

How Cos. Can Avoid Sinking In The Union Organizing Storm

By **Daniel Johns** (February 2, 2023)

In October 2020, I argued that, as a result of the pandemic, employers were likely to face a confluence of factors that would result in an increased risk of union organizing.

I likened union organizing in a post-pandemic world to the 2000 movie "The Perfect Storm," where a brave boat captain fought in vain to keep his boat afloat amid a coming together of several severe weather fronts.

It seems appropriate, more than two years later, to check in to see whether the perfect storm has actually materialized. To put it simply: It has.



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On the union organizing front, the perfect storm has come, and employers' boats appear to be taking on some water at the present time.

Unions filed 2,510 representation petitions in fiscal year 2022.[1] This volume of petitions represented a 53% increase from the previous year.

Unfair labor practice charge filings also saw a significant increase in 2022, rising to 17,988 filings.[2] Taken together, employers faced the largest increase in National Labor Relations Board filings since the 1950s.[3]

These filings took place across a broad number of industries, including retail, health care and even tech workplaces.

These developments also come at a time when the U.S. attitude toward unions is at its highest level of favorability since the 1960s.[4] Indeed between 2009 and 2022, Americans who hold a favorable view of unions increased from 48% to 71%.[5]

Employers face a significantly different and more favorable landscape for union organizing than existed before the pandemic.

In particular, the changeover in presidential administrations at the beginning of 2021 has resulted in a new NLRB that is intent on changing the legal landscape to favor organizing. The current NLRB is looking to completely revamp the law to support employee organizing and deter employers from attempting to influence elections.

For example, on Dec. 14, the NLRB resurrected the concept of microunits.[6] More specifically, the NLRB readopted a test used during President Barack Obama's administration for determining the appropriateness of the bargaining unit sought by a union in a representation petition.

Under that standard, a union need only show that the collection of employees sought constitutes a readily identifiable group that shares a community of interest.

If the union makes that showing, the burden then shifts to the employer to show that any employees left out by the union share an overwhelming community of interest with the unit sought by the union in order to have them included.

The deference shown to the union by this new standard with respect to the creation of bargaining units will make it much easier for unions to gerrymander smaller bargaining units to ensure maximum support in union elections.

The NLRB's changes to the legal landscape for organizing have not been limited to the shaping of favorable bargaining units. The NLRB's general counsel Jennifer Abruzzo also has made clear that she wants to limit an employer's ability to speak to employees during a union campaign.

On April 7, Abruzzo issued a memo to all board field offices announcing that she will seek to make employer captive audience meetings during union campaigns unlawful.[7]

Captive audience meetings — where an employer holds a mandatory staff meeting to discuss union organizing — are one of the most common ways that employers communicate with employees about union organizing.

Limiting an employer's right to engage in a campaign activity that has been legal since the 1940s would represent a tilting of the union organizing field substantially in the direction of unions.

On April 11, Abruzzo took yet another step to make it easier for unions to organize. Specifically, she asked the NLRB to revive the standard it adopted in the Joy Silk Mills matter in 1949 for recognition of unions.[8]

Under that standard, which has not been in place since the early 1970s, the NLRB would require an employer to recognize and bargain with a union, where the union presented evidence of majority support based only on card signing and where the employer refused recognition but was unable to establish a good faith doubt as to the union's majority status in the bargaining unit.

Put simply, this change, if adopted, would amount to the effective elimination of secret ballot union elections and the administrative adoption of union recognition based only upon card signing.

It is not an exaggeration to say that the combination of these actual and potential legal changes with pandemic-fueled employee unrest and an overall increased interest in union organizing could lead to an avalanche of workplaces becoming unionized. But that isn't all.

For unionized employers, the year 2022 became known as the "year of the strike." Not only has the pandemic and worker unrest led to increased union organizing, but it also led to more work stoppages.

Indeed, 2022 saw 374 employee work stoppages, a 39% increase over the year 2021.[9] As with union organizing, employee unrest from the pandemic likely fueled this increase in strikes.

There also were other factors at play with respect to this phenomenon, including labor shortages and record low unemployment rates across the U.S. These factors provided increased leverage to workers locked in labor negotiating impasses with their employers.

So, what can employers do to deal with this perfect storm?

First, review any handbook provisions or employment policies relevant to union organizing and stay abreast of legal changes. The law is changing — make sure employment policies

are up-to-date.

Do not be put in the position of being unable to enforce a faulty policy during a union campaign because the policy does not reflect the most current NLRB developments.

Second, engage with employees at every possible time and make sure that employees feel like they have an avenue to raise and discuss concerns in the workplace — make sure employees have a real voice and are heard.

Employees know when they are being patronized or paid lip service with respect to their particular issues. Communicate in a timely and respectful manner about employee concerns and do not let issues fester.

Third, revisit union organizing campaign messaging to make sure it is still relevant and effective. In particular, pay attention to how to effectively speak to younger, Gen Z employees, many of whom may have an interest in unions beyond just what unions may do to increase their wages and benefits.

Finally, deal with these issues now before there is a petition. If employers wait until a petition appears, the time may be too late to effectively counter any union messages and to make a difference with respect to a workplace becoming organized.

Employers should recognize the new landscape for union organizing or risk being sunk by this perfect storm.

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[1] See <https://www.bizjournals.com/bizjournals/news/2023/01/05/union-organizing-labor-worker-gen-z-hiring-jobs.html>.

[2] Id.

[3] Id.

[4] See <https://news.gallup.com/poll/398303/approval-labor-unions-highest-point-1965.aspx>.

[5] Id.

[6] *Amer. Steel Constr., Inc.*, 372 N.L.R.B. No. 23 (2022).

[7] See NLRB Memorandum GC 22-04 (April 7, 2022).

[8] *Joy Silk Mills, Inc.*, 85 NLRB 1263 (1949), enforced, 185 F.2d 732 (D.C. Cir. 1950), cert. denied, 341 U.S. 914 (1951).

[9] See <https://www.axios.com/2022/12/19/worker-strikes-surged-in-2022>.