

Changes to the NLRA, Government Efforts to Assist Union Organizing and How to Protect Your Company

Presented by:

James N. Foster, Jr.
McMahon Berger, P.C.
2730 North Ballas Road, Suite 200
St. Louis, MO 63131
(314) 567-7350
foster@mcmahonberger.com

This material has been prepared for informational purposes only and does not constitute legal advice. It is not intended to create, and receipt of it does not constitute, an attorney-client relationship. Readers should seek professional legal counsel before acting upon any information contained herein.



POLITICO

03/13/2023

The NLRB's \$76 million dream

NUMBERS TO KNOW: At the end of last year, the National Labor Relations Board received a \$25 million boost to the agency's budget, staving off an impending crisis that threatened to hobble the agency and furlough its workforce.

Current Board



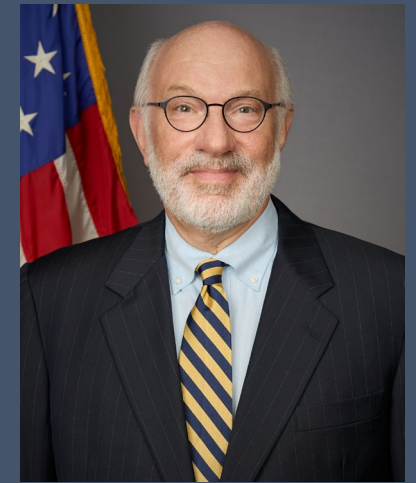
Lauren M. McFerran
Biden Appointee
Term Expires
12/16/2024



John F. Ring
Trump Appointee
Term Expired
12/16/2022



Gwynne A. Wilcox
Biden Appointee
Term Expires
8/27/2023



David M. Prouty
Biden Appointee
Term Expires
8/27/2026

As of April 2023, NLRB Charges Against
Employers are up 16% from last year!

Micro Units Are Back

The NLRB returned to its pro-union standard for determining appropriate bargaining units. The Board will require an employer challenging the appropriateness of such a micro unit to show that there is an “overwhelming community of interest” between the micro unit and other employees not included in the proposed unit.

Dues Check-Off After Expiration of a CBA

The Board overturned a Trump-era decision that had permitted employers to cease deducting union dues where the collective bargaining agreement requiring the deduction expired.

Uniform Policies

The Board ruled that such a policy that prohibits the wearing of union insignia is presumptively unlawful, absent “special circumstances” which are difficult for an employer to prove.

Consequential Damages Remedy

The NLRB expanded its remedial power by ordering consequential damages in all cases in which the traditional “make whole” relief is awarded. Now, however, employers who violate the act will owe monetary relief for other “foreseeable harms” such as out of pocket medical expenses, credit card debt attributable to the loss of employment, and missed mortgage or rental payments and related fees.

