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Labor Organizing in Retail: Conditions Remain for Continued Momentum

Amber Rogers and Kurt Larkin*

Abstract: *In 2022, labor organizing was in the spotlight with workers organizing at a rate not seen in years. The National Labor Relations Board saw an increase of union petitions during the last fiscal year, it was more than 50% higher than the previous year. Relatedly, more unions have won representation and American approval is at its highest in over 50 years. The rise of the "homegrown" union has directly impacted employers of all industries. The year 2022 can provide all industries and companies with lesson learned, particularly from those who faced threats for the first time. It is crucial to note too, however, that many of these companies and retailers have positive reputations. Labor and union laws continue to evolve as the Biden administration takes full control of the NLRB.*

2022 Overview of Retail Organizing

In 2022, labor organizing was in the spotlight with workers organizing at a rate not seen in years. Between October 1, 2021, and September 30, 2022—the National Labor Relations Board's (NLRB or Board) fiscal year—2,510 union representation petitions were filed.[1] This is a 53% increase from 2021, and is the highest number of union representation petitions filed since 2016.[2] Further, unions in 2022 have won the most elections since 2005.[3] Among the American public, union approval is hovering around 70%, its highest level since 1965.[4]

The political and social issues of the past few years, inflation, the looming recession, job security, wages, and pandemic-related frustration/unhappiness are just a few of the countless reasons cited for the boom in union support/approval. In addition to an increase

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in unionization as a whole, 2022 also produced a rise in "homegrown" unions rivaling the established blue bloods. For instance, in mid-November, more than 100 service industry workers gathered in South Carolina (the state with the country's lowest unionization rate) to formally announce the launch of a new union—the Union of Southern Service Workers (USSW). The USSW was created in an effort to increase unionization throughout the South.[5] The USSW will prioritize the service industry as a whole, including retail.[6] The USSW is just one of many homegrown/upstart labor unions making waves in 2022, with others including Starbucks Workers United, Trader Joe's United, and New Seasons Labor Union.

One lesson from 2022 is that organizing can spread like wildfire, as several industries and companies have faced or are currently facing unionization threats for the first time. This includes the retail industry, which did not escape 2022 unscathed, with several major retailers facing unionization threats despite little or no prior union history. Starbucks, REI, Target, Trader Joe's, and Apple are just a few examples of retailers who faced organization efforts over the course of 2022. Notably, many of these retailers enjoy generally positive reputations and did nothing significantly "wrong" to attract unionization efforts. Additionally, with the Biden administration taking full control over the NLRB, the law has vastly evolved over the past year.

The Rise in Strikes

With 2021 seeing a wave of strikes, it might be surprising to learn that, through the first half of 2022, there were three times as many U.S. workers who went on strike than in the first half of 2021.[7] According to Cornell University's labor tracker,[8] between January and June of 2022, there were 180 strikes across the United States and its territories involving 78,000 workers, compared to 102 strikes involving 26,500 workers in the first half of 2021.[9] This trend continued, as the year-end total in 2022 accounted for 385 strikes, up from 270 in the 2021 calendar year.[10] This figure includes 20 major strikes—which are tracked by the Bureau of Labor Statistics and involve 1,000 or more employees—which is a roughly 25% increase from the average of 16 major strikes per year over the past two decades.[11]

Increase in Number of Elections and Union Win Rate

In addition to the increase in strikes, the NLRB reported there were 1,249 union elections in the 2022 fiscal year, which represents a nearly 50% increase from the number of elections held the previous year.[12] Further, workers voted in favor of unionizing in 72% of those elections, up from 61% in 2021.[13] Starbucks' elections played no small part in driving this statistic, as the coffee retailer accounted for almost a quarter of all union elections in 2022, and unionizing efforts were successful in four out of every five of those elections.[14]

Although there are a number of potential explanations for the surging number of elections and increasing union win rates, some experts have identified the pandemic as the primary factor, reasoning that many companies that have seen increased organizing efforts labeled their employees "essential workers" during the pandemic but, in the employees' eyes, failed to adequately increase wages, benefits, or safety precautions to accompany the essential worker classification.[15] These frustrations, coupled with the current social and political landscape, have fueled the recent spike in union support, resulting in nearly 70% of Americans approving of unions despite only 10% of the nation's workers belonging to a union.[16] Time will tell if distance from the pandemic will lead to a decrease in the number of elections beyond 2022; however, employers should remain cognizant and not assume this to be the case given the myriad factors at play.

