

A New Era for Union Organizing: Is Your Organization Ready?

- Keith Eastland
- Leigh Schultz
- Brett Swearingen



The materials and information have been prepared for informational purposes only. This is not legal advice, nor intended to create or constitute a lawyer-client relationship. Before acting on the basis of any information or material, readers who have specific questions or problems should consult their lawyer.

Today's Topics: Answering Three Big Questions –

1. What's going on out there?
2. What is the NLRB doing?
3. What should you do?

What's Going On Out There?

Big Trends

- The COVID-19 pandemic has led to a massive worker shortage, giving employees increased bargaining power
- Dramatic increases in inflation have made wage competition even more cutthroat
- The current administration and NLRB are on labor's side
- Union activity has significantly increased—both strikes and organizing
- **BUT:** Recession may be on the horizon . . .



The Pandemic and the Worker Shortage

THE WALL STREET JOURNAL.

Subscribe Sign In

SPECIAL OFFER

English Edition | Print Edition | Video | Podcasts | Latest Headlines

Home World U.S. Politics Economy Business Tech Markets Opinion Books & Arts Real Estate Life & Work Style Sports Q

MANAGEMENT | MANAGING YOUR CAREER

Five Signs Workers Still Have Power in This Job Market

Job openings remain high, layoffs are low and employees keep quitting for better offers—even as many Americans brace for recession

The Pandemic and the Worker Shortage

Worker shortages are fueling America's biggest labor crises

Exhausted workers in education, healthcare and the railroad industry are pushing back after months of staffing shortfalls.

With more than 11 million job openings and only 6 million unemployed workers, employers have struggled for more than a year to hire enough people to fill their ranks. That mismatch has left employees frustrated and burnt out, and is fueling a new round of power struggles on the job.

While the railway dispute, which the White House helped resolve early Thursday, has garnered the most attention, a number of other strikes are spreading across the United States. Some 45,000 nurses walked out of the job in Minnesota this week, and health-care workers in Michigan and Oregon have recently authorized strikes. Seattle teachers called off a week-long strike, delaying the start of the school year.

At the center of each of these challenges are widespread labor shortages that have caused deteriorating working conditions. Staffing shortfalls in key industries, such as health care, hospitality and education, have put unprecedented pressure on millions of workers, igniting a wave of labor disputes as well as new efforts to organize nationwide.

After three years spinning their wheels, Michigan restauranters can't take much more

Austin Metz and Tess Ware | The Holland Sentinel

Published 9:04 a.m. ET Sept. 14, 2022

[View Comments](#) [f](#) [t](#) [e](#) [r](#)

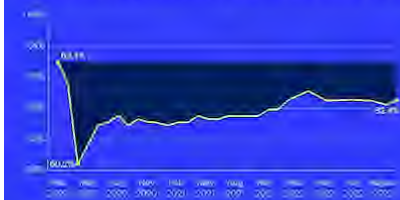
As the COVID-19 pandemic heads into year three, restaurants and other businesses in the hospitality industry continue to face uncertainty and weakened business conditions, causing many to close either temporarily or permanently.

While the pandemic impacted businesses across the globe in every industry, restaurants were hit particularly hard as they struggled to cope with ever-evolving restrictions and ongoing staffing issues.

The Pandemic and the Worker Shortage

Labor Force Participation

There would be 2.75 million more workers today if labor force participation was the same as in February 2020.



2.75M
missing workers

- Approx. 1 out of 60 people who were working before the pandemic are no longer in the workforce.

- Michigan had a tight labor market before the pandemic, with only 15,000 more available workers than job openings.
- Now there are 50,000 more job openings than available workers—and 100,000 more job openings than pre-pandemic.

Wages and Inflation

- Between June 2021 and June 2022, total wage and benefit costs for non-union workers increased by **6%**—*the highest since the early 2000s*—compared to **3.4%** for union workers.
 - Between 2018 and 2022, non-union compensation has risen dramatically while union compensation has remained steady.
- But both numbers represent declines in practical terms, based on the latest report from the U.S. Department of Labor, which had 12-month inflation at **8.3%**.