Restrictions On Employer Property Rights

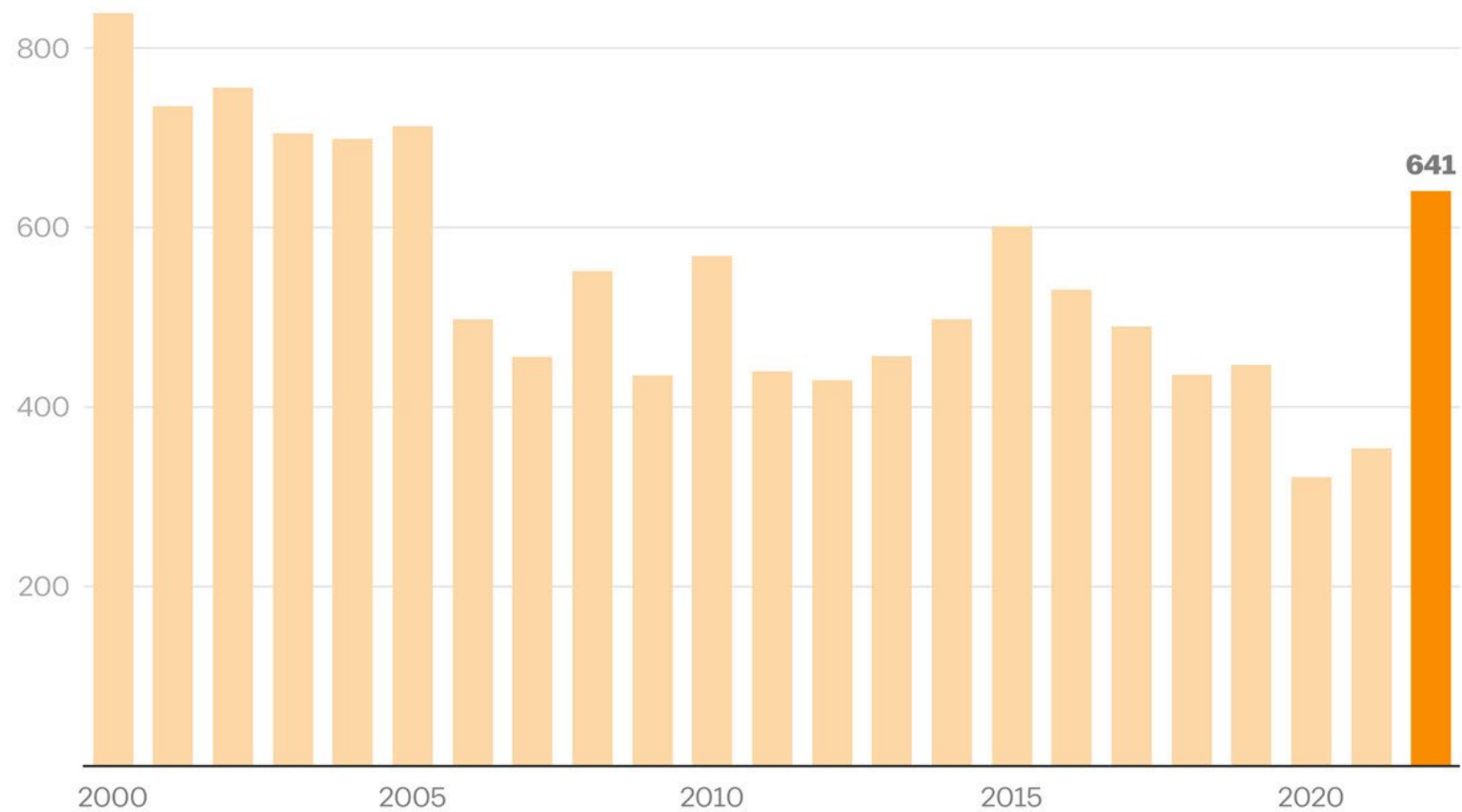
The Board reversed precedent and found that a business can only exclude contract workers from its property when the contract workers' protected activities (such as picketing, leafletting, etc.) "significantly interfere" with the property's use or there is another legitimate business reason to eject the contract workers.

What's Coming in 2023?

1. Captive audience meetings;
2. Joint Employer Rule;
3. Mandatory union recognition;
4. Independent Contractor Standard raised;
5. Employer work rules scrutinized.

Unions won more elections in 2022 than they have in nearly 20 years

Data for National Labor Relations Board elections, January through June each year



