In recent times, there has been a marked increase in industrial unrest, including the threat of strikes and other forms of industrial action. While there is no absolute right to strike or take industrial action in Ireland, legislation provides freedom in certain circumstances to strike and an immunity from legal liability in respect of strikes and industrial action will be conferred, provided a number of conditions are met.

The relevant law is contained principally in the Industrial Relations Act 1990 (the “1990 Act”) which:

» confers immunities on workers where, in “contemplation or furtherance” of a “trade dispute”, they participate in a “strike” or other “industrial action” provided the strike other industrial action is supported by a secret ballot and not less than one week’s notice is given to the employer;

» regulates picketing;

» provides for secret ballots with respect to strikes and other industrial action; and

» restricts employers in obtaining injunctions to restrain a strike or other industrial action.

WHAT IS “INDUSTRIAL ACTION”?

Section 8 of the 1990 Act, provides that the term “industrial action” means “any action which affects, or is likely to affect, the terms or conditions, whether express or implied, of a contract and which is taken by any number or body of workers acting in combination or under a common understanding as a means of compelling their employer or to aid other workers in compelling their employer to accept or not to accept terms or conditions of or affecting employment”.

The term strike is defined in the 1990 Act as meaning “a cessation of work by any number or body of workers acting in combination or a concerted refusal or a refusal under a common understanding of any number of workers to continue to work for their employer done as a means of compelling their employer, or to aid other workers in compelling their employer, to accept or not to accept terms or conditions of or affecting employment”.

Industrial action includes action short of a cessation of work such, as a “go-slow”, a work to rule, overtime bans and so on.
IS THERE A VALID “TRADE DISPUTE”?
Section 8 of the 1990 Act defines a trade dispute as meaning “any dispute between employers and workers which is connected with the employment or non-employment, or the terms or conditions of or affecting the employment, of any person”.

ARE THE ‘THE PARTIES’ ELIGIBLE FOR PROTECTION?
Section 8 of the 1990 Act refers to workers and employers. The term “worker” is defined as meaning “any person who is or was employed whether or not in the employment of the employer with whom a trade dispute arises”, but does not include a member of the Defence Forces or of the Garda Síochána.

An ‘employer’ is defined as meaning ‘a person for whom one or more workers work or have worked or normally work or seek to work having previously worked for that person.’

A ‘trade union’ for the purposes of Part II of the 1990 Act means “a trade union which is the holder of a negotiation licence under Part II of the Trade Union Act 1941”, i.e. an authorised trade union.

SECRET BALLOT
A trade union must conduct a secret ballot prior to organising, participating in, sanctioning or supporting a strike or other industrial action.

Section 14 of the 1990 Act provides that “the rules of every trade union must contain a provision that:

- the union “shall have full discretion in relation to organising, participating in, sanctioning or supporting a strike or other industrial action notwithstanding that the majority of those in the ballot favour such strike or other industrial action”;
- the union “shall not organise, participate in, sanction or support a strike or other industrial action against the wishes of a majority of its members voting in a secret ballot, except where, in the case of ballots by more than one trade union, an aggregate majority of all the votes cast favours such strike or other industrial action”;
- “where the outcome of a secret ballot conducted by a trade union which is affiliated to the Irish Congress of Trade Unions or, in the case of ballots by more than one such trade union, an aggregate majority of all the votes cast, is in favour of supporting a strike organised by another trade union, a decision to take such supportive action shall not be implemented unless the action has been sanctioned by the Irish Congress of Trade Unions”;
- as soon as practicable after the conduct of a secret ballot, the trade union shall take reasonable steps to make known to its members entitled to vote in the ballot:
  - the number of ballot papers issued;
  - the number of votes cast;
  - the number of votes in favour of the proposal;
  - the number of votes against the proposal; and
  - the number of spoil votes.

Ballots for industrial action are often in respect of a proposal authorising the union to engage in a “strike or other industrial action” or “industrial action up to and including withdrawal of labour”. In P Elliot and Co v Building and Allied Trade Union [2006] IEHC 340 Clarke J. held that there was nothing legally infirm in a secret ballot seeking authorisation of “industrial action up to and including the placing of pickets”. The Court noted that it is consistent with a policy of the section that a trade union could seek authority from its members, to engage in a range of industrial action, leaving it up the union’s management to determine precisely what action should be carried out. However, he did note that the industrial action actually engaged in must be “fairly within the parameters of that authorised”.

Section 14(3) of the 1990 Act provides that the “rights conferred by [the secret ballot provisions] are conferred on the members of the trade union concerned and on no other person.”

The Supreme Court had to consider whether an infringement of the rules can be relied on by an employer in Nolan Transport (Oaklands) Limited v Halligan [1999] IR 128. The Court made clear that where industrial action is taken contrary to the outcome of a secret ballot:

- the individual workers will not have the benefit of the immunities (noted below);
- the trade union will not lose its immunity, noted below, but it may lose its negotiating licence; and
- the restrictions on the right to an injunction to restrain industrial action, noted below, will not apply.

THE PROTECTION OF THE RIGHT TO TAKE INDUSTRIAL ACTION
Worker’s Immunity from legal liability
Workers who engage in actions in contemplation or furtherance of a trade dispute enjoy certain legal immunities under sections 10 and 12 of the 1990 Act. These immunities include immunity:

- concerning civil and criminal conspiracy; and
- from the tort of inducing a breach of contract or interfering with the trade, business or employment of another person.

These immunities do not apply if:

- the action complained of is taken in disregard of or contrary to the outcome of a secret ballot relating to the issue(s) involved in the dispute, or
- where agreed procedures in the employment concerned for the resolution of workplace grievances relating to one individual worker have not been resorted to and exhausted.

