidates. In health care settings, however, even reinstatement may be difficult for a striker because the employee may be recalled to a different shift and different work unit than their pre-strike work location.

Second, where the employer eliminated a striker's position pursuant to bona fide and non-discriminatory considerations, the employer may delay reinstatement indefinitely pending the availability of another similar position for which the striker is qualified.\footnote{NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 379 (1967).}
Third, the NLRB historically has granted a five-day grace period based on legitimate administrative difficulties that employers frequently face when reinstating striking workers. Officially, the NLRB has applied this grace period only to unfair labor practice strikes when assessing back pay for an unlawful denial of reinstatement. The NLRB has assumed, however, on several occasions, that the grace period would apply to economic strikes. The policy rationale of the five-day grace period is to allow employers a reasonable time period to resolve any administrative concerns before resuming normal operations. In addition, this underlying policy supports the legitimacy of a health care employer's decision not to immediately reinstate striking workers when forced to rely on temporary staffing agencies and their minimum employment contract periods: a situation that appears to exemplify the administrative difficulties the NLRB may have had in mind.

Fourth, temporary replacements employed for a mandatory contractual period may justify delayed reinstatement. For example, in Encino-Tarzana Regional Medical Center, the NLRB recognized the hospital's four-day minimum employment commitment to a staffing agency as a legitimate business reason for the three-day delay in reinstating striking registered nurses following a one-day strike. In addition, the NLRB found that the employer did not discriminate against the striking workers when the employer suspended its call-off procedures and instead used the nonstriking employees and the temporary agency workers as its entire replacement work force.

The NLRB stressed several factors in making its determination that the employer's delay constituted a legitimate and substantial business reason and that the employer did not discriminate against the striking workers: (1) the NLRB found that the temporary agency workers were lawfully on the job and that the employer was obligated to retain them during the four-day period set forth in the contract with the staffing agency; (2) the workload did not require additional employees beyond the temporary agency workers and the nonstriking employees, who together constituted the necessary replacement workforce during the strike and for the three days following it; (3) if the employer displaced the nonstriking employees with more senior striking employees then the nonstrikers would suffer the consequences of the strike, a result rejected by the U. S. Supreme Court in TWA v. IFFA; and (4) the nonstriking workers were more familiar and comfortable working with the temporary agency workers and, unlike the strikers, had no animosity towards them.

Under these circumstances, the NLRB found that the employer was justified in not immediately reinstating the striking employees after their unconditional offer to return to work until the end of the four-day contractual period. The NLRB also found that the employer was not obligated to displace the nonstriking employees to permit immediate reinstatement of more-senior striking workers. Under these circumstances, the nonstriking employees should have the same right to remain on the job as the temporary agency workers, and therefore the NLRB found that the employer had not discriminated against the strikers for this distinction in staffing during the three days following the strike.

Subsequently, the NLRB Office of General Counsel in an Advice Memorandum following the Encino-Tarzana decision determined that a health care employer had not discriminated against strikers when it

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9 332 NLRB No. 90 (Oct. 27, 2000).

unilaterally suspended the work schedule during the four-day contract with the staffing agency; and, as a consequence, strikers could not earn "cash plus" benefits, a program that provided nurses additional compensation based on time worked.\(^{11}\) The Advice Memorandum emphasized the following factors: (1) that the temporary employees were lawfully on the job; (2) that there was no need for a double staff justifying unilateral suspension of the schedule during the four-day contract period; and (3) that the non-striking employees had earned the Cash Plus benefits based on their time worked during the four-day contractual period and that giving the strikers these accrued benefits would reward them for their status as strikers. These factors follow the same reasoning as included in the NLRB decision in Encino-Tarzana and re-enforces the position taken by the NLRB that an employer may respond to a short duration strike with a temporary staffing contract including a mandatory time period that may delay reinstatement of strikers.

Similarly, contract provisions requiring a minimum cancellation or termination notice may also constitute a legitimate and substantial business reason for delaying reinstatement of striking workers. In Pacific Mutual Door Co.,\(^{12}\) based on the thirty-day cancellation provision in the staffing contract, the NLRB did not hold the employer liable for failure to reinstate striking workers until after the thirty-day period ended. The NLRB considered the mandatory nature of the provision, which was a condition precedent for entering into the staffing contract, as an important factor in its decision. In contrast, in Harvey Manufacturing, Inc.,\(^{13}\) the NLRB held the employer liable for not reinstating the striking workers immediately after their unconditional offer to return to work where the employer did not contend that the ten-day notice-of-termination provision in the staffing agency contract was a necessary pre-condition to the contract. Accordingly, whether the provision is mandatory, including the bargaining history between the parties, are important factors that may influence the NLRB's assessment of an employer's delay in reinstating striking workers.

**Conclusion**

Within the foregoing legal framework, health care employers certainly have the option of entering into agency or independent contractor agreements to temporarily replace striking employees. The wording of such contracts, and the bargaining history between the parties in entering into such agreements, can be very important factors in determining when striking employees who make unconditional offers to return to work, must be re-employed. The wording of mandatory minimum employment period clauses in such agreements that require the contracting health care provider to guarantee a certain number of hours or days of work and the circumstances or conditions under which such clauses were negotiated by the parties (i.e., did the staffing agency make such minimum employment period clause a condition precedent to any agreement), may permit health care employers to establish the time when strikers will be reinstated. Reduced patient census or overall loss of business, and the corresponding delay in returning to the previous level of health care services, can also serve as a legitimate non-discriminatory reason for delaying the return date of strikers. Additionally, as noted above, in economic strike situations, strikers can be permanently replaced and have priority recall rights only, if and when, jobs become available for which they are qualified. Such recall rights may be particularly problematic for striking registered nurses and other health care workers as they may not be recalled to their prior shift and unit.

\(^{11}\) Tenet Healthcare Corp., NLRB Advice Memorandum Reporter ¶38071 (January 22, 2001).

\(^{12}\) 278 NLRB 854 (1986).

\(^{13}\) 309 NLRB 465 (1992).
Further, care must be taken by a health care employer not to engage in unfair labor practices that arguably could cause a work stoppage. If an employer engages in such practices and a labor organization strikes in response to these illegal actions, permanent replacement options are lost. In such situations, if an employer refuses to reinstate unfair labor practice strikers after they have made an unconditional offer to return to work, the employer is liable for back pay from the unconditional offer date until the strikers are recalled to work.

Finally, health care employers faced with a potential work stoppage should carefully draft a comprehensive strike plan, obtain knowledgeable labor counsel with experience under the National Labor Relations Act and carefully follow all federal, state and local laws and regulations.