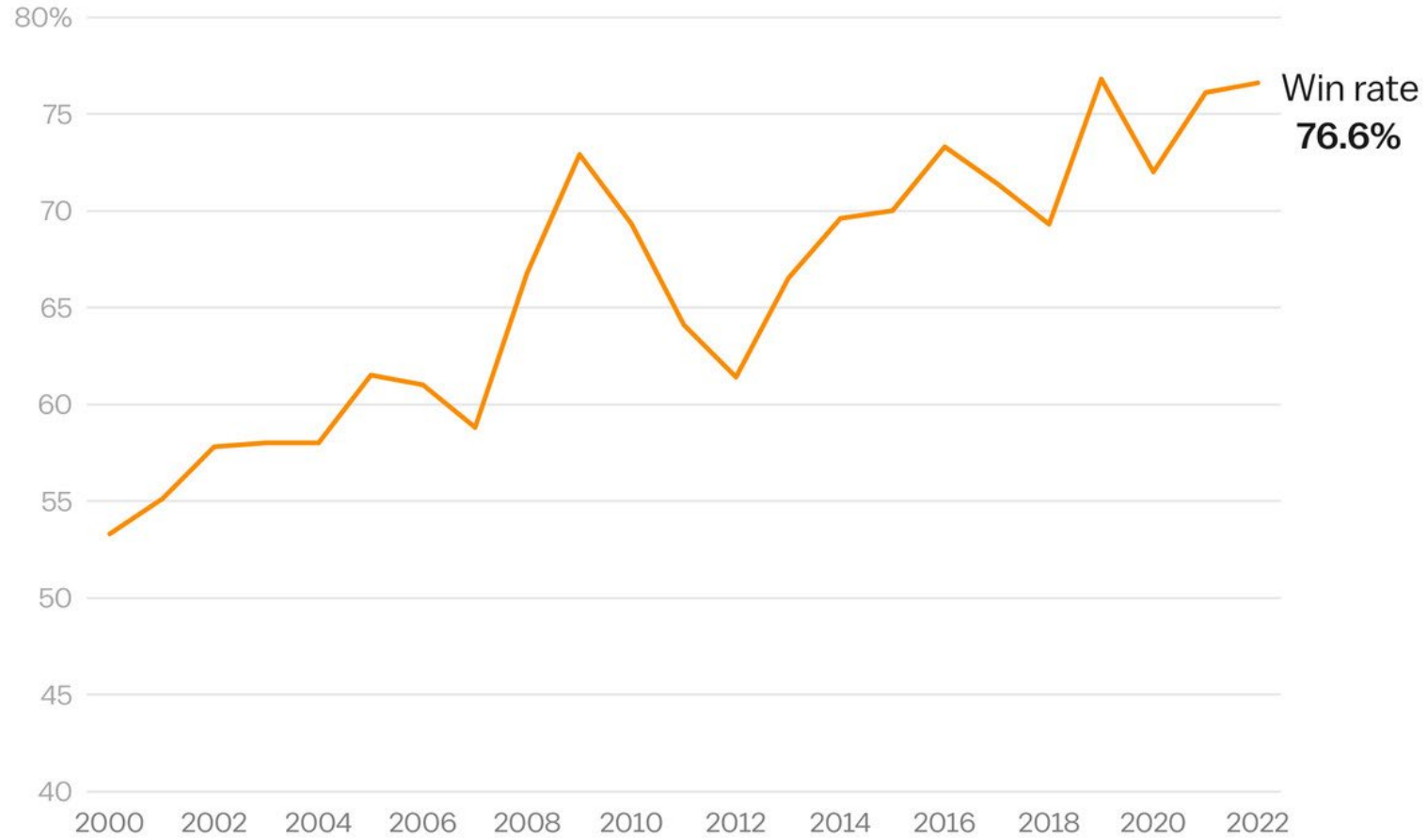
Source: Bloomberg Law

recode BY Vex



Unions are winning more than three-quarters of their elections

Data for National Labor Relations Board elections, January to June each year



Source: Bloomberg Law

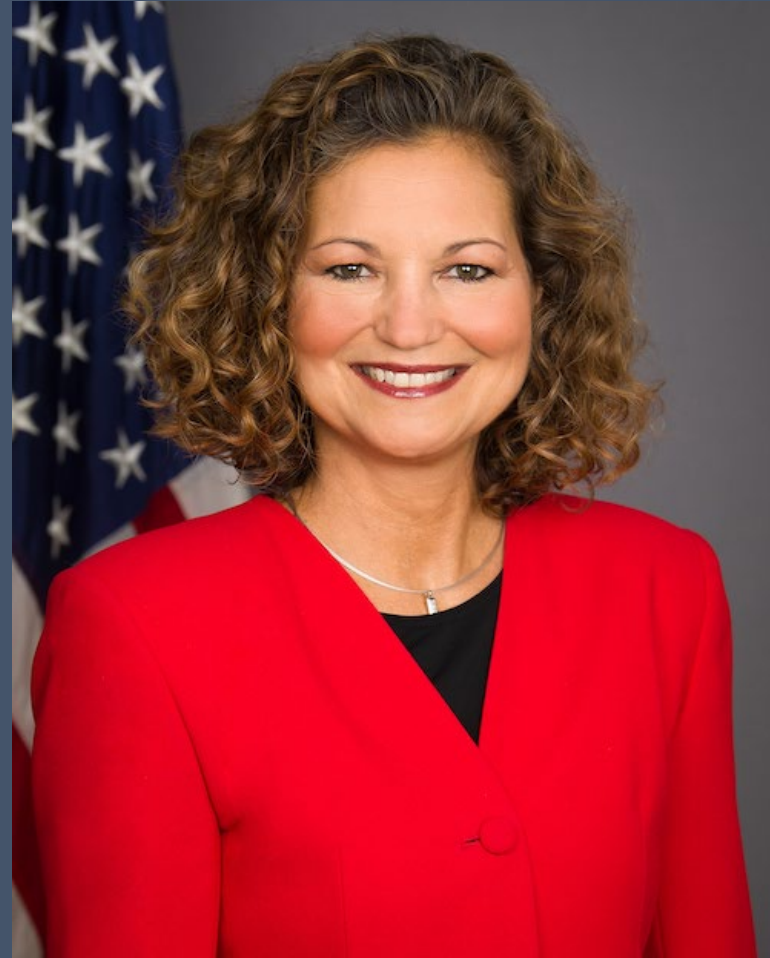
recode BY Vex



Changes to the NLRA

NLRB General Counsel

The General Counsel acts as prosecutor for alleged violations of the NLRA



Expected Changes Coming

Abruzzo Issues Memorandum Outlining Objectives

The issues that remain at the forefront of Abruzzo's prosecutorial agenda are as follows:

- Case involving the applicability of *Ridgewood Heath Care Center, Inc.*, 367 NLRB No. 110 (2019) (overruling *Galloway School Lines*, 321 NLRB 1422 (1966) and finding that a successor employer that discriminates in refusing to hire a certain number of the predecessor's workforce to avoid a Burns successorship bargaining obligation does not necessarily forfeit the right to set employees' initial terms.
- Cases involving the applicability of *Pittsburgh Post-Gazette*, 368 NLRB No. 41, slip op. at 3, n.5 (2019) (distinguishing *Finley Hospital*, 362 NLRB 915 (2015) in determining whether the post-contract status quo required increases to employer fund contributions).
- Cases involving the applicability of *Brevard Achievement Center, Inc.*, 342 NLRB 982 (2004) (declining to extend the Act's coverage to individuals with disabilities on grounds that these individuals, where working in a rehabilitative setting, are not employees within the meaning of Section 2(3) of the Act).

Expected Changes Coming (cont.)

- Cases involving the applicability of *United States Postal Service*, 371 NLRB No. 7 (2021) (Board refusing to find a pre-disciplinary interview right to information, including the questions to be asked in the interview, as a purported extension of *Weingarten*).
- Cases involving the applicability of *ABM Onsite Services-West*, 367 NLRB No. 35(2018) (Board, after initially asserting jurisdiction and certifying the union as representative of the employer's airport bag jammer technicians and dispatchers, reversed course and deferred to a National Mediation Board advisory decision in which NMB found Railway Labor Act jurisdiction under traditional six-factor carrier control test and overruled NMB cases requiring carrier control over personnel decisions).
- Cases involving a refusal to furnish information related to a relocation or other decision subject to *Dubuque Packing* (see former Chairman Liebman's dissent in *Embarq Corp.*, 356 NLRB No. 125 (2011) and OM-11-58).
- Cases involving the applicability of *Shaw's Supermarkets, Inc.*, 350 NLRB 585 (2007) (to assess whether this case should be overruled. The case permits midterm withdrawals of recognition where they occur after the third year of a contract of longer duration).

Expected Changes Coming (cont.)

- Cases involving the applicability of *Wal-Mart Stores*, 368 NLRB No. 24 (2019) (broadly defining an intermittent strike).
- Cases involving the applicability of *Service Electric Co.*, 281 NLRB 633 (1986) (allowing an employer to unilaterally set terms and conditions of employment for replacements even where those terms are superior to those that had been paid to striking unit employees).
- Cases involving the applicability of *Ex-Cell-O Corp*, 185 NLRB 107 (1970) (declining to provide a make whole compensatory remedy for failures to bargain).
- Cases involving the applicability of *Cordia Restaurants, Inc.*, 368 NLRB No. 43 (2019) (Board finding, among other things, that an employer does not violate the Act by promulgating a mandatory arbitration agreement in response to employees engaging in collective action).

Labor Organizing Continues to Garner Front Page Headlines

- From Amazon to Starbucks to Minor League Baseball, organized labor has continued the trend of being front page news.
- Institutions and industries that were once considered unreachable by unions, are now being organized at an unprecedented rate
- Unions are leveraging these success into media headlines, and more importantly, social media engagements
- These headlines coupled with new generation of workers being discouraged by current status quo of employment prospects has contributed to the surge in union organizing

More “Proposed” Changes Coming

- Stricter scrutiny of employee handbooks – reverse “reasonable” standard set out in *The Boeing Co.*, 365 NLRB No. 154 (2017)
- More difficult for employers to classify employees as independent contractors – reverse *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019)
- Permit employee use of employer email system for union organizing – reverse *Rio All-Suites Hotel and Casino*, 368 NLRB No. 143 (2019)
- More scrutiny, separation agreements with confidentiality language – reverse *Baylor University Medical Center*, 369 NLRB No. 43 (2020)
- Eliminate employer’s right to demand secret ballot election for union representation – reinstate “Joy Silk” doctrine - *Joy Silk Mills*, 85 NLRB 1263 (1949)

Government Efforts to Assist Union Organizing

Project Labor Agreements

- A February 2023 Executive Order directed federal agencies to use such agreements on construction projects above \$35 million.
 - Developing industries like cannabis are subject to PLAs at the state level in New York and Illinois.

