CHAPTER 12
INDUSTRIAL CONTROVERSY

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2.12.1 INTRODUCTION

Section 592 of the Labor Law provides for the suspension of a claimant's right to receive unemployment benefits or accrue benefit rights for a limited period beginning with the day after the loss of employment, if the claimant is unemployed due to a strike or other industrial controversy, under certain specific circumstances and with certain delineated exceptions. Prior to January 1, 2020, this suspension was for a period of seven consecutive weeks. However, the statute was amended, effective January 1, 2020, to reduce that suspension period from seven weeks to two weeks, a significant modification.[1] A "week" as used in § 592 (1) means any seven consecutive calendar days.[2]

The justification for this change was set forth in a Memorandum in support of the proposed amendment, which stated that without the change, striking workers must wait until after the expiration of a 49-day suspension period in addition to an unpaid waiting week, placing undue financial hardship on lawfully striking workers. The amendment decreases the time workers on strike must wait before receiving UI benefits from a total of eight weeks to a total of three weeks.[3] As under the prior law, the waiting week cannot be served until after the suspension period ends.

The rationale behind the statute, and the suspension of benefit accumulation for a limited period, was set forth by the Court of Appeals in 1950: "The State is to stand aside for a time, pending the settlement of differences between employer and employees, to avoid the imputation that a strike may be financed through unemployment insurance benefits."[4]

The statute has been amended a number of times since it was enacted in the 1940s.[5] In addition to the 2020 amendment, significant amendments occurred in 2007, 2008 and 2010. In 2007, the legislature added that the suspension period would not apply if the employer hired permanent or

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[1] Labor Law § 592 (1): Industrial controversy. (a) The accumulation of benefit rights by a claimant shall be suspended during a period of two consecutive weeks beginning with the day after such claimant lost his or her employment because of a strike, or other industrial controversy except for lockouts, including concerted activity not authorized or sanctioned by the recognized or certified bargaining agent of the claimant, and other concerted activity conducted in violation of any existing collective bargaining agreement, in the establishment in which he or she was employed, except that benefit rights may be accumulated before the expiration of such two weeks beginning with the day after such strike, or other industrial controversy was terminated.

[2] Labor Law § 592 (3), which also provides that "No waiting period may be served during a suspension period."

[3] Memorandum presented in support of Bill #A09136 to amend the Labor Law, NYS Assembly

[4] *Matter of Burger*, 277 App. Div. 234 (1950).

[5] Amendments in 1958, 1983, 2007, 2008 and 2010. Prior to 1944, the statutory provision was Labor Law § 504.2(B), which imposed a 10-week "waiting period" for a claimant who lost employment due to a strike. In 1944, § 504.2(B) was repealed and replaced by § 592.

temporary workers to replace the individuals involved in the industrial controversy. In 2008, the legislature removed "lockouts" from the category of industrial controversies that trigger the suspension and removed the hiring of "temporary workers" as a reason not to apply the suspension. In 2010, subsection 1 (b) was amended to provide that replacement workers hired by the employer are presumed permanent unless the employer certifies in writing that the striking employee may return to his position after the strike.[6] The legislature also added subsection (1)(b)(ii) which provides that there will be no suspension of benefits if the Commissioner of Labor determines that the claimant is not employed by an employer involved in the industrial controversy that caused his or her unemployment and is not participating in the industrial controversy; or the Commissioner determines that the claimant is not in a bargaining unit involved in the industrial controversy that caused his or her unemployment and is not participating in the industrial controversy.

Most of the cases involving industrial controversies and unemployment insurance are from the 1960s, 1970s and 1980s, and therefore predate the more recent and significant amendments to § 592. Although the policy statements and analyses set forth in the older cases are still pertinent, ALJs must be careful not to rely on earlier versions of the law that may no longer be applicable, especially cases that analyze use of temporary or permanent replacement workers, cases addressing lockouts, and cases that apply a seven-week suspension of a claimant's right to accrue and receive benefits.

2.12.2 STRIKE OR OTHER INDUSTRIAL CONTROVERSY

Before the suspension provisions of Labor Law § 592 are imposed, it must be established that the claimant lost his or her employment because of a strike[7] or other industrial controversy in the establishment[8] where he was employed. "[T]he statutory language—strike… or other industrial controversy—is exceedingly broad, encompassing all labor disputes, all strikes, permissible as well as impermissible."[9] For the purposes of Labor Law § 592, it makes no difference whether the

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[6] This added subsection also provides for a penalty to be imposed upon the employer for each employee per week of benefits lost. Labor Law § 592 (1) (b) (i).

[7] The basic definition of a strike is "a work stoppage by a body of workers to enforce compliance with demands made on an employer." www.merriam-webster.com/dictionary/strike (site last visited June 5, 2019).

[8] *Matter of Ferrara*, 10 N.Y.2d 1, 7 (1961) ("it is evident that the term 'establishment' is to be defined in geographic terms rather than in terms of corporate organization or exercise of management powers and functions").

