

Tensions Continue to Rise as Labor Organizing and Enforcement Both Increase Going in to 2023

by Jack Sullivan and Nisha Verma

As union organizing increases and covers industries not traditionally captured by unions, the landscape for employers is changing rapidly. Below are the key items employers (both union and non-union) should keep in mind for 2023, our forecast for what might change throughout the year, and recommendations for how employers can best prepare for these changes.

Trends in Labor Organizing

According to data released by the National Labor Relations Board, the number of union elections held in the United States in 2022 increased by 50% over the previous year. This pattern continues into 2023, with high-profile (and previously fully non-union) employers such as Starbucks and Amazon having more and more of their locations subject to a union petition. Labor strikes also went up by almost 50% between 2021 and 2022.

Further, the odds of winning such elections are stacked against employers. In 2022, 72% of elections were in favor of the union, with the number being even higher – 80% – for elections involving Starbucks employees.

While Americans are used to labor organizing in industries such as manufacturing and healthcare, efforts to unionize are becoming more common among workers in jobs or occupations that were traditionally thought of as comfortable or flexible, and therefore would not benefit from union representation. For example, 2022 brought unionization efforts from tech workers at Google and Microsoft as well as in more artistic environments such as graphic design, marketing, and entertainment firms. The goals of unionization at these companies is different from the traditional goals for workers who unionize, such as an increase in wages. Workers attempting to unionize in these occupations are vocalizing a focus on transparency, diversity, equity, and inclusion, and an increased ability to have a say in company decisions. This demonstrates a significant

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shift in the focus of unionization efforts.

One of the reasons these efforts have been largely successful is that on the whole, Americans' approval ratings of unions are at a record high – 71%.

NLRB Enforcement Priorities

Upon being appointed in 2021, the National Labor Relations Board General Counsel Jennifer Abruzzo has put an increased focus on enforcement of labor law violations, as well as a push to strengthen laws protecting employee speech and the right to information. Similarly, the NLRB decision-making body issued pro-union opinions in cases that came before them. In a 2022 decision, the NLRB expanded the type of remedies an employee might receive in a successful proceeding alleging an unfair labor practice. Simultaneously, regional offices are pursuing broader penalties in settlements of unfair labor practice charges filed, including consequential damages that go beyond back pay and front pay.

Under the direction of the General Counsel, Regional Offices are pushing employers to settle charges that it is not clear the General Counsel can win, in an effort to change employer behavior on the topic at hand. The agency saw a 19% increase in the number of unfair labor practice charges filed in 2022. Given this environment, the agency requested a significant increase in funding and received an increase of 25 million dollars in the 2023 Omnibus Bill.

Recent Changes in the Law for Unionized Employers

The Board expanded the rights of employees to picket and demonstrate on employer property by changing the standard by which contract workers that perform services on an employer's property can be ejected. The Board also altered the standards for unions to propose "micro-units" of employees when seeking proposed bargaining units, making it easier for unions to plan for and win elections.

Additionally, a recent decision now requires employers to deduct union dues following the expiration of a CBA, which removed leverage previously available to employers during contract negotiations. The right of employers to restrict union pins, clothing, or other insignia was also significantly limited.

Potential Changes in 2023

The NLRB General Counsel and the current Board majority have long criticized and sought to limit "captive audience meetings" during campaigns, in which employers require employees to attend sessions that present the employer's opposition to unionization. The General Counsel has issued a memorandum opposing the practice, and will push for a Board decision outlawing it.

On the important issue of employee speech, the NLRB will once again revisit handbook rules that affect employees' ability to disclose information about – and be critical of – the

workplace.

The General Counsel has also voiced support for a drastic change that would require employers to recognize unions without an election unless the employer can show the election is necessary.

The issues of joint employment status, and whether a worker is an independent contractor (and therefore would not have the right to unionize), have been a focus for some time, and decisions on those issues are expected in 2023.

There will likely be an increase in focus on pay transparency, and more states will start requiring employers to post salary information in efforts to eliminate pay discrimination. Additionally, an increased focus on mental health and wellness, sparked in part due to the Covid-19 pandemic, will likely affect employees' desires to unionize.

Tips for Employers That Are Currently Not Unionized (and Hope to Stay that Way)

While the stress and difficult working conditions endured during the pandemic – and the staffing shortage that followed – contributed to the rise in unionization, experts believe that the upward trend for unions will continue beyond those current economic indicators. In the broader political climate, distrust of institutions is rampant, and it is that same view of employers as institutions that leads employees to seek the representation of labor unions. Employers that want to avoid this trend must focus on trust, transparency, and mutual communication in the workplace and continue to ask themselves how their actions and statements will be perceived and whether they sound “tone-deaf.” Allowing workers a greater say in how company policies are decided and enforced will likely have a big impact on the likelihood of workers unionizing in industries that have traditionally been non-union. Additionally, devoting additional effort to diversity, equity, and inclusion initiatives as well as policies and practices to improve employees' mental health will likely increase trust among employees and deter further attempts to engage in unionization efforts.

Employers that question whether they have a clear picture of how messages from management are received by employees should take measures, which may include retaining outside consultants, to gauge the current workplace culture and how it could be improved – before a unionization drive takes place.