NEW YORK POST

April 26, 2021

Kamala Harris gets new job leading pro-union task force alongside border role



THE WHITE HOUSE

APRIL 12, 2022

Remarks by Vice President Harris on the Administration's Historic Commitment to Worker Organizing and Empowerment


Sheet Metal Workers Local 19 JATC

Philadelphia, Pennsylvania

THE VICE PRESIDENT: Good afternoon. (Applause.) Good afternoon, everyone. Good afternoon. Can we please give it up for William? (Applause.)

People know what we're talking about. They know what we're talking about. They know, today, as a matter of fact, about half of all non-union workers say they would join a union if given a chance. That is almost 60 million people in our country, nearly 20 percent of our nation. Think about it. Think about it.

And then that, of course, has to prompt the question: "Well, what's stopping them?" And we know that part of the answer — a big part of the answer is that, for decades, powerful forces in our country have been hard at work building barriers to stop workers from organizing. And we all know that we've got to then take it on with a powerful counterforce, which is why our administration is working even harder to tear those barriers down.



WHITE HOUSE TASK FORCE ON WORKER ORGANIZING AND EMPOWERMENT

REPORT TO THE PRESIDENT

VICE PRESIDENT KAMALA D. HARRIS, CHAIR
SECRETARY OF LABOR MARTIN J. WALSH, VICE-CHAIR



Table of Contents

<u>Section 1: Our Mission to Empower Workers and Support Worker Organizing, Including Major Proposal Categories and Examples.....</u>	2
<u>Section 2: The Biden-Harris Administration’s Commitment to Workers.....</u>	7
<u>Section 3: Understanding History and Meeting the Moment.....</u>	10
<u>Section 4: Full List of Recommended Executive Actions.....</u>	14

Section 2: The Biden-Harris Administration's Commitment to Workers

While the Task Force worked over the past several months to develop, recommend and then begin to implement the recommendations in this report, worker empowerment has been at the heart of President Biden's and Vice President Harris's agenda since their very first days in office. That is reflected in the Executive Orders issued to date. For example:

- On January 22, 2021 the President signed an executive order repealing the prior administration's harmful actions to limit the collective bargaining power of federal employee unions and remove protections from career civil servants. And just days later, on January 25, the President signed an executive order strengthening Buy American provisions to ensure American taxpayer dollars create well-paid, union jobs in the United States and give our workers and companies the tools they need to compete globally for decades to come.
- On April 27, 2021 the President signed an executive order promoting economy and efficiency in federal contracting by raising the hourly minimum wage for federal contractors to \$15 starting in 2022, indexing it to inflation, extending it to workers with disabilities, and eliminating the tipped minimum wage by 2024. That wage increase went into effect on January 30 – raising wages immediately for approximately 70,000 federal workers to \$15, with an additional 300,000 federal contractors beginning to see raises over the course of this year.
- On November 28, 2021, the President signed an executive order to improve the efficiency of federal contracting by reducing job turnover when government service contracts change hands, keeping experienced workers on the job. The executive order also furthers the Biden-Harris Administration's equity goals, given that service contract workers are disproportionately women and people of color.
- The Office of the United States Trade Representative (USTR) is pursuing worker-centered trade policy—ensuring that unjust labor rights suppression abroad does not turn into unfair competition for workers in the United States, including by its recent use of the US-Mexico-Canada Trade Agreement's Rapid Response Mechanism to ensure that workers obtained redress for labor rights violations.
- The Department of Veterans Affairs (VA) restored “official time” for their union representatives, which allows union representatives to perform those roles during the work day, so they can effectively represent those who serve our nation's veterans every day.
- The Department of Energy (DOE) established a new Office of Energy Jobs in its Office of Policy to promote a department-wide, union-jobs-oriented approach to all of DOE's activities and planning.
- The Federal Labor Relations Authority voluntarily recognized its staff union—after the prior administration unilaterally withdrew recognition—ensuring that their employees could once again advocate for their needs without having to go through another burdensome and unnecessary election.