Rise of Homegrown Unions

One of the most important aspects of current union trends is the national shift away from traditional unions and toward independent, "homegrown" unions. Whereas the traditional union model has featured large, well-funded unions and paid union organizers, many of today's most effective union efforts have come from movements started within companies' own ranks and led by employees. Starbucks Workers United, Trader Joe's United, and Amazon Labor Union are just three of many examples of this phenomenon that have flooded recent news headlines with accounts of their efforts to organize from within.

These independent unions generally have no official affiliation with larger labor organizations, such as the United Auto Workers or the Teamsters. As a result, independent unions are able to avoid obstacles present to organizers from large organizations, including unfamiliarity with companies' workplaces and employees or other unique challenges present within individual companies. Conversely, independent unions are directed by individuals that possess intimate knowledge of the workplaces they seek to unionize and are able to strengthen their efforts by proposing changes carefully tailored to improve that workplace and address its unique challenges.[17]

Critical to the success of these grassroots union movements has been the involvement of young, college-educated activists, many of whom inherently believe in the power of collective action. For example, a 2021 Pew Research Center survey indicated that 69% of those ages 18 to 29 say unions have a positive effect while fewer than half (44%) of Americans ages 65 and older say the same.[18] These young activists have injected into homegrown unions interests beyond simply wages and benefits, encouraging workers to seek transparency, flexibility, and work–life balance, and greater recognition and appreciation for their work, among other interests. Additionally, the involvement of young activists has led to the increased use of social media to allow independent unions to broadcast their messages efficiently with less hassle than has traditionally been required for more traditional organizing techniques.[19]

Although homegrown unions are a relatively new phenomenon, they have already demonstrated they can be highly effective at targeting specific types of industries, including retail. It will be important for retail employers to understand homegrown unionization efforts because they are likely to play a significant role in the future of the employer–employee relationship within the retail industry.

General Counsel Abruzzo's Agenda

In addition to the increases in union representation elections and work stoppages, 2022 also saw a policy shift favoring unions over employers. Throughout the course of his presidency, President Biden has stated on a litany of occasions that he intends to be the "most pro-union president" in American history.[20] Indeed, one of his first official acts as president was terminating Peter Robb, the Trump-appointed NLRB general counsel (GC), just minutes after taking the oath of office.[21] President Biden shortly thereafter nominated Jennifer Abruzzo as Robb's successor,[22] who was later confirmed by the Senate. While the GC does not have the power to change or make law, he or she does set the Board's litigation and enforcement agenda and priorities, thereby having a significant hand in shaping the nation's labor policies.

Abruzzo hit the ground running, quickly issuing several interpretive memoranda and otherwise signaling her intent to ask the Board to substantially overhaul well-established NLRB precedent in an effort to diminish employer rights. One of the most significant, and illustrative, memoranda Abruzzo has issued is Memorandum GC 22-04, which states that Abruzzo, as general counsel, would request the Board overrule long-standing precedent and hold that employer-mandated meetings in which employers utilize their right to free speech by communicating their views and stance on unionization violates the National Labor Relations Act (NLRA). GC 22-04 asserts that, since 1948, the Board has incorrectly concluded that an employer does not violate the NLRA by requiring employees to attend these so-called "captive audience" meetings, which Abruzzo claims infringe on employees' Section 7 rights to refrain from listening to employer speech.[23]

This is significant because, for the past 75 years, employers have utilized these meetings to, among other things, (1) lawfully inform employees of their stance on unions; (2) address head-on any misrepresentations, rumors, or other false statements being made by the union; and (3) provide employees with information about unions and the potentially negative consequences of joining a union. Because many of these negative consequences are most commonly *not* disclosed by the union, these meetings equip employees with a full understanding of what it means to unionize, thereby allowing employees to make a fully informed choice.