[9] *Matter of Heitzenrater*, 19 N.Y.2d 1 (1966) (noting that the merits of the dispute are irrelevant to the issue of whether there shall be a suspension of benefits under this section of the Labor Law).

strike is lawful or unlawful under the National Labor Relations Act,[10] or whether it was sanctioned by a union.[11] Nor is it necessary that all, or a majority of, union members participate in the strike for it to be considered an "industrial controversy."[12] In addition to strikes, the term "industrial controversy," includes situations where the employer laid off employees performing a certain job, other employees refused to perform the work, and the union refused to supply additional workers or to allow the remaining employees who were members of a different union, to work in that job;[13] where employees engaged in a work stoppage in order to assist a sister union;[14] and when workers at the end of an assembly line were laid off because workers at the beginning of the line went on strike, causing shutdown of the entire assembly line.[15]

However, not all separations from employment during periods of contract disputes or negotiations have been found to be "industrial controversies" invoking the suspension provisions of § 592. For example, where workers are laid off due to a shortage of materials caused by a strike in a separate establishment;[16] laid off due to lack of work during a period where a strike is threatened but not acted upon;[17] or laid off where employer's customers stopped placing orders due to apprehension over the effect of a pending strike;[18] the Court has declined to find an industrial controversy.

Although all strikes and industrial controversies are covered under § 592, "lockouts" are specifically excluded from situations in which claimants are subjected to a two-week suspension. The difference between a strike and a lockout is simple: "a lockout occurs when management

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[10] For more information on the various reasons for strikes and their legality, see www.nlrb.gov/strikes. (site last visited on June 7, 2019).

[11] Since § 592.1 includes "concerted activity not authorized or sanctioned by the recognized or certified bargaining agent of the claimant, and other concerted activity conducted in violation of any existing collective bargaining agreement," wildcat strikes are industrial controversies that may lead to the imposition of the two-week suspension. Therefore, union support is not needed to find that an industrial controversy exists and that § 592 of the Labor Law applies.

[12] *See Matter of Ferrara*, 10 N.Y.2d 1 (1961).

[13] *Matter of Klein*, 12 N.Y.2d 678 (1962), *aff'g* 15 A.D.2d 201 (3d Dep't 1961).

[14] *Matter of Sprague,* 4 A.D.2d 911 (3d Dep't 1957); *Matter of Gaar,* 90 A.D.2d 652 (3d Dep't 1982).

[15] *Matter of Carmack*, 19 A.D.2d 766 (3d Dep't 1963).

[16] *Matter of Blair*, 28 A.D.2d 1156 (3d Dep't 1967). (motors division of an automobile manufacturer went on strike, leading to lack of materials for the separate body division).

[17] *Matter of Cohen*, 283 App. Div. 143 (3d Dep't 1953) (during layoff, employer decided to change terms of work, but no opposition from the union); *Matter of Keane*, 2 A.D.2d 148 (3d Dep't 1956).

[18] *Matter of Keane,* 2 A.D.2d 148 (3d Dep't 1956) (no strike ever called at ship repair yard although strike was contemplated by union).

decides that employees will stop working, while a strike occurs when workers decide, as a group, to walk off the job to win concessions or favorable terms from the employer."[19]

A lockout occurs when the employer refuses to furnish available work to its regular employees.[20] "If the employer furnishes available work to employees, even if it is not at their normal work location, there is no lockout.[21]

2.12.3 IN THE ESTABLISHMENT

Once a strike or industrial controversy has been demonstrated, it must next be proved that the controversy occurred "in the establishment" where the claimant was employed. Both elements are needed to impose a suspension under § 592.

"Establishment" means the physical place where the claimant(s) worked.[22] It is to be defined "in geographic terms rather than in terms of corporate organization or exercise of management powers and functions."[23] Applying this definition, the Court has found where one union local calls a strike at a site, union members working at other sites and belonging to different locals were not in the same establishment and were not subject to a suspension of benefits.[24] Additionally, buildings owned by the same company have been held to be separate establishments when

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[19] Appeal Board No. 591180.

[20] *Matter of Weis*, 28 N.Y.2d 267, 273 (1971) ("a temporary withholding of the right to work due to lack of work is commonly understood to be a lay-off and not a lockout"; appeal dismissed on grounds that there was no constitutional issue to be decided).

[21] Appeal Board No. 591180 (national telecom company closed one building but employees were advised to report to different work sites) *aff'd Matter of Parron*, 159 A.D.3d (3d Dep't 2018).

[22] *Matter of Machcinski*, 277 App. Div. 634, 644 (3d Dep't 1951). (A strike at Ford Motor Company's Dearborn, MI plant did not require a suspension of benefits for employees who worked at plants in Buffalo and Green Island, NY, who were laid off due to a lack of materials. The Court held, "[w]e believe the word 'establishment' as used in the statute means the place where the employee was last employed. Obviously, the Legislature never intended by the use of the word 'establishment' to include all the plants of the Ford Motor Company, situate[d] as they are in so many States of the union and in foreign countries. To adopt the [employer's] contention would require us to hold that a few employees in any of the employer's plants, in any part of this country, can prevent the workers in the Buffalo and Green Island plants from earning a livelihood or, in lieu thereof, from getting the insignificant amount of unemployment insurance that is available to them under the statute.")