Section 4: Full List of Recommended Executive Actions

Recommendation Text as Submitted to the President on October 23, 2021

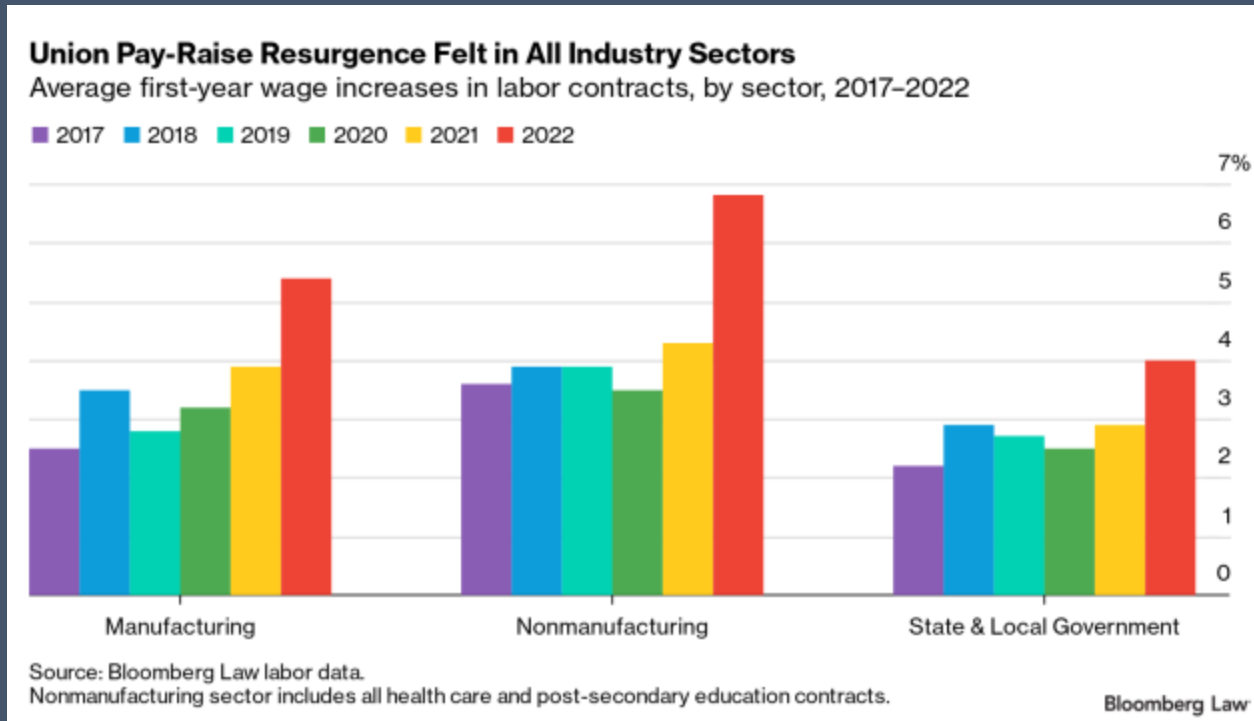
Table of Contents

Federal Employees: Making the Federal Government a Model Employer	17
Implement a Suite of Strategies to Empower Workers to Organize in the Federal Sector and Remove Unnecessary Obstacles to Organizing	17
Reinstitute Labor Management Forums	19
Expand Collective Bargaining Rights for the Transportation Security Administration’s Screening Workforce	20
Identify a Long-Term Solution to Creating a Robust Wildland Firefighter Workforce.....	20
Federal Contractors’ Employees: Ensuring Union Access to Employees	20
Standardize Guidelines for Union Organizer Access to Military Bases and Installations	21
Strengthen Labor Provisions in National Park Service Concessions Contracts	21
Ensure Union Organizer Access to Private-Sector Contractors’ Employees on Federal Property	21
All Employees: Facilitating First Contracts for Employees Who Organize a Union	21
Helping to Translate Worker Organizing into Collective Bargaining Agreements.....	21
Strengthen Existing FAR Provision Encouraging Conciliation/Mediation/Arbitration for a Labor Dispute that is Affecting or Threatens to Affect Contract Work.....	22
Private-Sector Employees: Improving Transparency of Anti-Union Campaigns by Employers	23
Improve Reporting on Persuader Activity	23
Promote Regulations on Unallowable Labor Relations Costs in the Defense Department.....	23
All Employees: Increasing Visibility, Support, Awareness, and Promotion of Collective Bargaining	24
Increasing Awareness of Workers’ Rights.....	24
Launch a Know Your Rights Initiative on the Rights to Organize and Collectively Bargain.....	24
Department of Defense Verification of Posting of Organizing and Bargaining Notice	25
Expand Worker.gov	25
Increase Awareness of Employee Rights Among Head Start Staff.....	25
Inform Farmworkers about their Right to Join a Union at USDA Farmworker Housing Facilities...	26
Connect Small Business Owners with Resources on Unionization.....	26
Bully Pulpit and Bully Pulpit Resource Center	26
Department of Defense Promotion of Regulations on Allowability of Certain Labor Relations Costs Relating to Maintaining Satisfactory Labor Relations	27

