

Phoenix Rising? Unions and Employee Rights in the Era of Worker Empowerment

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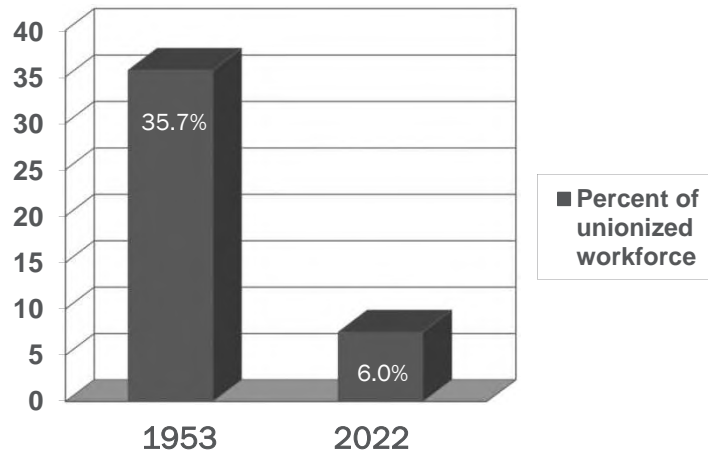
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Today's Topics

- The current labor environment
- Fundamental changes to union election process
 - Cemex
 - New election rules
 - Work rules (Stericycle)
- The legal pendulum shift in key areas:
 - Employee misconduct/employer property rights
 - Micro-units
 - Remedies for unfair labor practices
- Right to Work

The Current State of Unions

Private Sector Representation



**So What's Up With The Name
Of This Presentation?**

Today's Labor Environment: The Perfect Storm?

HELP
WANTED

THE WALL STREET JOURNAL.

U.S. ECONOMY

Tight Labor Market Returns the Upper Hand to American Workers

Employers competing for low-wage workers are offering signing bonuses and other perks

and prepress lead Claire Neimeier, left, talks with prepress specialist Hunter Edwards about a print job at ColorHub in Grand Rapids, Mich. ELAINE CROMIE FOR THE

By [Eric Morath](#) and [Greg Ip](#)
June 20, 2021 1:35 pm ET

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Low-wage workers found something unexpected in the economy's recovery from the pandemic: leverage.

Bernie Sanders: Amazon Labor Union victory has launched a national movement

April 12, 2022 | 10:24 AM CDT | BY JAKE JOHNSON



At left: Chris Smalls, president of the Amazon Labor Union, center, with other members of ALU marching at the Amazon JFKS distribution center in Staten Island, Oct. 25, 2021. At right: Sen. Bernie Sanders. | AP photos

On an organizing call Monday night with leaders of the [Amazon Labor Union](#), Sen. Bernie Sanders, Ind.-Vt., said he believes the grassroots group's historic election [victory](#) in Staten Island earlier this month has empowered workers across the nation to collectively face down their corporate employers and fight for better conditions.

"All across this country, people are saying, 'Whoa! If these guys at Amazon can take on that company, we can do it as well,'" said Sanders, the chair of the Senate Budget Committee. "What we're looking at, I think, is a national, sweeping movement."

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More Michigan Starbucks locations join union drive

Published: Feb. 07, 2022, 9:44 a.m.



Friends in High Places

“I will be the most pro-union president you’ve ever seen.”



The Federal Government’s View



POLITICS

Biden's Infrastructure Package Is Designed to Boost Unions

Biden throws support behind unions amid Alabama Amazon workers' landmark vote

The president urged workers to "make your voice heard."

By Catherine Thibodeau
March 22, 2021, 12:41 PM • 5 min read

Biden Vows To Be 'Strongest Labor President You've Ever Had' At Union Event


Andrew Bolander
Journalist
Labor law, politics, Congress and the union movement

Biden establishes pro-union task force chaired by Harris

By Antonia Finn
BARRON'S HUMAN RESOURCES

Former Union Boss Marty Walsh Confirmed As Labor Secretary

Breaking: On First Day in Office, President Biden Shakes Up NLRB By Firing GC and Appointing New Chair



The choice to join a union is up to the workers — full stop.

The White House Task Force

- The Task Force on Worker Organizing and Empowerment was established in Spring 2021 (co-chairs: VP Harris and the Secretary of Labor).
- “A historic effort to put the federal government’s policy of encouraging worker organizing and collective bargaining into action.”
- “Dedicated to mobilizing the federal government’s policies, programs, and practices to empower workers to organize and successfully bargain with their employers.”
- “The Task Force will include more than twenty cabinet members and heads of other federal agencies who will take a whole-of-government approach to empower workers.”

