As the last minutes of a contract tick down with no agreement in sight, the union must consider its options. One is to strike. A second is to temporarily extend the contract while carrying out elements of an inside campaign. A third is to let the contract expire, work day-by-day, and conduct a full-fledged inside campaign.

Inside Campaigns

Inside campaigns have several things to recommend them. For one, "job-wobbling" activities such as handbills, rallies, off-duty picketing, overtime refusals, work-to-rule, and grievance walkouts, along with the threat of full-scale strike, may create enough pressure that the employer agrees to settle the contract. For another, the employer may respond in ways that violate the National Labor Relations Act (NLRA). It may videotape workers as they handbill or rally. It may prohibit employees from meeting in the lunchroom. It may warn workers that they face discharge if they take part in picketing or consumer boycott activities. ULPs of this nature give the union an opportunity to call an unfair-labor-practice strike, a walkout in which employees are protected against permanent replacement. (See Chapters 13 and 14.)

An inside campaign may provoke the employer into initiating a lockout. It might sound illogical, but if you are going to hit the bricks anyhow, a lockout has advantages over a strike. The public and other unions will be more responsive to solidarity requests. Thirty-four states and Puerto Rico pay unemployment insurance to locked out workers (see list on page 92). The employer will be barred from hiring permanent replacements. Finally, running a "clean" lockout is not easy: if the employer violates a labor law rule (see Chapter 15), the NLRB may declare the lockout unlawful and order workers reinstated with full back pay.

Work without a contract—what's in jeopardy?

A common fear about letting the contract expire is that the employer can cut wages, halt payments to benefit plans, cancel vacations, scrap seniority, assign supervisors to unit work, refuse to hear grievances, and so on.

In truth, the NLRA requires management to maintain contract terms and conditions of employment while it bargains on a new agreement, except for the matters discussed below.1 Abandoning or changing a pre-existing condition is an unfair labor practice (ULP), giving the union a basis for filing an NLRB charge, calling a ULP strike, or filing a challenge to a lockout.

Areas in jeopardy are union security, dues checkoff, agreements on permissive subjects, arbitration, and matters in the employer's final contract offer.

Union security and dues checkoff. Union-security obligations—the duty to join the union within 30 or 60 days of hire—are unenforceable in the absence of an executed contract. Dues checkoff is also at risk: unless language in the expired agreement provides for the procedure to continue indefinitely, the employer can stop making deductions.2 Members will still owe dues, but the union will have to collect individually.

Arbitration. With three exceptions, the arbitration duty generally disappears during the without-a-contract period. The exceptions are: grievances filed while the contract was still in effect; grievances over events that occurred prior to expiration; and grievances over rights that accrued under the expired agreement. For grievances over new matters, including discharges, the employer's only duty is to discuss the matter with the union and to supply information.

With arbitration no longer a concern, the employer may be tempted to fire workers who play leading role in inside campaign activities. A counterweight is the union's ability to strike in protest (the no-strike/no lockout clause expires with the contract). The union can also file charges at the NLRB, which, without a contract in force, will not apply its deferral policy.3

Agreements on permissive subjects. Contract termination releases the employer from agreements covering permissive subjects of bargaining. Health insurance for already retired employees is one example. Neutrality accords and promises not to relocate are also at risk.

Final proposals. A last area of jeopardy is the employer's final contract offer. Under NLRA rules, if the union and the employer come to a deadlock in contract negotiations, and the preceding contract has expired, the employer can declare impasse and implement its proposals. While the union cannot ignore this possibility, several obstacles stand in the employer's way:

• The employer may not implement a change unless the parties have reached a bargaining impasse on the contract as a whole: Impasse on a single proposal is not sufficient.4

• The employer may not declare impasse if the union is in the process of making counteroffers; the employer has insisted on permissive bargaining subjects; the employer has committed ULPs that have contributed to the deadlock; union information requests are pending on disputed proposals; or the employer has otherwise failed to bargain with the union in good faith.

• The employer may not implement a proposal on a partial basis. For example, if its health insurance proposal has four parts, it must implement each. Nor may the employer impose a change that is stricter or more disadvantageous than in a proposal presented to the union during negotiations. The employer can, however, pick and choose among entire proposals.

• The employer may not implement a proposal that deprives employees of an NLRA right, such as the right to strike, to picket, to distribute literature, or to bargain on future changes.

• The employer must continue to observe unaffected terms in the expired collective bargaining agreement.