Inflation We Haven't Seen Since the '70s

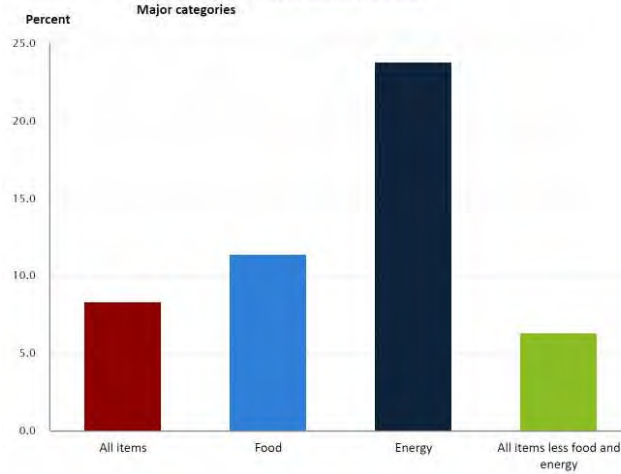
12-month percentage change, Consumer Price Index, selected categories, not seasonally adjusted



Inflation We Haven't Seen Since the '70s (Cont.)

12-month percentage change, Consumer Price Index, selected categories, August 2022, not seasonally adjusted

Click on columns to drill down



What The Federal Government Thinks



WHITE HOUSE TASK FORCE ON WORKER ORGANIZING AND EMPOWERMENT

REPORT TO THE PRESIDENT

The Role of Organized Labor

As the President has said, “unions built the middle class [and] lift up workers, both union and non-union.” At its core, it is our administration’s belief that unions benefit all of us.

Unions have fought for and helped win many aspects of our work lives many of us take for granted today, like the 40-hour work week and the weekend, as well as landmark programs like Medicare.

Unions continue their fight for higher wages, greater job security, safety and health protections, health insurance and retirement plans, and protections from discrimination and harassment for all workers. This includes those who have historically been held back, such as women, LGBT workers, Black and Latino workers, workers with disabilities, and older workers. Researchers have found that today’s union households earn up to 20% more [than non-union households](#), with an even greater union advantage for workers with less formal education and workers of color. Meanwhile, research has shown that [growing economic inequality](#), [growing pay gaps for women and workers of color](#), and [declining voice in our democracy for working class Americans](#) are all caused, in part, by the [declining percentage of workers represented by unions](#).



The New York Times

Biden expresses solidarity with Alabama workers attempting to unionize an Amazon warehouse.

President Biden expressed solidarity with workers attempting to unionize an Amazon facility in Alabama in a video released Sunday that emphasized his broad support of the labor movement — without explicitly backing their cause or naming the company itself.

Around 6,000 workers at an Amazon warehouse in Bessemer, a former steel town outside of Birmingham, are voting over the next week on whether they want to be represented by the Retail, Wholesale and Department Store Union.

If successful, they would be the first of Amazon’s 400,000 American workers to join a union — a landmark undertaking and early test of Mr. Biden’s campaign claim that he will be the “most pro-union president” ever.

Sanders pressures Biden on Amazon unions: ‘The time for talk is over’

White House, Unions’ Senators’ Amazon antagonism is no surprise. He senses on Biden signals a new phase of his pro-union strategy.



Sen. Bernie Sanders (D-Vt.) speaks at a news conference on Amazon’s 20th anniversary in New York, June 19, 2015. (AP Photo/Chris Wedel)

By BUSINESS EMBERTY and ELANORA HUELLER
PUBLISHED 10:41 AM EDT

Bernie Sanders says Joe Biden’s the most pro-union president he’s ever seen, at least rhetorically speaking. Now he’s leaning on his 2020 primary rival to match those words with action.

The Vermont senator sent Biden a Tuesday letter, obtained by POLITICO, asking the president to cut off federal contracts to Amazon until the massive company stops what he calls its “illegal anti-union activity.” As the Senate Budget Committee chair, Sanders will also hold a hearing next week dedicated to calculating how many federal contracts go to companies that are fighting back against unionization efforts, with a focus on Amazon.

Union Activity On The Rise

- Union election petitions have increased 56% through the first nine months of FY 2022
- The NLRB received 1,935 union election petitions between October 1, 2021 and June 30, 2022
- By May 25, total petitions exceed the total for all of FY 2021
- Here is what the Board's GC has said about the increase:
"Right now, there is a surge in labor activity nationwide, with workers organizing and filing petitions for more union elections than they have in the last ten years. This has caused a significant increase in the NLRB's caseload, and the Agency urgently needs more staff and resources to effectively comply with our Congressional mandate."



