

Are Union-Free Strikes Protected? The NLRB (National Labor Relations Board) Thinks So.

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In June 2013, we issued a [client alert](#) discussing the efforts of unions and the **National Labor Relations Board (NLRB)** to target the primarily union-free big box retailer and fast food industries. After describing how Target had come under scrutiny from the NLRB, the client alert detailed how the **United Food & Commercial Workers Union (UFCW)** and the UFCW-backed group “OUR Walmart” had been coordinating strikes and filing charges with the NLRB against Walmart. The client alert then foreshadowed: “[g]iven the Board’s recent penchant for union activism, do not be surprised if it takes a close look at Walmart’s policies and practices in the coming months.”

As predicted, the Board filed a consolidated complaint against Walmart on January 14, 2014 alleging the union-free retailer violated workers’ rights in response to coordinated strikes across 13 states. The complaint alleges dozens of Walmart supervisors and one corporate executive threatened, disciplined, surveilled, and/or terminated more than 60 workers in response to the union-free strikes.

The complaint is significant for two reasons: (1) the Board is taking the position that union-free workers have a protectable right to strike; and (2) the Board is testing its position against the nation’s largest employer. The Board views the union-free strikes as a form of protected concerted activity, and its press release states that the National Labor Relations Act (NLRA) guarantees employees the right to “act together to try to improve their wages and working conditions with or without a union.” The complaint alleges Walmart violated the NLRA by maintaining a policy that treats absences for participation in strikes as unexcused. The complaint also details alleged retaliatory disciplinary actions taken by Walmart supervisors at particular store locations, though many of the listed locations involved only a single worker being absent.

From an employer perspective, the Board’s position raises many questions. For example, how is a supervisor to know whether a non-union worker is participating in a “strike” or just absent? Can a single worker go on strike, or is there a minimum number of strikers for the activity to be “concerted”? Can strikers be permanently replaced? Are “intermittent” strikes prohibited? It is easy to see why union-free strikes create tough questions for union-free employers.

The Board's actions against Walmart are worth watching as they come amidst a larger backdrop of worker protests and political debates over minimum wage and working conditions that are likely to remain in the spotlight for the foreseeable future. How courts ultimately grapple with the Board's position and the resulting questions could have far-reaching effects on the labor market in 2014 and beyond.

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