

July 20, 2020 Strike for Black Lives and Enforcement of No-Strike Clauses

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The Movement for Black Lives (“M4BL”), in coalition with the Service Employees International Union, the American Federation of Teachers, United Farm Workers, and Fight for 15, recently announced the organization of a nationwide “Strike for Black Lives” to take place on July 20, 2020. According to M4BL, the strike is in support of “dismantling racism and white supremacy to bring about fundamental changes in our society, economy and workplaces.”

To that end, M4BL includes in its demands “[j]ustice for Black communities,” that corporations “take immediate action to dismantle racism,” and that “[e]very worker ha[ve] the opportunity to form a union, no matter where they work.” The SEIU has indicated that the walk-off is slated to last for 8 minutes and 46 seconds, highlighting the recent deaths of George Floyd, Breonna Taylor, Elijah McClain, and other members of the Black and brown communities at the hands of law enforcement.

The relevant legal issue at the foreground for employers is whether this strike constitutes protected “concerted activity for . . . mutual aid and protection” under Section 7 the National Labor Relations Act (“Act”). This strike is likely not concerted protected activity for non-union employees. Thus, non-union employees could be subject to discipline. And for unionized employees, a strike that violates a valid and enforceable no-strike provision of a collective bargaining agreement is generally not protected activity under Section 7 even though the activity is concerted, and employees striking in violation of a valid no-strike provision can also be subjected to discipline.

There is necessarily interplay between an employer’s authority to lawfully discharge an employee and the practical implications of disciplining an employee for demonstrating in support of issues relating to the Black Lives Matter movement. Decisions to discipline employees for engaging in concerted activity that is not protected, with a sensitive backdrop such as the Black Lives Matter movement, should be carefully considered by employers on a case-by-case basis, with consideration towards the potential consequences of disciplining employees supporting a movement focused on racial equality.

Key Takeaways for Employers

Employers must consider both the legal and practical implications of supporting or prohibiting political activity, including this Strike for Black Lives. Discipline may be permissible but not something that an employer wants to do in this instance. If an employer does not intend to discipline employees for participating in the Strike for Black Lives despite being able to do so, it is in the interest of employers to issue a company-wide statement addressing the strike and highlighting its reservation of the right to discipline actions that go beyond the strike, including blocking ingress/egress, violence or destruction of property. An employer that intends to discipline anyone

who participates in the unauthorized strike may also want to give notice of the intent to discipline employees for such conduct. This will eliminate arguments that employees did not understand the consequences for participating in the strike.

If you have questions, we encourage you to reach out to your Benesch contact or one of the below to discuss.

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