These immunities do not apply if:

- the action complained of is taken in disregard of or contrary to the outcome of a secret ballot relating to the issue(s) involved in the dispute, or
- where agreed procedures in the employment concerned for the resolution of workplace grievances relating to one individual worker have not been resorted to and exhausted.
Trade Union’s Immunity

Section 13 of the 1990 Act provides that a trade union is immune from civil liability in respect of any tortious act committed by or on behalf of the trade union in contemplation or furtherance of a trade dispute.

The immunity applies where the act was done “in the reasonable belief” that it was in contemplation or furtherance of a trade dispute. This trade union immunity applies irrespective of the outcome of a secret ballot.

In the event that any tortious acts by a trade union or its members are found not to be in “contemplation or furtherance of a trade dispute” an employer can bring an action in tort against the trade union.

Lawful Picketing

Section 11 of the 1990 Act provides that picketing, provided that it is peaceful, and is in contemplation or furtherance of a trade dispute, is lawful.

“Picketing” means:

» “attending at, or where that is not practicable, at the approaches to, a place where their employer works or carries on business, if they so attend merely for the purpose of peacefully obtaining or communicating information or of peacefully persuading any person to work or abstain from working”. This form of picketing is commonly referred to as “primary picketing”, and

» “attending at, or where that is not practicable, at the approaches to, a place where an employer who is not a party to the dispute works or carries on business if, but only if, it is reasonable for those who are so attending to believe at the commencement of their attendance and throughout the continuance of their attendance that that employer has directly assisted their employer who is a party to the trade dispute for the purpose of frustrating the strike or other industrial action, provided that such attendance is merely for the purpose of peacefully obtaining or communicating information or of peacefully persuading any person to work or abstain from working”. There is an exception for life-preserving health services. This form of picketing is commonly referred to as “secondary picketing”.

Note in each case the people who may participate are people in respect of whom “their employer” works or carried on business at that location (primary) or “their employer” has been assisted by the employer which works or carried on business at that location. It is lawful for a trade union official (paid by the union or an elected officer of a branch) to accompany any member of his union whom he represents provided that the picketing is lawful primary or secondary picketing and provided that such official is attending merely for the purpose of peacefully obtaining or communicating information or of peacefully persuading any person to work or abstain from working.

The Courts will intervene by way of interlocutory injunction to regulate picketing in circumstances where the picketing is in breach of other laws, for example, if the picketing causes an obstruction to the highway or where the information communicated (whether on placards or by way of circulars, etc.) is defamatory.

The High Court considered the term “works or carries on business” in Dublin City Council v. T.E.E.U, Gannon and Cummins [2010] IEHC 289. Laffoy J. held that pickets can continue at a location where their employer works or carries on business if, but only if, it is reasonable for everybody who should have been allowed to participate and also that the sites were being picketed by non-employees. The injunction was granted by the High Court and upheld on appeal. The High Court and Supreme Court held that the onus of proving that the conditions required by section 19 were satisfied (i.e. the ballot and the notice) was on the defendant union/workers and that this required them to satisfy the Court that the secret ballot rules were complied with. As the defendants failed to prove that the secret ballot rules had been complied with the defence provided by section 19 was not available to the picketers.

The application of section 19(2) was also considered recently by the High Court in Dublin Airport Authority v Services, Industrial, Professional and Technical Union. In that case the plaintiff obtained an injunction to restrain a work stoppage. Gilligan J. held that the onus...
lay on the defendant union to show that a ballot took place in compliance with section 14 of the 1990 Act. The union failed to adduce evidence in this regard and therefore was not entitled to rely on section 19 of the 1990 Act so as to defeat the application.

**Damages**

An employer may be entitled to damages for loss caused by persons who are not protected by or lose the immunities referred to above.

**Dismissal**

The Unfair Dismissals Acts 1977 to 2007 provide that trade union membership or participation in trade union activities constitute automatically unfair reasons for dismissal.

Furthermore, the dismissal of an employee for taking part in a strike or other industrial action is deemed to be an unfair dismissal if:

- other employees of the same employer who took part in the strike or other industrial action were not dismissed for taking part, or
- other employees who were dismissed for so taking part were subsequently reinstated or reengaged by the employer and the claimant was not reinstated or reengaged.

A distinction can be made between dismissal for taking part in a strike or other industrial action and dismissals for misconduct in the course of the strike or industrial action. An employer may dismiss for misconduct during the course of a strike or industrial action. Examples will include malicious damage and assault. The normal rules with regard to investigation and due process apply.

**Withholding Of Remuneration**

As strikes and other industrial actions are usually a breach of the contract of employment, an employer will not be obliged to pay part of the salary for the duration of the action covered.

If employees are on strike (that is, refusing to work at all), it is clear that an employer is not obliged to pay an employee in respect of any period during which they are not working. It is also clear that it is unlawful for an employer not to pay employees who do not participate in a strike or industrial action.

Section 5 of the Payment of Wages Act 1991, which restricts employers from making deductions from wages, expressly excludes from its application deductions made by an employer from the wages of an employee where the employee has taken part in a strike or other industrial action and a deduction is made by the employer on account of the employee having taken part in that strike or other industrial action.

An employer may be entitled to remove an employee from the payroll where the employee chooses to engage in industrial action and fails to give an undertaking not to do so. Fair procedures must be adopted in making the decision to remove the employee from the payroll.

The legal position where the employer allows the employee to continue working on a restricted basis, but seeks to impose a reduction in the employee’s pay, is more complicated. The matter has not yet been considered by the Irish Courts. There is some authority in English decisions which suggests that that the employer can make a partial deduction on account of the loss of services.