

# THE MOVE TO UNIONIZE: A NEW LANDSCAPE OF CONCERTED ACTIVITY AND HOW LABOR LAW IMPACTS NON-UNION WORKPLACES

By Rita M. Lauer

## I. UNIONIZATION ACTIVITY

### A. Employee Activity

#### 1. Surveys regarding union participation

- a. 58% adults surveyed perceived, “long-term decline of the share of workers represented by unions as a bad thing” for the county and working people. 61% say union decline bad for working people.
- b. Pew Research, data collected February 18, 2022.
- c. 71% of Americans now approve of labor unions.
- d. 40% of union members say their membership is “extremely important.”
- e. Employee engagement higher among nonunion workers.
- f. Highest approval of labor unions since 1965.
- g. Gallup poll, data collected Aug 1-23, 2022.

#### 2. Union Participation 1983 to present

- a. Share of US Workers belonging to a Union has continued to decline since 1983.
- b. In 1983, 20% of US workers were Union members.
- c. 2021, 10.3% of US workers were Union members.
- d. 2022, 10.1% of US Workers were Union members.
- e. PEW Research Center dated February 18, 2022 & US Department of Labor Stats released January 19, 2023.

#### 3. Union participation data breakdown

- a. The union membership rate of public-sector workers (33.1 %) continued to be more than five times higher than the rate of private-sector workers (6.0 %).

- b. The highest unionization rates were among workers in protective service occupations (34.6 %) and in education, training, and library occupations (33.7 %).
- c. Fastest growing union is SEIU; service sector union.
- d. Men continued to have a higher union membership rate (10.5 %) than women (9.6 %).
- e. The gap between union membership rates for men and women has narrowed considerably since 1983 (the earliest year for which comparable data are available), when rates for men and women were 24.7% and 14.6 %, respectively.
- f. Black workers remained more likely to be union members than White, Asian, or Hispanic workers.
- g. Nonunion workers had median weekly earnings that were 85 percent of earnings for workers who were union members (\$1,029 versus \$1,216).
- h. By age, workers ages 45 to 54 had the highest union membership rate in 2022, at 12.6 %. Younger workers—those ages 16 to 24—had the lowest union membership rate, at 4.4 %.
- i. Bureau of Labor Statistics January 19, 2023.
- j. Gender, age, private v. public sector breakdown of participation.
- k. Starbucks/Amazon Unionization activities.
  - i. 2022 – Amazon warehouse on Staten Island voted to approve union. 8,300 person warehouse.
  - ii. Not another single Amazon facility has voted to approve unionization.
  - iii. Since December 2021 – only 300 Starbucks stores have unionized; less than 3% of its US company stores.
  - iv. NLRB has filed numerous unfair labor charges against Starbucks.
  - v. October 2022 – Starbucks filed 22 unfair labor practices against Worker’s United (Union).
  - vi. Recording contract negotiations.
  - vii. Failing to meet in person.

- viii. Not to be “out done” NLRB issued 29 unfair labor charges against Starbucks in May of 2022. 29 charges included 200 alleged violations of the National Labor Relation Act.

## II. WHAT IS PROTECTED CONCERTED ACTIVITY

### A. The NLRA

#### 1. Substance of the NLRA

- a. National Labor Relations Act governs relations between union employees and their employers but also protects some nonunion employee actions.
- b. Applies to ALL” employees” EXCEPT supervisors, managerial employees, agricultural workers, individuals who work for their parents or spouse, rail road employees. Management includes employees who act in a capacity for persons who determine or administer policy. \*There is one minor exception to this rule.
- c. Guarantees all employees the, “right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in concerted activities for purposes of collective bargaining or other mutual aid or protection.” (Section 7 rights).
- d. Application to Non-union employees
  - i. Cannot restrict/ discipline/terminate employees for various communications to third parties or each other about work conditions.
- e. Nonapplication to Management
  - i. One exception where Management refuses to engage in Unfair Labor Practices then they have protections.