While GC 22-04 has yet to be tested in court, seeking to overturn more than 75 years of precedent as one of her first acts as GC signifies Abruzzo's intent to rewrite federal labor law so it protects and favors unions over employers.

Similarly, Abruzzo has expressed that she is looking to simplify the process of unionization by reviving the *Joy Silk* standard—an NLRB standard that was used from 1949 to 1966—which would allow the Board to recognize a union if a majority of workers simply filled out cards of support.[24] This change would signify a drastic departure from the current process required for unionization, as unions would not need to win formal elections in most cases in order to be recognized.[25]

Under the current law, employers retain the ability to force an election by refusing to recognize a union; however, under the *Joy Silk* standard, an employer would be required to demonstrate "good faith doubt" to the Board regarding whether the organizers actually have the support of more than 50% of the workforce.[26] Employers failing to make such a demonstration to the Board would be ordered and required to bargain with the new union.

Abruzzo filed a brief in a pending case in April of 2022 in which she urged the revival of the *Joy Silk* standard, claiming "the Board's current remedial scheme has failed to deter unfair labor practices during union organizing drives and provide for free and fair elections."[27] In Abruzzo's view, the NRLB's current election process accounts for the reduction in private-sector unions, which at the time her brief was submitted represented only 6.1% of the workforce.[28] The reinstatement of the *Joy Silk* standard, as Abruzzo urges, would make it substantially easier for workforces to organize and force employers to recognize unions, even in circumstances where the employer does not have any knowledge of, much less control over, the organizing process.

Changes in Law Via Board Decisions

In addition to GC Abruzzo's initiatives, the Board is and will likely continue to reduce employer rights through its decision making in various cases. One example of note for retailers is *Tesla*,[29] wherein the Board ruled that workplace dress codes and uniform policies that prevent employees from wearing pro-union apparel *of any type*, even if facially neutral, are presumptively unlawful unless such policies are justified by "special circumstances."[30] This is significant because the previous standard drew a distinction between an employer's complete ban on union insignia and an employer's regulation of the type and/or manner in which employees wore union insignia. But now, under *Tesla*, any union insignia donned by an employee is protected unless the employer can demonstrate that there are "special circumstances" that justify the employer's regulation of such.

Notably, this "special circumstances" exception is much harder to meet than may be facially apparent. Despite the *Tesla* Board citing *Komatsu*,[31] which acknowledges employee safety, quality control, public image, and workplace decorum as possible "special circumstances," demonstrating the applicability of the special circumstances exception will be challenging for employers. This is apparent from the *Tesla* decision, wherein the Board rejected Tesla's rule banning employees from wearing metal buttons because they could scratch and/or otherwise damage the cars.

The Tesla plant at issue was not unionized, and thus employers should be mindful that this decision, and the NLRA, impacts both union and nonunion employees equally. Employers with written dress code policies, particularly retailers with public-facing employees, should conduct a thorough review of any such policies.