Note: Angered by an inside campaign, an employer may consider adding harsh proposals to its bargaining demands so that it can retaliate against the union upon reaching an impasse. The Board has ruled, however, that the submission of new demands at late stages of negotiations, especially when they void previously accepted items or revive proposals that were previously abandoned, is bad-faith bargaining and precludes the employer from declaring a lawful impasse.5

Death by 1000 Cuts

The most successful inside campaigns employ a constellation of activities to increase tension and disrupt the employer. As explained by one organizer:

The key is that you create a situation so that management, from the time they get up in the morning till the time they go to bed, they worry about what you're doing. And if you're doing a good job, they wake up with nightmares.
Many innovative inside campaign techniques are described in the popular guide *A Troublemakers Handbook*.6 This section discusses tactics whose legality has been litigated at the NLRB.

Note: Two inside campaign pitfalls are partial and intermittent strikes. A partial strike occurs when workers slow production or refuse to perform expected tasks. Examples: instructors who refuse to turn in grades; nurses who refuse to work mandatory overtime. An intermittent strike is a series of work stoppages intended to harass the employer into a state of confusion. Labor law does not protect partial or intermittent strikes Ñ even if the contract has expired. The employer may fire employees who take part.

Handbills. Handbills and newsletters build unity and rankle management. Handbills can express strong opinions, including accusations of mismanagement and strong-arm tactics.7 The employer may not station managers or supervisors in close proximity in order to surveil the activity.8

Unless it disrupts operations, an employer must allow handbilling before and after work and during breaks on outside areas such as parking lots, walkways, and steps.9 The employer must also permit handbilling in inside non-work or mixed-use areas such as cafeterias and smoking rooms.10 Management may not confiscate handbills placed on lunch tables prior to employees taking their seats.11

At or away from the workplace, workers can handbill customers, the public, and other employees with appeals for support. If the union handbills at the location of another employer, it must avoid picketing or calls for a sympathy strike. It can display a stationary banner.

Rallies. A union can hold contract campaign rallies and informational meetings before work, after work, and during break times. Unless the event interferes with operations or causes disciplinary problems, the employer must permit employees to gather on parking lots and outside walkways.12

Employer videotaping of peaceful protests is illegal.13 The union may also hold rallies off premises.

Insignia. Employees can wear contract campaign insignia such as buttons, armbands, shirts, hats, and ribbons. Possible legends: "No contract, no peace," "Fight for a fair contract," "Stop union busting," "DonÕt touch our health care," "Up your final offer." A solidarity day—for example, everyone wearing red shirts—is protected by the NLRA unless it violates an enforced dress code. Cars may display signs in company parking lots.

An employer can bar a particular button or insignia if it is obscene, incites violence, interferes with safety or quality, disrupts production, creates disciplinary problems, or upsets customers. Management may not act on speculation: it must have evidence that the insignia is having the claimed effect.14

An employer may enforce a total ban on insignia if "special circumstances" justify the rule. The NLRB allows hospitals to ban insignia in patient-care areas. Retail stores can do the same on the selling floor. A company whose employees wear uniforms while dealing with the public can also ban insignia.15

An employer that bans insignia must enforce its policy consistently and across the board. If a hospital allows nurses to wear religious, holiday, or political buttons, it cannot forbid insignia with contract campaign legends.16

Off-duty picketing. One of the most dramatic campaign tactics is off-duty picketing. (If an extended contract forbids picketing, this tactic will have to await expiration.)

Employees have a protected right to picket before and after their shifts and during breaks – even if operations are in progress.17 Picket signs should refer to the labor dispute. Example: "Fighting for a fair contract. Honk if you're with us."

Although it is not widely appreciated, off-duty pickets have the right to ask customers, contractors, and delivery workers not to cross their picket line.18 Union drivers whose contracts permit them to respect "primary" picket lines can honor requests.

Off-duty picketing is guaranteed to set management's hair on fire, especially if outside personnel honor the line. Nonetheless, the employer cannot discipline workers for disloyalty, force employees to choose between picketing and working, lay off the individuals involved, or hire replacements.19

Unions representing health care employees must give ten days notice to the institution and the FMCS before commencing off-duty picketing.

Work-to-rule. In a work-to-rule activity, also known as work by the book, employees scrupulously follow every order, policy, procedure, or standard issued by management for the performance of their jobs, especially safety and hygiene directives. No one works off the clock, outside his or her job description, or at more than a normal speed. Everyone takes full breaks, and no one volunteers for extra work.