The slide displays logos for several major employers: Union Pacific Railroad (top center), Chipotle Mexican Grill (top right), Amazon (center), Kellogg's (bottom right), and Trader Joe's (bottom left). On the left side, there is a red sign with a circular image of a woman and the text "YOU HAVE THE RIGHT TO ORGANIZE" and "EMPLOYEES' WORKERS' RIGHTS".

A New Kind of Organizing

- Meet Christian Smalls.
- Insiders v. outsiders...

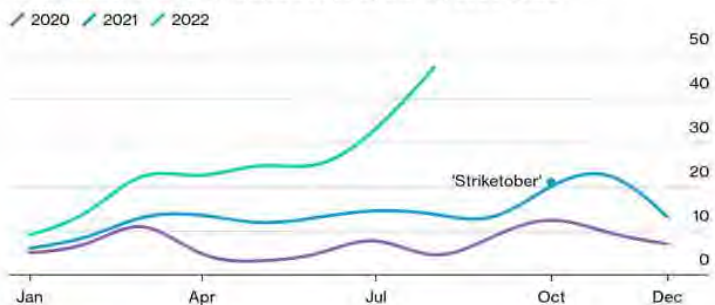
In early 2021, they took a road trip to another Amazon warehouse. When workers held a union drive in Bessemer, Ala., Mr. Palmer and Mr. Smalls wanted to witness it. But they found organizers from the retail union — the one that had previously declared an interest in JFKS — less than welcoming to them and thought the professionals seemed like outsiders who had descended on the community.

By April, workers in Bessemer had rejected the union by more than a 2-to-1 margin. Mr. Palmer and Mr. Smalls declared their intention to organize JFKS, but few took them seriously. Why should they when better-funded, more experienced operatives had been beaten?



Is Another “Striketober” On Its Way?

Worker Walkouts in 2022 Already Surpass ‘Striketober’ Mark
Total number of union-initiated strikes by month, 2020-2022



Source: Bloomberg Law labor data
Note: September 2022's total, as of Sept. 15, is 17 strikes. Totals do not include management-initiated lockouts.

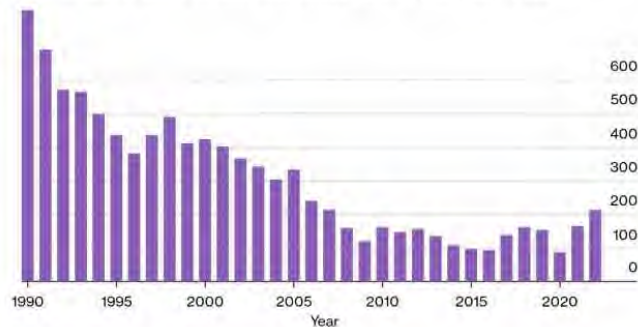
Bloomberg Law

So Far There Have Been More Strikes In 2022 Than In Any Year Since 2006...

...and there's still 3 months to go!

Strike Activity Is Surging in 2022

Total number of union-initiated work stoppages by year, 1990–2022



Source: Bloomberg Law labor data

Note: 2022's total of 213 strikes is as of Sept. 15. Totals do not include management-initiated lockouts.

Bloomberg Law

Case Study: Railway Strike Averted At 11th Hour

- In addition to wages, dispute reportedly centered around staffing shortages and scheduling rules that workers said allowed too little flexibility, such as sometimes being forced to be on call 7 days a week
- The labor shortage and supply-chain problems were prominent issues in negotiations
- U.S. Secretary of Labor Marty Walsh hosted final negotiations in D.C., and President Biden called in to negotiators at 9 pm – 27 hours before the strike was scheduled to begin
- After a tentative deal was struck, the union thanked President Biden, Secretary Walsh, Senators Schumer, Durbin, and Sanders, and Speaker Pelosi in its press release.

Case study: Railway Strike Averted At 11th Hour (Cont.)

