



Practicing Before the National Labor Relations Board

Sim Avila

1

Agenda

- Section 7 Rights
- Representation Matters/Elections
- Unfair Labor Practices and Employee Investigations
- Strikes and Injunctions
- Update “Protecting Right to Organize Act”
 - Joint employer liability
 - Independent contractors
 - Right to work state laws.

2

NLRB Board

[Lauren M. McFerran, Chairman](#)

[Marvin E. Kaplan](#)

[Gwynne A. Wilcox](#)

[David M. Prouty](#)

The Board has five Members and primarily acts as a quasi-judicial body in deciding cases on the basis of formal records in administrative proceedings. Board Members are appointed by the President to 5-year terms, with Senate consent, the term of one Member expiring each year.



3

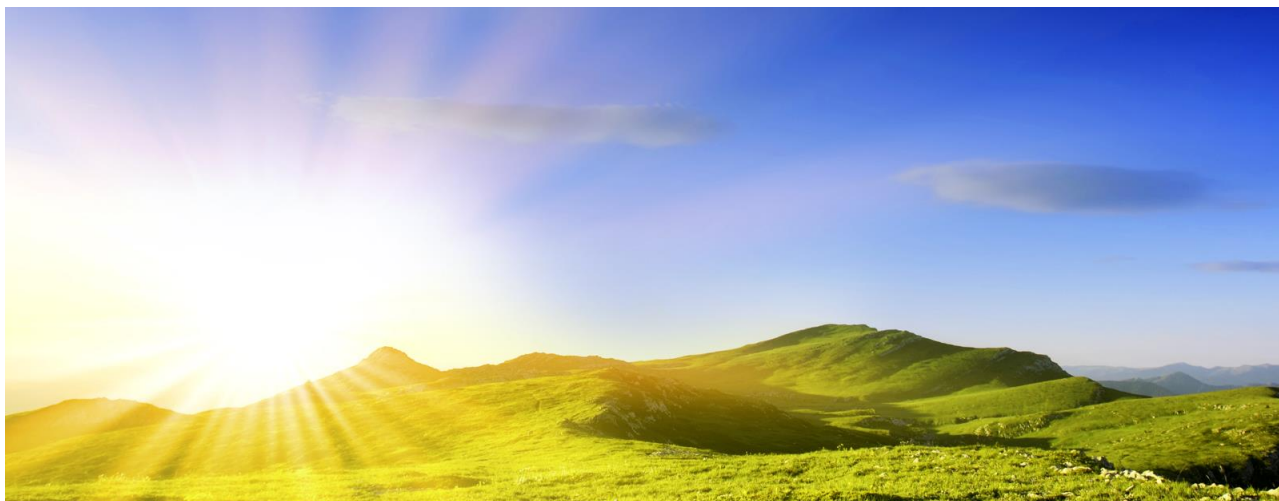


Jennifer A. Abruzzo

General Counsel

The General Counsel, appointed by the President to a 4-year term, is independent from the Board and is responsible for the investigation and prosecution of unfair labor practice cases and for the general supervision of the NLRB field offices in the processing of cases.

4



Section 7 Rights

5

Section 7 Rights

“Employees shall have 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 other concerted activities for the purpose of collective bargaining or other mutual aid or protection...”

6

Section 7 Rights - Examples

- One, two or more employees take action for mutual aid or protection regarding their terms and conditions of employment.
 - Talking with co-workers about working conditions
 - Joining with co-workers to demand better working conditions
 - Talking to a government agency about problems in the workplace
 - Bringing group complaints to an employer's attention
 - Organizing a union
- Workers need not be part of a union to avail themselves to protections of Section 7

7

Section 7 Rights – GC Memo 21-03

- Vigorous Enforcement of Mutual Aid or Protection and Inherently Concerted Doctrines
 - This is a fundamental right
 - Section 8 prohibits discrimination against employees who exercise Section 7 rights
- Mutual aid or protection – focuses on whether there is a link between the activity and matters concerning the workplace or employees' interest as employees
- This may occur even when employees have not explicitly connected their activity to workplace concerns, like when they engage in political or social justice advocacy with nexus to employees' interests as employees
- Going forward, employee activity regarding a variety of societal issues will be reviewed to determine if those actions constitute mutual aid or protection

8

Section 7 Rights – GC Memo 21-03

- Cases involving retaliation against concerted employee conduct will be vigorously pursued where factors tie worker's protests to their interest as employees.
- Employees may act in concert, even when the conversation, at its inception, involves only a speaker and a listener, if such activity is an indispensable preliminary step to employee self organization.
- Some discussions of "vital elements of employment" may be inherently concerted (i.e. Job security, safety, racial discrimination, etc.)
- "Our focus .. Is on the means to safeguard employee rights to engage in protected, concerted activity ... to redress an employer's retaliatory response.