#### 2. Definition of Protected Concerted Activity

- a. Generally, “concerted activities” are when employees act together to achieve a mutually desired end within the workplace.”
- b. Connected to work conditions or terms of employment.
- c. Protects complaints or protests against employers. This includes statements by employees that may be “unintentionally or negligently false or misleading statements.”
- d. Where employees act together (or vocalize) to achieve a mutually desired end in the workplace.

- i. Examples of protected concerted activity
  - (A) Black Friday walkouts by Walmart employees
  - (B) Social Media Posts
  - (C) Television interviews; Direct TV example
  
- e. What behavior/activity to look out for and how to respond
  - i. When an employee complains about something in the workplace, try to resolve it; ex., furnace is not working – tell employees someone has been called and it will be fixed.
  - ii. If you can't resolve, make a note, tell employees you will check out on ways to resolve.
  - iii. This includes wages, work conditions, treatment in the work place.
  - iv. Handed a petition by employees concerning an issue in the work force – tell them management and HR will review this and respond timely and thank them for bringing the concern to your attention.
  - v. Employees start posting on Facebook about the workplace, do not post or contribute. Print it out, give to HR.
  - vi. Fliers about unionizing being handing out by employees, this should get your radar up. Take a flier and give it to HR.
  
- f. What NOT to do in response to certain activity; termination/discipline employees
  - i. Do not immediately terminate/discipline.
  - ii. Do not post/comment on Facebook/TikTok or other social media responsive to the “issue.”
  - iii. Do not have employment manual that prohibits blanket comments on social media about the work place.
  - iv. Do not have employment manual that prohibits blanket comments to third parties or co-employees.
  - v. Do not engage or automatically tell employees they can't do something – especially where you think it may be concerted activity.
  - vi. As always, there are exceptions, unless the behavior by the employee is illegal.

- B. Written terms that are protected concerted activity
  - 1. Severance Agreements
    - a. Violation of 8(a) because may interfere or restrain exercise of right under NLRA,
    - b. Broad non-disparagement and confidentiality clauses,
    - c. Employee prohibited from making statement that could “harm the image of the employer, officers, directors, employees...”
    - d. Agreement only to be disclosed to, “spouse, professional advisor, unless compelled by law to...” disclose terms to anyone else.
  - 2. Broad Restrictions regarding non-disparagement and confidentiality clauses
    - i. Cannot restrict employee broadly from making statements about the employer.
    - ii. Cannot restrict disclosure of agreement, must include access to NLRB, judicial and media/third parties.
    - iii. Parker Robb protects supervisor who is retaliated against for refusing to commit an unfair labor practice.
    - iv. NLRB will apply this decision retroactively to severance agreements that have these overly restrictive clauses.
    - v. Employers should reach out to employees to offer a “cure” or amendment to existing severance agreements that are violative.
  - 3. Pre-Employment Offers
    - a. May contain violative language here if too broad of language. Review any confidentiality clauses and non-compete language.
      - i. These too can be subject of a violation if you have language that may, “restrain, interfere with or coerce an employee’s exercise of Section 7 rights.”
      - ii. Confidentiality clauses – considered to have a “chilling effect” by NLRB.
      - iii. DOES NOT INCLUDE – trade secret/proprietary information clauses.
  - 4. Looking ahead

- a. NLRB looking to noncompete/nonsolicitation /no poaching/broad releases are being reviewed by the NLRB.
- C. Right to Work Update State of Michigan
1. March 24th – Michigan’s Right to work law was repealed. Takes effect March 30, 2024.
  2. Right to work – Gave Employees the following:
    - a. Refrain from or resign from membership in, affiliation with, or financial support of a labor organization.
    - b. Become or remain a member of a labor organization.
    - c. Pay any dues, fees, or other charges to a labor organization.
    - d. Pay a charitable organization or another third party an amount of money equivalent to dues, fees, or other charges that are required to be represented by a labor organization.
    - e. Been called a “free rider” provision because employee received benefits of union representation without paying union dues.
    - f. According to National Bureau of Economic Research, states with Right to Work laws have unionization rates that are 20% lower than states without said laws.
    - g. Right to Work legislation has been eliminated in its entirety.