Curiously, the Board has not directly addressed the legal status of work-to-rule or delineated when it crosses the line into unprotected partial strike activity. In one case, however, it allowed workers to stop bringing in personal tools, explaining

that, "Where an action is voluntary, the concerted refusal by employees to perform that action is a protected concerted activity and does not constitute an unlawful partial strike."[20]

Employees should not expect NLRA protection if they deliberately reduce their output, refuse assigned duties, stop taking expected shortcuts, or refuse direct orders from management.

Limited-duration strike. A union whose contract has expired can sponsor a limited duration (half-day, full-day, two-day, etc.) strike. The work stoppage can be called over contract demands, a post-expiration grievance, a ULP, or another issue.[21] Health care unions must give ten days advance notice.

Conducting two walkouts during an inside campaign is a risk. Although an argument can be made that an intermittent strike requires three related walkouts,[22] [22] during an open and obvious inside campaign the NLRB may find two stoppages a series or pattern, even if each is called over a different issue.

Note: The intermittent-strike pitfall does not apply to a union that calls a short strike, returns to work, and then strikes indefinitely.[23]

As with an extended strike, a danger exists that the employer will hire permanent replacements. This risk can be reduced by confining the strike to a single day and, soon after it begins, submitting an unconditional offer to come back the next day. A struck employer may not hire permanent replacements after it receives a return-to-work letter.[24]

A union can further reduce the risk of replacement by waiting to strike until the employer commits a ULP, such as a unilateral change or a failure to supply information. Refusing to reinstate employees after a ULP strike violates the NLRA.

An employer may not reprimand, harass, or threaten an employee for taking part in a lawful strike. Nor may it warn that in the future it will hire permanent replacements.[25] [25]

Break-time demonstration. Employees can demonstrate during meal or break periods if they do so without disrupting operations. During lunch, for example, workers might march to the labor relations office to present a petition.[26]

Overtime moratorium. Whether a union can instruct members to refuse overtime depends on whether contract or past practice treats assignments as voluntary. If workers have been free to decline overtime requests without penalty, a union-sponsored moratorium is protected.[27] If overtime is mandatory, repeated refusals are a partial strike.

Customer boycott. To support an inside campaign, employees can urge customers or clients to withhold purchases of the employer's products or services.28 Unions with boycott restrictions in their bargaining agreements must wait for contract expiration. Possible tactics include:

- Off-duty picketing and handbilling at the workplace
- Handbilling trade shows
- Handbilling customer facilities
- Signs on automobiles
- Airplane banners
- Letters to customers
- Letters to retailers
- Picketing stores that sell the employer's products
- Asking customers to sign no-buy petitions

To ward off charges of disloyalty, handbills and other union literature should refer to the labor dispute and should avoid attacking the quality of the employer's products or services.

Q & A

Call-in rule

Q. After the contract expired, we held a one-day strike to protest the company's bargaining posture. The next day, management issued each striker a written warning for violating a company rule requiring employees to call in prior to absences. Are the warnings lawful?

A. No. Strikers may not be disciplined for violating call-in or call-out rules.29

Sickout

Q. Can we call a sickout to support our contract campaign?

A. Yes, if the employer is made aware that the action is being undertaken as a union protest (and the contract has expired).30

Pending cases

Q. Three grievances are scheduled for arbitration. If we let the contract expire, will they die?

A. No. Unless language in the contract completely extinguishes the arbitration procedure, you will be able to arbitrate pre-expiration grievances. 31

Return after work stoppage

Q. The day after the contract expired, we held a morning rally outside the plant gate. At nine o'clock we told the general manager we were ready to work without conditions. His response: "Today is history. See you tomorrow." Should we file a ULP charge?

A. Yes. Absent a substantial business justification, an employer must immediately reinstate workers who offer to return from a lawful work stoppage.32

Temp agency contract

Q. When we tried to come back from a walkout the boss said we would have to wait because he had signed a five-day contract with a temporary employment agency. Is this lawful?

A. Probably not. A contract with a replacement agency is generally not a sufficient reason to delay strikers from returning.33

Picketing in uniform

Q. Can we wear uniforms on an off-duty picket line?

A. Perhaps. An employer must tolerate workers picketing in uniform unless, prior to the walkout, it consistently enforced a rule against wearing uniforms off-duty.34

Taking down names

Q. While we handbilled outside the plant, the director of Human Resources wrote our names on a pad of paper. Is this legal?

A. No. Recording or even pretending to record the names of employees who engage in protected activity is illegal.35 File a ULP charge.

Picketing Business

Q. Can we set up a picket line outside a business owned by a company director?

A. No. It is illegal to picket a secondary business (see page 41). But you can handbill or display a stationary banner.