Support for Emerging Labor-Management Partnerships.....	27
Organize Informative Training or Listening Sessions at GSA.....	27
All Employees: Reduce Administrative and Tax Burdens on Workers Joining Unions	27
Eliminate Obstacles and Allow for Automatic Deductions from Payments to Medicaid Providers..	28
Explore Potential Tax Levers to Remove Barriers to Worker Organizing.....	28
All Employees: Ensuring Effective Enforcement of Existing Laws.....	28
Improve Coordination and Cooperation on Anti-Retaliation Enforcement.....	29
Support Enforcement of Labor and Employment Standards	29
Prevent and Address Worker Misclassification.....	29
Strengthen Service Contract Act Compliance and Enforcement Efforts.....	30
Davis Bacon Act Payroll Verification Automation	30
Review HUD’s Practices for Monitoring and Enforcing Wage Rates Across HUD Grantees	30
Federal Contractors’ and Grantees’ Employees: Strong Labor Standards Applied to Federal Funding	31
Propose Job Quality Guidance.....	31
Strengthen Merit Staffing Requirements	31
Issue Guidance and Other Directives to Agencies to Ensure Financial Assistance Programs	
Empower Workers	31
Require Compensation Plans for Blue Collar Workers on Federal Service Contracts.....	32
Davis-Bacon Regulatory Reform.....	32
Provide Additional Program Guidance and Technical Assistance for Financial Assistance Programs	
.....	32
Develop Guidance that Identifies Best Labor Practices and Recommendations Across State	
Revolving Fund Water Programs	33
Promote COVID Economic Injury Disaster Loan Program as a Tool to Re-Employ Unionized	
Workforces.....	33
Supporting Labor Rights in HHS’s Grants Program	34
Include Labor-Management Collaboration as a Department of Education Competitive Grant	
Selection Criterion	34
Incorporating Labor Standards into Transportation Discretionary Grant Programs	34
Update Innovation Principles and Reorient NETT Council	35
Ensure that the Entities Providing Cafeteria Services Use Full-Time Workers	35
Federal Contractors’ and Grantees’ Employees: Ensuring Compliance with Existing Labor Standards	
in Federal Grants and Contracts	36
Increase the Number and Coordination of Agency Labor Advisors	36
Provide Job Aid and Training for the DHS Contracting and Acquisition Workforces	36
Private-Sector Employees: Ensuring Taxpayer Dollars Are Spent on Made-in-America Goods and	
Construction Projects that Provide Good Union Jobs in the United States	36

Empower America’s Workers through Increased Reliance on Made in America Goods and Services	37
Promote Manufacturing in the United States.....	37
Ensure National Telecommunications and Information Administration Broadband Grants Support Construction Jobs with Strong Labor Standards.....	37
Ensure Bureau of Ocean Energy Management Offshore Wind Leasing Projects Are Built with Union Labor.....	38
Include a Project Labor Agreement Evaluation Preference for Department of Interior Construction Contracts	38
Use Evaluation Factors That Support Union Participation in Veterans Affairs Construction Projects	38
Federal Contractors’ and Grantees’ Employees: Eliminating Barriers to Union Eligibility for Federal Grants and Contracts	39
Ensure that Labor Unions Are Eligible to Compete for Relevant Federal Financial Assistance Opportunities	39
Evaluate Union Suitability as Lead Applicants, or Partners, on Department of Labor Grants and Promoting Worker Organizing and Collective Bargaining in Grants.....	39
Federal Contractors’ and Grantees’ Employees: Promoting Apprenticeships through Federal Programs	40
Expand Use of Registered Apprenticeships and Training through Labor-Management Partnerships (LMPs) for Recipients of Federal Funds	40
Implement Good Jobs Challenge Funds Training that Leads to Quality Jobs.....	40
All Employees: Facilitate Diversity and Inclusion in Unionized Jobs	41
Work with the Union Veterans Council to Help Service Members, Military Spouses, and Veterans Transition into Good Union Jobs.....	41
Explore Creating a Veterans’ Employment Recruiting and Apprenticeship Program	41
Review HUD’s Current Section 3 Enforcement and Identify Improvements	41
HUD and DOT to Partner with DOL’s Employment and Training Administration	42
All Employees: Ensuring Unions Have a Seat at Many Federal Advisory Tables.....	42
Include Union Voices on Advisory Committees	42
Building Formalized Lines of Direct Communication between HUD Regional Offices, Unions, Worker Centers and Worker Stakeholders	43
All Employees: Developing Research and Collecting Data to Advance Policy About Worker Organizing and Empowerment	43
Analyze Relationship between Union Density and Middle-Class Stability and Growth	43
Harness and Expand Existing Statistical Surveys to Improve Data on Worker Organizing, Bargaining, and Employment Relationships	43
Establish an Integrated Data Approach	44
Continue the U.S. Energy Employment Report.....	44

DOL Reports Favor Unions



DOL Reports Favor Unions



How To Protect Your Company

- Engagement Surveys/Analysis
- Vulnerability Assessments

How To Protect Your Company (Cont.)

