

**In This Issue:**

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The New Jersey Supreme Court holds that striking employees are entitled to unemployment benefits if there is not a “stoppage of work” resulting in the employer’s production being curtailed by at least 20 percent.

## ***Paid to Picket?* N.J. Supreme Court Rules Strikers May Be Eligible for Unemployment Benefits**

By Russell J. McEwan and Margo D. Eberlein

In a decision sure to bewilder many New Jersey employers, on January 27, 2009, the New Jersey Supreme Court held in *Lourdes Medical Center of Burlington County v. Board of Review* that, under certain circumstances, employees who participate in a labor dispute may be eligible to collect unemployment insurance benefits while on strike.

New Jersey’s unemployment benefits statute disqualifies individuals from collecting benefits in a variety of situations, including where unemployment is due to a “stoppage of work” caused by a labor dispute. However, regulations promulgated by the N.J. Department of Labor, Division of Unemployment Insurance (“the Division”), provide that a “stoppage of work” occurs only if the employer curtails production below 80% of its normal operations. Thus, if production is not curtailed by at least 20% due to the labor dispute, strikers are eligible for benefits.

In *Lourdes*, approximately 250 nurses employed by a non-profit hospital went on strike after working without a contract for two months. Thereafter, the hospital hired temporary replacement nurses at a cost of \$1 million per month and experienced increased management costs because it was forced to hire extra security and divert its public relations staff from their normal duties to handle strike-related matters. Underscoring the severe financial impact of the strike, the hospital’s operational losses were projected to exceed the prior year’s losses by \$8 million. Nonetheless, the hospital continued to operate at full capacity during the strike.

Approximately 100 of the striking nurses applied for unemployment insurance benefits. The Division, in granting unemployment compensation to the striking nurses, concluded that the hospital had not experienced a decline in production sufficient to constitute a disqualifying “work stoppage.”

The Supreme Court, in reversing a lower court decision and upholding the Division’s decision, rejected the hospital’s argument that the heavy financial burden caused by the strike was tantamount to a stoppage of work. The court noted that “the very purpose of a strike is to inflict sufficient financial pain on an employer to accomplish the goal of the striking workers.” Instead, the court agreed with the Division that because the hospital’s

productivity during the strike was not lower than 80% of its normal operations, there was no “stoppage of work” within the meaning of the statute.

While the Lourdes decision may cause a company to suffer from higher insurance experience ratings as a consequence of its striking employees drawing unemployment benefits, the court’s decision may have even more profound consequences for employers:

- With the removal of perhaps the greatest disincentive for employees to strike—a loss of pay—New Jersey employers may face a greater risk of strikes in the future.
- Labor unions are likely to take more aggressive bargaining positions based on their members’ willingness to engage in a strike, knowing they could be paid at least a portion of their normal income through unemployment insurance benefits.
- For employers that enter negotiations unprepared for a strike or that simply cannot afford a strike, the price of labor peace may be higher labor costs.
- The availability of unemployment benefits could prolong strikes, as strikers, secure in the knowledge that the State will pay them unemployment insurance benefits, may elect to stay out on strike with the hope of securing a better contract.
- Companies that hire replacement workers during a strike may be particularly vulnerable to unemployment insurance claims by strikers, to the extent that their operations stay above the 80% productivity threshold.

In light of the court’s decision, New Jersey employers with union-represented employees should reexamine the manner in which they prepare for contract negotiations and calculate the cost of a potential strike. Further, employers should develop contingency plans to respond to an increased threat of strikes in support of bargaining positions by reason of the potential availability of unemployment insurance benefits. Such plans should evaluate whether the company is best served by intentionally curtailing its operations by at least 20% to avoid unemployment benefit liability, or by working at full capacity during a strike and living with the resulting impact on its leverage at the bargaining table, as well as on its unemployment insurance experience rating.

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