

Date of Hearing: April 23, 2024

ASSEMBLY COMMITTEE ON JUDICIARY

Ash Kalra, Chair

AB 2404 (Lee) – As Amended March 21, 2024

SUBJECT: STATE AND LOCAL PUBLIC EMPLOYEES: LABOR RELATIONS: STRIKES

KEY ISSUE: IN ORDER TO PROTECT PUBLIC EMPLOYEES' CONSTITUTIONAL RIGHTS IN THE WORK PLACE, SHOULD THE LEGISLATURE CREATE A STATUTORILY PROTECTED RIGHT TO SYMPATHY STRIKE FOR ALL PUBLIC EMPLOYEES?

SYNOPSIS

Labor strikes play a pivotal role in the development of workers' rights and the maintenance of balance in the relationship between employers and employees. Throughout modern history, workers have used their power in the country's economy to force their employers to address grievances. A similarly important tool in the labor toolkit is what is referred to as a "sympathy strike," or a strike action in which the individuals striking do not necessarily have a grievance against their employer, but are acting in solidarity with the striking workers. A sympathy strike can be particularly effective where employees of a single employer are represented by multiple unions. However, many collective bargaining agreements include prohibitions against sympathy strikes.

This bill is nearly identical to AB 504 (Reyes, 2023) which was heard and approved by this Committee last year. The bill establishes the right of public employees, except for specified peace officers and emergency responders, to engage in sympathy strikes by prohibiting public employers from disciplining or otherwise engaging in adverse action against an employee for their refusal to enter the site of a primary labor dispute, perform work for an employer involved in a primary labor dispute, or cross a picket line. Additionally, the bill prohibits a public employer from directing a public employee to engage in any of the previously listed activities. The bill also expressly authorizes a recognized employee organization to inform employees of their rights, and to encourage employees to exercise said rights. Finally, the bill voids any provision in a public employer policy or collective bargaining agreement that purports to limit or waive the rights covered in the bill.

The bill is sponsored by the California Labor Federation (CLF) and the California Teamsters Public Affairs Council and further supported by a number of labor unions. It is opposed by a coalition of local government advocates and the University of California (UC). This bill was previously heard and approved by the Assembly Committee on Public Employment and Retirement on a vote of 5-1.

SUMMARY: Establishes and protects the right of public employees to demonstrate solidarity with, and participate in, labor disputes. Specifically, **this bill:**

- 1) Makes a finding and declaration regarding the right of a public employee to demonstrate solidarity with other employees by honoring a strike, refusing to enter the premises or

perform work for an employer engaged in a primary labor dispute and finds it to be a fundamental human right protected by the Constitution and laws of this state.

- 2) Protects a public employee from legal or disciplinary or any other adverse action arising from that public employee's refusal to do any of the following:
 - a) Enter property that is the site of a primary strike;
 - b) Perform work for another employer involved in a primary strike; and
 - c) Go through or work behind any primary strike line.
- 3) Prohibits a public employer from directing a public employee to take any of the actions above.
- 4) Authorizes a recognized employee organization to inform employees of their rights and encourage employees to exercise their rights under the provisions of this bill.
- 5) Makes void as against public policy any provision in a public employer policy or collective bargaining agreement that purports to limit or waive the rights set forth in this bill.
- 6) If the bill conflicts with a collective bargaining agreement entered into before the effective date of the bill, requires the parties to negotiate over the provisions of this bill upon the request of the employer or exclusive representative. Following the expiration of a collective bargaining agreement that was entered into before the effective date of this bill, applies the bill's provisions.
- 7) Exempts specified peace officers and emergency responders.
- 8) Specifies that this bill does not alter existing law relating to strikes by essential employees as set forth in judicial decisions and decisions of the Public Employee Relations Board, as promulgated or revised from time to time.
- 9) Defines, for purposes of this bill, "honoring a strike" as a refusal to perform work for a public employer in response to a primary strike by an exclusive representative of a public employer.

EXISTING LAW:

- 1) Prohibits Congress from making any law abridging the freedom of speech or the right of people to peaceably assemble. (United States Const. First Amendment applied to the states by Amendment XIV; Cal. Const., Article 1, Section 2.)
- 2) Grants employees the right to engage in concerted activities, including lawful strike actions, for the purpose of collective bargaining or other mutual aid or protection, and the right to refrain from any or all such activities. (29 U.S.C Section 157.)
- 3) Creates a protected right of public sector employees to participate in union activities. (*Fresno County In-Home Supportive Services Public Authority* (PERB Decision No. 2418-M (2015).))