Further, the NLRB issued a number of employee-friendly decisions over the course of a single week in December to close out 2022. The most notable of these decisions was that in *Thryv, Inc.*,[32] in which the three Democrat-appointed members of the NLRB decided over the dissent of the NLRB's two Republican-appointed members to expand the scope of remedies available to employees where an employer is found to have engaged in unfair labor practices under the NLRA. The NLRA permits the NLRB to order "make-whole" relief for unfair labor practices, and this has traditionally been interpreted as being limited to reinstatement and back pay.[33]

In *Thryv, Inc.*, however, the majority substantially broadened the "make-whole" remedy the NLRB can order, holding that "make-whole relief encompasses, *at a minimum* . . . direct or foreseeable pecuniary harms that are a consequence of a[n] [employer's] unfair labor practices."[34] As a result of this expansion, employers found to have engaged in unlawful labor practices may be liable for damages not traditionally compensable for such violations, including medical expenses incurred by unlawfully separated employees who would have had those expenses covered by the employer's health insurance plan, credit card interest, or rental car expenses incurred after the loss of an employer-provided vehicle.[35]

Notably, the Board did not address whether other forms of damages, such as those for pain and suffering or emotional distress, were included in the newly expanded definition of "make-whole" relief. However, GC Abruzzo has expressed interest in pushing the Board to include such damages measures in the definition of make-whole relief, and employers should be aware that such an expansion could occur in the future.

2023 Expectations

With inflation and employee satisfaction showing no signs of returning to pre-pandemic levels, and the newfound fear of a looming recession (and, with it, the heightened fear of job loss and/or slashed wages), retailers should expect labor organizing to remain at the forefront of workers' minds and brace for this unionizing trend to continue through 2023.

Notes

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1. Of these 2,510 representation petitions, 2,072 were filed in calendar year 2022. *See* NLRB, *Representation Petitions—RC*, National Labor Relations Board, https://www.nlrb.gov/reports/nlrb-case-activity-reports/representation-cases/intake/representation-petitions-rc.

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6. *Id.*

7. *See supra* note 3.

8. Cornell, *ILR Labor Action Tracker*, https://striketracker.ilr.cornell.edu/ (last visited Nov. 29, 2022).

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labor-unions-organizing-elections-worker-rights-wages#:~:text=1.,up%20from%2061%25%20in%202021.

13. *Id.*

14. *Id.*

15. *See supra* note 3.

16. *See supra* note 7.

17. *See* Luke Cregan, *Independent Unions Are Having a Moment. But Are They Here to Stay?* The Christian Science Monitor (Aug. 22, 2022), https://www.csmonitor.com/Business/2022/0822/Independent-unions-are-having-a-moment.-But-are-they-here-to-stay.

18. *See* John Gramlich, *Majorities of Americans Say Unions Have a Positive Effect on U.S. and That Decline in Union Membership Is Bad*, Pew Research Center (Sept. 3, 2021), https://www.pewresearch.org/fact-tank/2021/09/03/majorities-of-americans-say-unions-have-a-positive-effect-on-u-s-and-that-decline-in-union-membership-is-bad/.

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26. *Id.*

27. *See* Michael Moore & Bonnie Thomas, *New Hurdle for Employers: Potential Revival of Joy Silk Card-Check Recognition*, JD Supra (Apr. 19, 2022), https://www.jdsupra.com/legalnews/new-hurdle-for-employers-potential-1446873/.

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29. 371 NLRB No. 131 (Aug. 29, 2022).

30. *Id.*; *see also* NLRB, *Board Rules Workplace Policies Limiting Wearing Union Insignia, Including Union Apparel, Are Unlawful Absent Special Circumstances*, National Labor Relations Board (Aug. 29, 2022), https://www.nlrb.gov/news-outreach/news-story/board-rules-workplace-policies-limiting-wearing-union-insignia-including.

31. 342 NLRB 649 (2004).

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33. *See* Daniel Pasternak & Scott Held, *NLRB Issues Flurry of Blockbuster End-of-Year Decisions (With More to Come?)*, Employment Law Worldview (Dec. 21, 2022), https://www.employmentlawworldview.com/nlrb-issues-flurry-of-blockbuster-end-of-year-decisions-with-more-to-come-us/.

34. *Id.* (emphasis added); 372 NLRB No. 22 (Dec. 13, 2022).

35. *Id.*