

Decrease In Union Membership Will Inevitably Result in a Blitzkrieg of Government's Pro-Union Actions

Labor & Employment Law Update

By Timm Schowalter on March 3, 2022



President Biden, the self-described “most pro-union president,” is faced with the grim reality that despite his administration’s systematic efforts to boost union membership, union membership has, instead, fallen back to historic lows. The Bureau of Labor Statistics released figures that the rate of union

membership, or the percentage of wage and salary workers who were part of a union, dropped to 10.3% in 2021, matching the record low in 2019. Among private-sector workers, the numbers were even worse: union members made up just 6.1% of that workforce, compared to 33.9% of the public sector.

At first glance, these figures appear promising for employers who desire to remain union free and avoid the NLRB at all costs. Yet, these historically low numbers will inevitably result in reinvigorated efforts to alter the labor playing field to benefit unionization. In fact, the coordinated effort has already begun. On the heels of the release of the BLS statistics, NLRB’s General Counsel Jennifer Abruzzo sent a comprehensive field memorandum to all field offices that detailed how she will seek to coordinate with the U.S. Equal Employment Opportunity Commission, the Department of Labor, the Occupational Safety and Health Administration, and other worker-protection agencies to “swiftly” adopt the White House recommendations to boost union organizing. The memo also stated that the NLRB will actively pursue partnerships with the Internal Revenue Service, the Department of Justice’s Antitrust Division, and the Federal Trade Commission to identify employee misclassification that prevents workers from unionizing. Abruzzo explained: “Stronger collaboration and networked

enforcement will particularly assist those most vulnerable and will help to secure a voice at the table through union representation if workers so choose.” Abruzzo further stated she would strengthen a current memorandum of understanding with the Department of Homeland Security to prevent immigration officials from violating workers’ labor rights, “regardless of immigration status.”

The memo not only set forth the coordinated and systematic administrative efforts to increase union organizing but directed the field offices to take affirmative measures to better assist union organizing. First, Abruzzo reiterated her directive in her August memo to “aggressively” seek Section 10(j) injunctions against employers. Section 10(j) injunctions empower the NLRB to petition federal courts to halt violations, and are one of the NLRB’s strongest weapons against employers. Second, to effectuate this directive, Abruzzo directed all field offices to promptly investigate any alleged act of coercion during a campaign and immediately submit such allegations for consideration of injunctive relief, even if there is no outward coercive conduct such as a termination or other discrimination against workers for their union activity.

To fully understand the context of the NLRB recent actions, one must recognize that the Protecting the Right to Organize Act (H.R. 842), the biggest piece of pro-union legislation in a century, has little, if any, chance of getting through Congress. Accordingly, Abruzzo is orchestrating a comprehensive administrative blitzkrieg to accomplish many of the pro-union organizing objectives of the stalled bill.

Thus, while it is evident that U.S. workers are rejecting organized labor at historical levels, the Biden administration is holding true to its promises to organized labor to do everything within its executive power to promote and encourage unionization. Accordingly, employers must remain vigilant in their union avoidance measures including conducting union avoidance management training, reviewing their economic packages to ensure competitiveness, identification and training of poor managers who fail to consistently enforce policies and practices, reiteration of open-door management policies, and proactive implementation of employee trust and recognition programs. Employers should also routinely consult with their labor attorney to ensure compliance with the ever changing NLRB standards.

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