- 4) Establishes the Meyers-Miliias-Brown Act which governs collective bargaining procedures for California's municipal, county, and local special district employees. (Government Code Sections 3500 - 3511. Unless otherwise noted all future references are to the Government Code.)
- 5) Establishes the State Employer-Employee Relations Act of 1978, or the Dills Act, which governs collective bargaining procedures for state government employees. (Sections 3512 – 3524.)
- 6) Establishes the Higher Education Employer-Employee Relations Act (HEERA) which governs collective bargaining for the California State University System, the University of California System and Hastings College of Law. (Sections 3560 – 3599.)
- 7) Establishes the Prohibition on Public Employers Deterring or Discouraging Union Membership (PEDD). Among other things, the PEDD prohibits a public employer from deterring or discouraging current or prospective public employees from exercising specified collective bargaining rights. (Sections 3550 – 3553.)

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS: Labor strikes play a pivotal role in the development of workers' rights and maintaining balance in the relationship between employers and employees. Throughout modern history, workers have used their power over the country's economy to force their employers to address grievances. Demonstrations such as the Pullman Strike of 1894, the U.S. Postal Strike of 1970, and writers' strike of the Writers Guild of America in 2008 have created sufficient disruption in their relevant industries and nationwide to increase the standard of living for all workers. A similarly important tool in the labor toolkit is what is referred to as a "sympathy strike," or a strike action in which non-striking workers refuse to cross the picket line and instead appear in solidarity with the striking workers. A sympathy strike can be particularly effective where employees of a single employer are represented by multiple unions. In the event a single union elects to go on strike, the pressure on larger employers may be insufficient to create any meaningful change. In that case, the solidarity of a sympathy strike helps increase workers' leverage to encourage their employer to address the concerns of the striking union.

However, many collective bargaining agreements (CBAs) include prohibitions against sympathy strikes, thereby allowing employers to direct their employees to cross a picket line in order to appear at work, and discipline them for their failure to do so. Perhaps recognizing the power of a sympathy strike, the intent of these clauses is to help ensure the continuity of services for the employer. While the goal is understandable, such clauses often undermine the power of a strike, and risk creating significant tensions between workers as non-striking workers may often be expected to help fill the vacancies left by striking workers. The threat of being viewed by their own colleagues as a real life "Scabby the Rat" can risk significant tension in the workplace, to say nothing of the discomfort in contradicting one's own conscience. According to the author:

Contract clauses that prohibit workers from exercising the right to honor picket lines go against the values and public policy of the state. The right to honor a picket line is not just a democratic right, it is a matter of conscience for many Californians. It is a choice that people make according to what they believe is morally right. In light of recent employer actions, California needs to ensure public employees' right to honor and support strikes.

This bill would establish the right of all public employees, except firefighters and specified peace officers, to engage in sympathy strikes by prohibiting public employers from disciplining or otherwise engaging in any adverse action against an employee for their refusal to enter the site of a primary labor dispute, perform work for an employer involved in a primary labor dispute, or cross a picket line. Additionally, the bill would prohibit a public employer from directing a public employee to engage in any of the previously listed activities. The bill also expressly authorizes a recognized employee organization to inform employees of their rights, and to encourage employees to exercise said rights. Finally, the bill voids any provision in a public employer policy or collective bargaining agreement that purports to limit or waive the rights covered in the bill. In effect, this bill would allow a public employee who is a member of one union (or not covered by a CBA at all), to express solidarity with colleagues who are members of a different, striking union. While appearing broad in scope, the actual effect of this bill is limited. For example, the bill would not grant a public employee the right to refuse to appear at their job with a state agency if the workers of the private coffee shop down the street are striking. Rather, this bill would allow the public employee to refuse to appear for work at the state agency *if the state agency itself is the site of a primary labor dispute*, refuse to cross a primary picket line *if the picket line is at the state agency*, or perform work for the state agency *if the state agency is involved in a labor dispute*. It is also worthwhile to note that the language permits, but does not require, workers to participate in a sympathy strike.

Labor actions, including sympathy strikes, are likely protected by the First Amendment. The First Amendment of the United States Constitution states that, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; *or abridging the freedom of speech*, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.” (U.S. Const., 1st Amend; emphasis added.) The freedom of speech has, since the adoption of the First Amendment, been a foundational tenet of American democracy and a rallying cry for Americans across the political spectrum. The importance of the freedom of speech to the people of California is underscored by the inclusion of a similar assertion of that freedom in Article I, Section 2 of the California Constitution.

Further, since 1940, the Supreme Court has recognized “[t]he dissemination of information concerning the facts of a labor dispute [...] as within that area of free discussion which is guaranteed by the Constitution.” (*Thornhill v. Alabama* (310 U.S. 88,103) 1940.) In *Thornhill*, a picketer was arrested and convicted under an Alabama law that made it a crime for any person to essentially participate in a picket line. The Supreme Court ultimately overturned the petitioner’s conviction, writing:

The range of activities proscribed by [the Alabama law], whether characterized as picketing or loitering or otherwise, embraces nearly every practicable, effective means whereby those interested – including the employees directly affected – may enlighten the public on the nature and causes of a labor dispute. The safeguarding of these means is essential to the securing of an informed and educated public opinion with respect to a matter which is of public concern. [...] Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion. We hold that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in [the Alabama statute].