MILLER JOHNSON 14

Whole-of-Government Approach

- Last year, the NLRB and the DOL/WHD unveiled an MOU to collaborate on “information sharing, joint investigations and enforcement activity, training, education, and outreach.” They agreed that each agency will:
 - Train the other’s staff
 - Advise employees of rights they have under the other’s jurisdiction
 - Share information, including contact information
 - Refer cases to one another

The Numbers Don’t Lie

- It’s not just anecdotal or an academic theory. Union organizing is back on the rise.
- In FY 2022 (10/1/21 – 9/30/22), 2,510 union representation petitions were filed.
 - A 53% increase over FY 2021
 - The most petitions since 2016
- Workers voted in favor of unionizing in 72% of those elections – up from 61% in 2021
- The public support for unions is high. (Gallup – 8/30/23)
 - 67% support unions; 77% say unions help union members
 - 75% support the UAW in negotiations with the Big Three
 - 72% support the SAG writers and 67% support the SAG actors

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The Changing Legal Landscape

The PRO Act

- When President Biden won the 2020 election, Democrats controlled the White House and Congress.
- Unions immediately pushed to pass the PRO Act. The PRO Act was organized labor's Christmas wish list.
- It had many provisions but generally did 3 things:
 - Expanding union and employee rights to organize and bargain
 - Restricting employer rights to oppose unionization or to bargain
 - Silencing employers' voices by expanding the scope of action that violates the law, by excluding them from important election procedures, and through increased penalties and expanded remedial provisions

The PRO Act Dies in the Senate

- President Biden supported it and unions lobbied hard for it to become law.
- It passed the House in 2020, but it stalled in the Senate despite having nearly 50 co-sponsors.
- That's where it remains today – protected by the filibuster.
- But that is not where this story ends...

The End Run – the Biden NLRB

- The NLRB has been busy working to implement those aspects of the PRO Act that it can through enforcement actions, agency directives and Board decisions.
- It also has been steadily swinging the labor law pendulum back in favor of unions and union organizing by making fundamental changes to the union election process.
- It has also been undoing many of the decisions issued by the Trump NLRB (most of which were reversals of the Obama NLRB).
- Are we having fun yet?

Cemex - A Brave New World

- For decades, unions had only two ways to begin representing a group of employees without an election:
 - Get over 50 percent of the unit to sign union cards, ask for recognition and have the employer agree. But, the employer could simply refuse and the union *must* seek an election – and win!
 - If over 50 percent of the unit signed cards and the employer refused recognition, but then the employer committed “egregious” or “hallmark” ULPs that made a fair election impossible, the Board could order the employer to recognize the Union. This is called a “Gissel bargaining order.”
- On August 25, 2023, the NLRB issued a decision (*Cemex*) that changed this fundamental framework in significant ways.

Cemex - A Brave New World (Cont.)

- In *Cemex*, the NLRB changed this framework in a way that greatly benefits unions and makes it much more likely that a union could begin to represent employees without an election.
- It is not quite a “card check” rule, but honestly, it is pretty close.
- When combined with the other changes we will discuss, the *Cemex* decision (which will certainly be appealed) will have fundamental impacts on the collective bargaining process.
- Every employer should pay attention. So what does it say?

Cemex - What It Does (Cont.)

- Under *Cemex*, if a union/group of employees obtains the support of more than 50 percent of the prospective bargaining unit, it can demand recognition (just like before).
- But if this happens, the burden shifts to the employer. The employer cannot just refuse and demand an election. The employer must – ***within two weeks of the demand*** – file its own petition for an election (called an “RM petition”).
 - If the employer does not, the union is recognized. End of story.
- If the employer timely demands an election, then the Board will hold an election.
- Not ideal, but sounds ok, right? Unfortunately, there is another slide.

***Cemex* – What It Does (Cont.)**

- If the employer timely demands an election, then the usual Board election process will unfold (with the changes we'll discuss shortly).
- But, and here's the catch, if the employer commits any unfair labor practice during the “critical period” (the period from the filing of the election petition until the election), then the Board *can* dismiss the RM petition and issue a bargaining order – even though the union lost the election!
- The bargaining order requires the employer to bargain with the Union without an election.

***Cemex* - What It Does (Cont.)**

- So what type of ULPs will lead to a bargaining order without an election?
- It depends, but the standard is way, way lower and almost anything *could* be found to be enough.
- The Board will set aside an election for a ULP during the “critical period” unless the violation(s) are “so minimal and isolated” that it is virtually impossible to conclude the misconduct could have affected the election results.

Cemex - What You Should Do

- Cemex will be appealed and may not survive (the dissent makes several good points) but it is going to be the law for the next several years.
- So what should you do?
 - Do your best to create an environment where employees don't feel the need to turn to a union (more on this later).
 - Train your supervisors on:
 - Early warning signs for union activity
 - Their role in creating an environment where there is no need for a union (and hold them accountable)
 - What to do if there is a demand for recognition (and what not to do)
 - If you get a demand for recognition, call your attorney ASAP.