[23] *Matter of Ferrara,* 10 N.Y.2d 1, 7 (1961).

[24] *Matter of Curatalo*, 10 N.Y.2d 10 (1961) (steel workers at the employer's construction sites called a strike and set up pickets leading to layoffs of steel workers at the fabrication plant due to a backup of steel at the plant; workers at the fabrication plant did not work in the establishment where the industrial controversy took place)

separated by multiple railroad tracks and public streets, even though connected by overhead bridges.[25]

2.12.4 PERIOD OF SUSPENSION

Pursuant to Labor Law § 592 as amended in 2020 the accumulation of benefit rights shall be suspended during a period of two consecutive weeks, beginning the day after the loss of employment, or the day after the first effective day of the strike. For the suspension to be imposed, the claimants must have been actually employed at the time the strike was called.[26] The start date of the suspension does not change if the employees were on leave at the time of the strike or industrial controversy;[27] or if workers are under notice of impending layoff at the time the strike is called.[28]

The accumulation of benefit rights begins after two weeks or the day after the termination of the strike, whichever comes first.[29] The strike ends when the workers stop striking, even though the employer may not be ready to begin operations immediately.[30]

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[25] *Matter of Sierant*, 24 N.Y.2d 675 (1969) (grain elevators owned by General Mills – where longshoremen were on strike – were a different establishment than the flour mills and packaged food plants); *Matter of Farina*, 41 A.D.2d 98 (3d Dep't 1973) (workers at a General Motors plant laid off because of a strike at different General Motors plants did not work in the establishment where the industrial controversy existed); *but see Matter of DiLella,* 48 A.D.2d 91 (3d Dep't 1975) (striking drivers and warehouse workers were found to be employed in the same establishment despite fact that drivers performed no work at the employer's place of business).

[26] *Matter of Burger*, 277 App. Div. 234 (3d Dep't 1950) (longshoremen who obtained work through daily shape-ups not subject to the suspension when they had not been working at the time the strike was called).

[27] Appeal Board No. 13748-46 *aff'd Matter of Birkmeyer,* 272 App. Div. 855 (3d Dep't 1947) (Claimants, some of whom were on sick leave from their employment on the date stoppage of work occurred because of strike, and others who became ill at varying times during the strike suspension period, were deemed to have lost their employment on the date on which the strike began and were properly suspended for seven consecutive weeks beginning with the day following the day the strike began).

[28] *Matter of Echevarria*, 273 App Div 1046 (3d Dep't 1948).

[29] Labor Law § 592 (1).

[30] *Matter of George*, 14 N.Y.2d 234 (1964) (full employment was not resumed until the settlement of discrete strikes at different GM plants); *Matter of Acquisto*, 25 A.D.2d 326 (3d Dep't 1966) (nationwide strike against GM by the United Automobile Workers ended with memorandum of understanding but production did not resume in full for nearly a week due to lack of material).

2.12.5 EXCEPTION FROM SUSPENSION UNDER LABOR LAW § 592 (1) (b)

Benefits will not be suspended if the employer hires a permanent replacement worker to fill a striking employee's position. “A replacement worker shall be presumed to be permanent unless the employer certifies in writing that the employee will be able to return to his or her prior position upon conclusion of the strike, in the event the strike terminates prior to the conclusion of the employee's eligibility for benefit rights under this chapter.”[31]

The nature of the writing is not set forth in the statute. An employer’s clear and unequivocal responses to a Department of Labor questionnaire indicating that no permanent replacement workers have been hired is a sufficient certification in writing that the replacement workers are temporary.[32] However, where an employer does not clearly indicate that the hiring is temporary, and the striking employees will have the right to return to their positions upon the conclusion of the strike, the suspension period will not apply.[33]

[31] Labor Law § 592(1)(b)(i). The statute also provides that if an employer does not permit an employee’s return after certifying that her replacement was temporary, the employee is not only entitled to recover any benefits lost as a result of the two-week suspension, but the Department of Labor may impose a penalty upon the employer of up to seven hundred fifty dollars per employee per week of benefits lost.

[32] Appeal Board No. 591076 (workers at telecommunications company went on strike; company answered DOL questionnaire indicating no permanent workers were replaced and all temporary employees were let go at end of strike).

[33] *Matter of D’Altorio* (Clare Rose, Inc), 2019 Slip Op. 04249 (3d Dep’t May 30, 2019) (No certification found where employer sent a letter to the union’s general counsel stating that it intended to permanently replace the strikers, sent each striking employee a similar letter, stating that striking employees will not automatically have the right to return to their positions once the strike is ended; after striking workers applied for UI benefits, the employer responded to DOL questionnaires stating, “Temporary workers have been hired, and the Company announced its intention to hire permanent replacements.” In response to the follow-up question, “Will the strikers be able to return to their prior positions at the conclusion of the strike?” the employer responded “Yes, unless permanently replaced”).