In sum, the ability of workers to disseminate information regarding a labor dispute, including in the form of formal protests such as a strike, is a practice wholly protected by the First Amendment. Moreover, both federal law, through the National Labor Relations Act, and state law have since recognized the right of employees to strike, and protected employees who choose to strike from discipline based on their strike actions. Arguably, the right of an employee to engage in a sympathy strike, particularly in a situation where they may be expected to perform work on behalf of striking co-workers, would fall under a similar argument.

The value of a strike is often in the disruption it causes. Much of the opposition's concerns lie in the potential of disruption. However, particularly for large employers such as the state or the University of California, disruption is often the purpose behind a union's decision to strike. There is always a power imbalance between an employer and its employees, with the employer exerting enormous influence over each worker's daily life. The ability of workers and their unions to advocate for better working conditions is pivotal to the ongoing health of the state's workforce, and is better accomplished through increased solidarity.

Additionally, the opponents argue that allowing any public employee the right to engage in a sympathy strike could frustrate local governments' abilities to carry out certain services. They contend that, "[w]hen a labor group prepares to engage in protected union activities, local agencies can plan for coverage and take steps to limit the impact on the community. This bill would remove an agency's ability to plan and provide services to the community in the event any bargaining unit decides to strike." Acknowledging the value that local governments provide, and the fact that strike actions may impact their services, it seems appropriate to reiterate that the disruption is the point. In fact, it is possible that with the added possibility of a sympathy strike, public employers may be more active in engaging their unions and reach an agreement earlier to the benefit of both parties, in order to avoid a strike. Ultimately, while understandable, the opponent's position appears to underline the purpose of labor strikes and emphasize the importance of this bill.

The opponents also contend that by establishing a right to sympathy strike in statute, "the bill would allow those who have not gone through the negotiation process to now refuse to work simply because another bargaining unit is engaging in striking." As detailed above, the right to strike has been considered a form of speech protected by the First Amendment, as the opponents wholly acknowledge. They argue, however, that the right to strike is guided by state law which "has created a framework for when unions can engage in protected strike activity that has been honored by local government and unions alike." This position appears to simultaneously acknowledge workers' right to strike as protected under the First Amendment, but limit the right as legitimate so long as they abide by the procedures established in law. Ultimately, the ability to legislate an additional protection, which the opponents acknowledge is in line with First Amendment protections, is wholly within the powers of the Legislature. Additionally, while the opponent's concern is not unreasonable, it does appear to suggest that employees will engage in a sympathy strike even when there is nothing legitimate to strike over. The decision to engage in a strike is a difficult one – one that can impact an employee's relationship to their workplace in fundamental ways, as well as cause disruption in their personal lives. It seems unlikely that a worker who has no compelling reason to engage in a sympathy strike would do so "simply because another bargaining unit is engaging in striking." Rather, the decision would include consideration of whether they would be expected to complete the same work as the striking workers, whether the underlying cause of the strike was relevant to their own experience, among other factors.

Setting aside the arguments above, the opponents of the measure identify a specific concern regarding the impact of a statutory right to sympathy strike in the limited scenario where government entities share a location. In particular they argue that ensuring public employees' right to sympathy strike "poses a serious problem for public agencies that are providing public services on a limited budget and in a time of workforce shortage. Allowing any public employee, with limited exception, to join a striking bargaining unit in which that employee is not a member could lead to a severe workforce stoppage." They further submit that "when government services are co-located, employees from a non-struck agency could refuse to work at the shared campus if employees from a different agency are on strike, as it would be considered crossing the picket line." They highlight the prevalence of co-located government services in rural communities and the potential for disruption in services. This was also identified as a concern in the Governor's veto message of AB 504 (Reyes, 2023), which was at the time of the veto practically identical to the current measure. The Governor cited concern that the bill was:

[O]verly broad in scope and impact [and had] the potential to seriously disrupt or even halt the delivery of critical public services, particularly in places where public services are co-located. This could have significant, negative impacts on a variety of government functions including academic operations for students, provision of services in rural communities where co-location of government agencies is common, and accessibility of a variety of safety net programs for millions of Californians.