New Election Rules

- The Board recently issued new (old) election rules.
- In many ways, these rules are a return to the so-called “quickie” or “ambush” election rules.
- The rules are designed to shorten the amount of time from the filing of a petition to an election.
 - Why? Employers run effective campaigns.
 - The more employers are able to communicate with employees about what it truly means to be represented by a union, the less likely employees are to vote for the union in the election.
- There are many specifics, but those are for another day.
- The rules take effect on December 26, 2023.

Limiting Employer Speech Rights

- In the NLRB General Counsel's Cemex brief, she also asked the Board to overrule 74 years of precedent.
- The General Counsel wants 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 and other conversations where employees are "cornered"
- Broader than just union organizing.
- Would require warnings and assurances.
- The Board in Cemex did not decide the issue, but it is likely that the General Counsel will find a "test" case to push the

The Return of Micro Units

- In December 2022, the NLRB returned to the Obama era rule permitting "micro units" – i.e. small groups of employees within a workforce.
- What is a micro unit?
 - A "readily identifiable" group of employees that shares a "community of interest."
 - Could be based on job classification, department, skills, work location, etc.
 - The employer would have the burden of showing anyone excluded shares an "overwhelming" community of interest.
- Why does this matter? It gets the union in the door!

Stericycle & Work Rules

- On August 2, 2023, the Board issued its decision in *Stericycle*, which re-instated a modified version of its Obama-era standard on workplace rules.
- The Obama Board’s standard prohibited any workplace rule that would be interpreted by a reasonable employee as “limiting protected activities.”
- The NLRB’s new standard under *Stericycle* is even harsher in some respects.

Stericycle (Cont.)

- Now, the Board will now evaluate workplace rules and policies in two steps:
 - The NLRB will first determine if an employee “could” (not “would”) “reasonably interpret” a rule to restrict or prohibit protected activity. If so, the Board will find the rule to be presumptively unlawful.
 - Intent does not matter. Nor does it matter if the rule has another reasonable interpretation that does *not* restrict protected activity.
 - It also doesn’t matter if the rule has not been applied to impact rights.
 - If the rule is presumptively unlawful, the employer must show both:
 - The rule furthers a legitimate and substantial business interest; and
 - The rule is as narrow as it can be to protect that interest.

Stericycle (Cont.)

- Some rules that will now likely be found unlawful:
 - Prohibiting statements or social media postings that adversely affect the employer’s business interests
 - Prohibiting the use of cameras or cell phones in a way that could be construed as prohibiting employees from using cameras or video equipment in break areas during break time.
 - Requiring “civility,” “professionalism,” or “respect” toward coworkers.
 - Requiring confidentiality
 - Prohibiting employees from distributing materials and literature.

Employee Discipline / Misconduct

Old (2020) 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.

New “Old” 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.

Restrictions on Employers' Property Rights

- In Bexar County II, the Board held that property owners can prohibit off-duty contract workers from protesting on their property only if they show the activity would significantly interfere with the use of the property, or some other legitimate business reason.
- Overruled a Trump-era rule that allowed property owners to prohibit contract workers from protesting on their property unless they worked regularly and exclusively on the property.



Severance Agreement Language (*McClaren*)

- In February, the NLRB issued a decision holding that union and non-union employers violate the NLRA when they offer and/or enforce overly-broad severance agreements to **non-supervisors**.
- What does this mean?
 - Employers cannot make the existence of severance and settlement agreements confidential for non-supervisors. But employers can make the financial information confidential.
 - Employers cannot include broad non-disparagement language. Employers can only include non-defamation language in agreements with non-supervisors.

Expanded 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 (*Thryv, Inc.*)
- Imposition of union’s bargaining costs for bad faith bargaining

Consequential Damages

- In *Thryv, Inc.*, the Board significantly expanded its longstanding make-whole remedy to include consequential damages
- Now, in addition to the ordinary backpay, lost benefits, and/or reinstatement, employers may be on the hook for:
 - Increases in premiums
 - Unpaid medical bills
 - Credit card interest and late fees
 - Penalties for early withdrawals from retirement accounts to cover living expenses
 - Higher transportation or childcare costs
 - Even the loss of a vehicle or home if the employee is unable to make required payments

Settlement Negotiations

- Settlements to include “full relief” with 100% backpay and lost benefits – with consequential damages included
- Refusal to include “non-admissions” language; some requiring admissions language
- 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

Right to Work Update

- March 24, 2023: Governor Whitmer signed legislation repealing Michigan's 2012 Right to Work law
- What does this mean?
 - Private sector employers and unions can negotiate "union security clauses" that require workers to pay union dues as a condition of employment.
- When will this go into effect?
 - April 2024



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