- The tentative deal protects against discipline if workers need time off for routine or preventive medical care, hospitalizations, and surgical procedures
- The deal gives workers an immediate 14% raise with back pay dating back to 2020, and raises totaling 24% over the five years of the contract (from 2020 through 2024)
- The deal also provides workers with cash bonuses of \$1,000 a year
- Once deal is ratified, union members will receive an average of \$11,000 in backpay per person

What Is The NLRB Doing?

OPINION | REVIEW & OUTLOOK

Rewriting Labor Law by Executive Fiat

NLRB counsel Jennifer Abruzzo strips companies of free-speech rights in a memo.

By [The Editorial Board](#) [Follow](#)

April 11, 2022 6:57 pm ET

SAVE TEXT 454



NLRB: Big Picture

- This may be the most aggressive NLRB we've ever seen
 - Case law, processing charges, negotiating settlements, rulemaking
- But the Board's aggressiveness could cause consequences in the courts, and Congress
 - Congress already failed to pass major labor law changes as part of Build Back Better (or even a slimmed-down reconciliation package), and could cut funding depending on the results of midterms
- There are real, practical impacts. (E.g., cases will move more slowly, settlements will be more difficult, increased costs.)

Impacts on Union Organizing: Restricting Employer Speech Rights

- The General Counsel of the NLRB (its “prosecutor”) has filed a brief asking the Board to overrule 74 years of precedent.
- The GC seeks to make it unlawful for employers to speak to employees on work time if the content involves union or other protected activity and employees are not free to leave.
 - This includes “captive audience” speeches (which the PRO Act sought to make unlawful) and other conversations where employees are “cornered”
- Will require warnings and assurances—think *Miranda* rights
- Broader than just union organizing.
- The Board will decide whether to make this proposed rule the law.

“Sensible Prophylactic Safeguards”

Captive Audiences

For “Captive Audiences,” employers must:

- Explain the purpose of the meeting (at announcement and start)
- Assure employee that their attendance is voluntary, that they are free to leave at any time, that non-attendance will not result in reprisals (including loss of pay), and that attendance will not result in rewards or benefits.

Concerned Employees

For “Cornered Employees,” supervisors must:

- Explain the purpose of the encounter
- Assure employees that participation is voluntary, that non-participation will not result in reprisals (including loss of pay) and that participation will not result in rewards or benefits
- Obtain “affirmative consent” to talk to the employee(s) and let them know they may end the encounter at any time without loss of pay.

Impacts on Union Organizing: Imposing Unions on Employers

- The GC has also proposed recognizing unions without an election.

Current Rule

- NLRB may only impose the union on employers without an election if the union secures majority support and the employer commits severe and egregious ULPs.

Potential New “Old” Rule (Joy Silk Doctrine)

- NLRB will presume that a majority card showing is sufficient absent an employer’s good faith doubt and may impose the union on an employer who requires an election (i.e. refuses voluntary recognition) if there are any violations of the law.

Impacts on Remedies

- The new General Counsel is employing a very expansive view of remedies under the NLRA:

Abruzzo: I will pursue the full breadth of possible remedies under the NLRA to deter violations and to protect and enforce the statutory rights of workers in this country.

- “Make-whole” monetary relief for lost gains by employees due to employers’ bad faith bargaining! (*Pathway Vet Alliance*)
- Consequential damages and front pay – (call for briefs in *Thryv, Inc.*)
- Imposition of union’s bargaining costs for bad faith bargaining

Impacts on Union Access Rights

- The GC is looking for cases to bring to overrule three Trump-era Board decisions that restricted non-employee union representative access to employer property.
- If successful, non-employee union agents would be permitted to access property such as store parking lots and internal cafes if others were permitted access—regardless of the union’s purpose.
- Good win, for now—
 - The D.C. Circuit recently rejected UFCW Local 400’s challenge to one of the Trump-era Board decisions involving Kroger’s exclusion of union reps from Store 538’s parking lot when they were soliciting in favor of a store boycott.

Impact on Employee Discipline / Misconduct

Current Rule

No violation for disciplining employee engaged in misconduct if employer can prove it would have done so regardless of any related union or protected activity.

Anticipated New Rule

“[T]he protections of Section 7 must ‘take into account the realities of industrial life and the fact that disputes over wages, bonuses, and working conditions are among the disputes most likely to engender ill feelings and strong responses.’ [S]tatements during otherwise protected activity lose the Act’s protection only where they are ‘so violent or of such serious character as to render the employee unfit for further service.’”