This concern appears limited to the less common situation that may unequally impact more remote areas of the state. There may be some middle ground that balances the concern identified against the rights of those workers to engage in a sympathy strike. *In order to avoid the same fate for this year's measure, the author may wish to consider identifying potential amendments addressing co-located government entities that may alleviate the Governor's stated concerns.*

ARGUMENTS IN SUPPORT: This bill is sponsored by the California Labor Federation and the California Teamsters Public Affairs Council and is supported by a coalition of labor unions. In support of the measure CLF submits the following:

The right to collectively bargain and strike are fundamental democratic rights of Americans. The National Labor Relations Act gives private sector employees the right to strike and goes even further by specifying that nothing in the Act can "interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

Like the federal law, California has enacted laws giving public sector workers the right to strike. The Public Employment Relations Board has affirmed that public sector employees have the statutorily protected right to strike and that public employees that go on strike are protected from discipline by an employer for participation.

In 2022, an estimated 48,000 graduate workers, postdoctoral scholars, and academic researchers represented by the United Auto Workers (UAW) began contract negotiations with the University of California (UC) for living wages, childcare subsidies, and job security. After negotiations stalled, UAW members went on strike in the largest higher education strike in the nation's history.

During the 40-day strike, unions representing non-UC unions, such as UPS drivers and construction workers, were able to honor the picket lines and cease work serving the UC. However, certain UC workers represented by other campus unions, such as Teamsters 2010

and UC-AFT, were unable to honor the picket lines and had to continue work for the UC, unlike unions representing non-UC workers. Contract clauses prohibiting workers from respecting picket lines were pushed by the UC to prevent workers from standing in solidarity with their fellow union members.

The purpose of a strike is to compel an employer to negotiate with workers over wages, working conditions, and other issues like childcare and paid leave. When wages and benefits increase for one set of workers, it raises the floor for all workers at the same employer. Not only does this benefit workers, their families, and the community, but it also protects against inequality across job classifications. But when workers are forced to cross picket lines, it undermines the ability of strikers to bring employers to the table and can lead to protracted labor disputes.

Forcing workers to cross picket lines of their co-workers they see every day also contributes to a hostile work environment. At times, members of the same family are divided across the picket line. When one member crosses a line that another is walking, workers are forced to act against their family's interests and well-being. The hostility created by strike ban clauses can linger when workers return to the same workplace with potential negative consequences.

California has long led the way in protecting workers' rights in the private and public sector and has enshrined the right to strike into law. Contract clauses that prohibit workers from exercising that right go against the values and public policy of the state.

The right to honor a picket line is not just a democratic right, it is a matter of conscience for many Californians. It is a choice that people make according to what they believe is morally right. AB 2404 will protect the rights of public sector workers to honor a picket line and prohibit public sector employers from having policies or clauses in collective bargaining agreements preventing this right. AB 2404 will protect the dignity and conscience of California's public sector workers.

ARGUMENTS IN OPPOSITION: This bill is opposed by a number of local government advocates and the University of California (UC). In support of their position the UC submits the following:

State laws governing collective bargaining ensure a fair process for both unions and public entities and thoughtfully create a framework for when unions can engage in protected strike activity. That current framework drives public sector employers and employee organizations toward good faith and structured negotiations and aims to maximize labor peace while minimizing disruptions to public services. Under AB 2404, bargaining units with closed contracts could engage in "sympathy strikes" with other units, thus undermining the purpose of collective bargaining agreements and hindering public entities' ability to serve the needs of the state.

Further, the requirements of AB 2404 void no strike provisions in existing contracts – provisions that were agreed to by both parties through good faith bargaining and concessions. These concessions were likely made because it is critical for public entities to ensure operational continuity and labor peace during the term of an agreement. In the absence of enforceable provisions, contracts will be thrown into disarray and the threat of mass disruption across all bargaining units would distort future contract negotiations, to an extent that there would be little incentive for any party to negotiate and settle contracts early.

The bill will also have significant fiscal implications for the University. Under AB 2404, UC would need to re-negotiate every current contract that has a “no-strike” clause; UC would expect one-time costs of at least several million dollars to engage in bargaining as required by 3550.1(e)(2). Going forward, UC would expect to incur costs associated with multiple striking bargaining units. Strikes can cost UC millions of dollars daily; sympathy strikes would compound that figure.

REGISTERED SUPPORT / OPPOSITION:**Support**

California Association of Professional Scientists – UAW (co-sponsor)
California Labor Federation, AFL-CIO (co-sponsor)
California Teamsters Public Affairs Council (co-sponsor)
UAW Local 4123 (co-sponsor)
UAW Local 4811 (co-sponsor)
UAW Region 6 (co-sponsor)
California Association of Psychiatric Technicians
California Federation of Teachers AFL-CIO
California School Employees Association
California Teachers Association
Orange County Employees Association
Smart - Transportation Division

Opposition

Association of California Healthcare Districts (ACHD)
California Association of Joint Powers Authorities (CAJPA)
California Special Districts Association
California State Association of Counties (CSAC)
League of California Cities
Public Risk Innovation, Solutions, and Management (PRISM)
Rural County Representatives of California (RCRC)
University of California
Urban Counties of California (UCC)

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