Premises Review

- Access Policies;
- Surveillance Systems;
- Security Measures;
- Smoking Areas;
- Boundaries of Property.

How To Protect Your Company (Cont.)

Rapid Response Teams

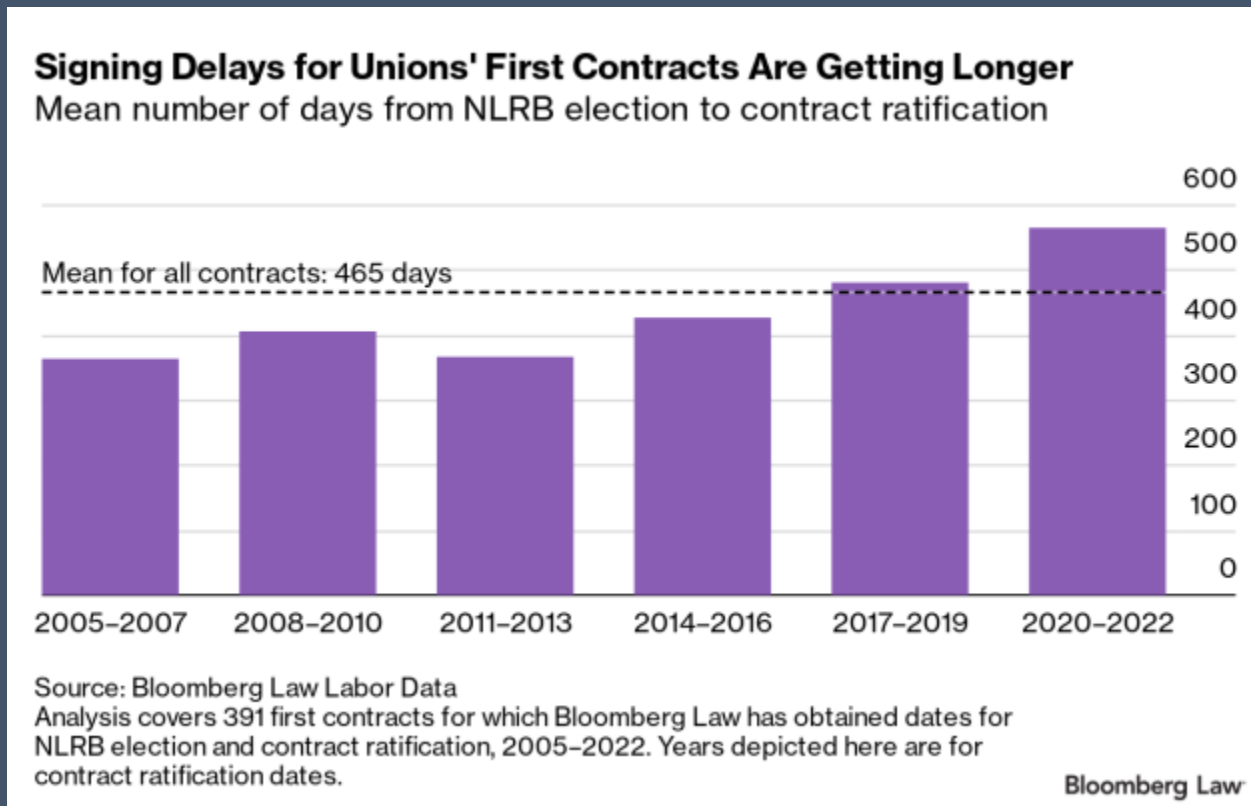
- Qualifications
- Availability
- Training

Avoid Consultants

- Not credible to staff
- DOL requires reporting of “Persuaders”

How To Protect Your Company (Cont.)

General Messaging



How To Protect Your Company (Cont.)

Prepare Upper-Level Managers

- Know NLRB Election Timeline
- Know Local Conditions
- Review job descriptions
 - Supervisors
 - Managers
 - Exclusions

How To Protect Your Company (Cont.)

Develop Off The Shelf Materials

- Must be relevant to your industry
- Must be relevant to your people
- Must be kept up to date

How To Protect Your Company (Cont.)

Listen/Listen/Listen!!!

QUESTIONS?

Disclaimer

No information contained in this presentation should be relied upon by you as legal advice. An attorney's answer to a question depends on many facts, and the facts of each case are different. If you encounter a situation where you believe you need legal advice, contact an attorney and relay the facts of your case to him or her.