Guess What's Protected?

- Referring to the owner as a “f***ing motherf***er,” “f***ing crook,” and “asshole” in public efforts to support a union
- Calling the company vice president a “stupid f***ing moron” in a speech urging coworkers to support a union
- Yelling that a supervisor is an “egotistical f***er” in explaining why a union would help workers.

Impact on Settlements (“Capitulation”)

- Settlements to include “full relief” with 100% backpay and lost benefits
- Refusal to include “non-admissions” language; some requiring admissions language
- Default language waiving defenses on merits = required
- Letters of apology
- Training of supervisors and employees approved and/or conducted by the NLRB
- Public reading of notices by executives
- Refusal to permit non-board settlements

Joint Employer Rule

- The Trump-era Board published a joint employer rule in 2020.
- The new Board published a long-expected proposed rule in early September that would return to the previous *Browning-Ferris Industries* standard.
- Likely expansion of “joint employer” status to include—
 - Vendor/client will have a joint employer relationship whenever joint control is merely “reserved” in their contracts; the potential to control will be enough and it won’t matter if joint control is ever exercised
 - The vendor/client reserved joint control may be “indirect” (e.g., contract pricing that impacts wages and benefits)
 - The vendor/client reserved joint control need not be on important, fundamental employment terms, but can arise if the control related to “limited and routine” matters, such as staffing and scheduling
- This rule affects which employers have a bargaining obligation and the scope of liability for ULPs, and is particularly important to companies that use staffing firms and franchisors.

Impacts on Bargaining

- Good faith in bargaining: unions will get a break, management won’t; hard bargaining is likely to be declared unlawful surface bargaining; and achieving an overall impasse will be extremely difficult.
- Union information requests: look for more, be prepared to answer them quickly, and err on the side of producing the information/documents
- Dues checkoff: new NLRB will find they continue post-expiration
- Employee communications during bargaining: new NLRB is much more likely to find unlawful “individual bargaining” by unlawful “bypassing” the union

Impacts on Bargaining (cont'd)

- Final offers: will be closely scrutinized for unlawful "non-mandatory" proposals
- Post-impasse implementation of changes: harder than ever to prove "impasse"
- Lockouts/Replacements: likely to be found "unlawfully motivated" (or unlawful)

What Should You Do?

Two Important Goals:

1. Keep employees engaged.
2. Protect against legal and financial risks.

Employee Engagement: Why do Employees Organize?

1. Better wages, benefits, and scheduling
2. Desire for stronger voice due to lack of trust in management, or perceived or real disrespect
3. Inconsistent application of policies, rules, discipline (i.e., playing “favorites”)
4. Insufficient communication from management
5. Poor front-line leadership
6. Feeling that complaints/concerns are ignored

Employee Engagement: The Importance of Supervisors

- Effective communication and supervision is the #1 factor for keeping employees engaged.
- Good supervisors —
 - understand company policies and fairly/consistently enforce them
 - get to know their employees, and treat them with dignity & respect
 - regularly communicate with all employees, including providing expectations and constructive feedback
 - don't judge employees (even when they want to!)
 - Build trust by being as honest as possible and making clear they want employees to succeed
 - respond appropriately and follow through when employees raise concerns
 - create a community where team members feel valued

Risk Mitigation

- Train supervisors and managers on legal rules/how they can communicate effectively and lawfully
- Review and update policies, rules, and company practices promptly when the compliance environment changes—goal is to be proactive, not reactive
- If supervisors are ineffective at employee engagement, consider moving them to a different role



Keith Eastland

616.831.1749

eastlandk@millerjohnson.com



Leigh Schultz

269.226.2983

schultzl@millerjohnson.com



Brett Swearingen

616.831.1836

swearingenb@millerjohnson.com

DETROIT

409 E. Jefferson Ave
Fifth Floor
Detroit, MI 48226

GRAND RAPIDS

45 Ottawa Ave SW
Suite 1100
Grand Rapids, MI 49503

KALAMAZOO

100 W Michigan Ave
Suite 200
Kalamazoo, MI 49007

millerjohnson.com