9



Representation Matters/Elections

10

BLS Report

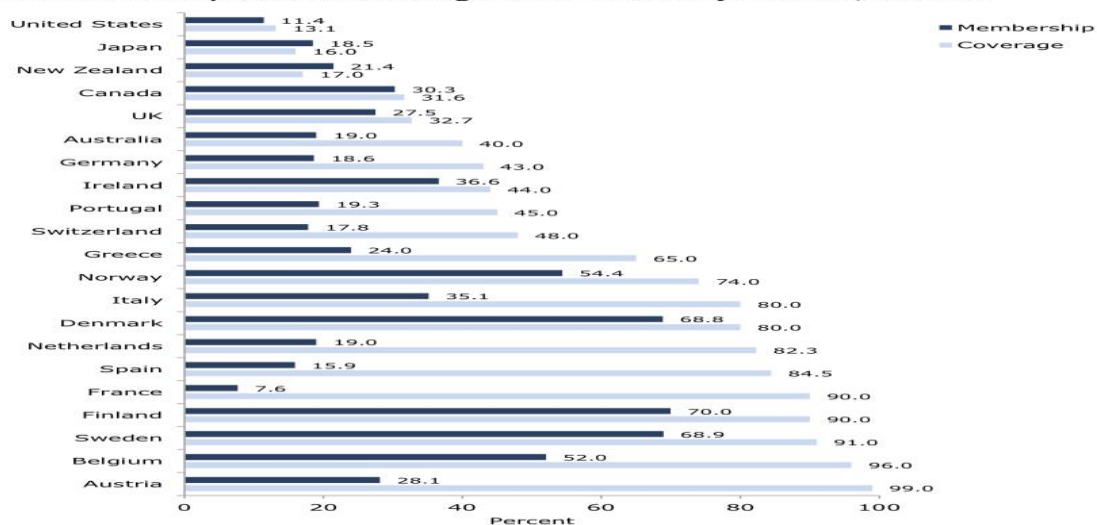
January 23, 2023

- Union membership fell as a percentage of the U.S. workforce to **10.1 percent**, down from **10.3 percent** in 2021, ...
- However, unions actually added 273,000 members—200,000 of which were from already-unionized employers hiring.
- In 2022, 16.0 million wage and salary workers were represented by a union, up slightly ... from 2021.

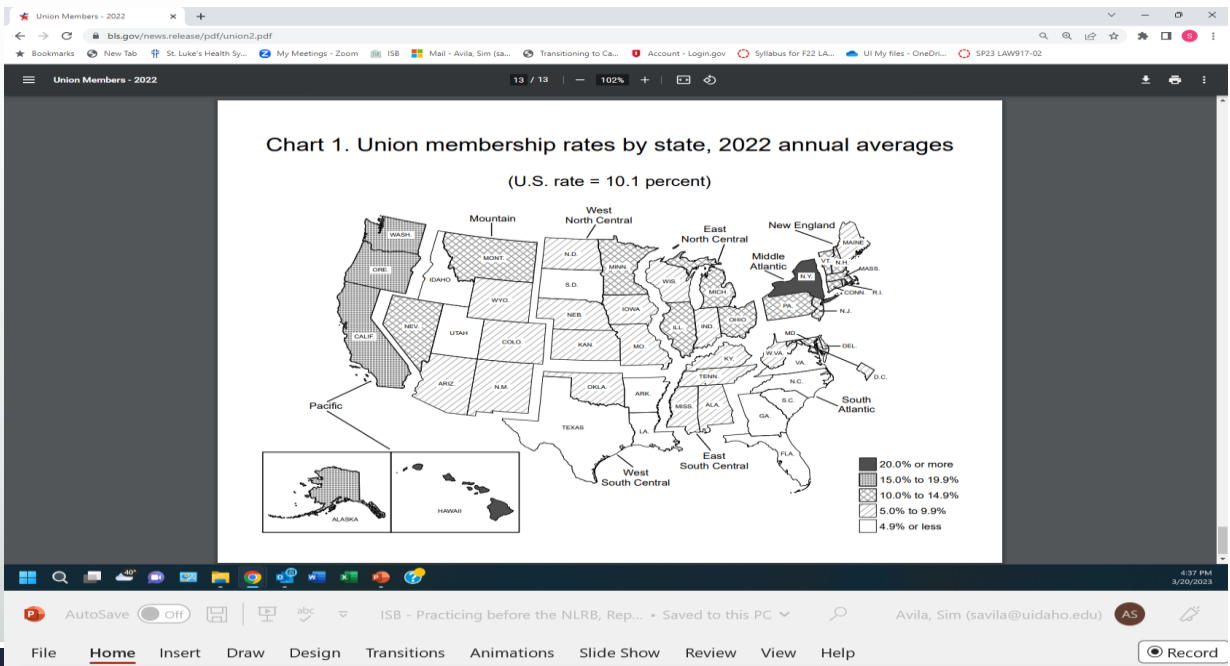
11

World Press.com

FIGURE 2
Union Membership and Union Coverage Rates in 21 Wealthy Countries, 2007-2010



12



13

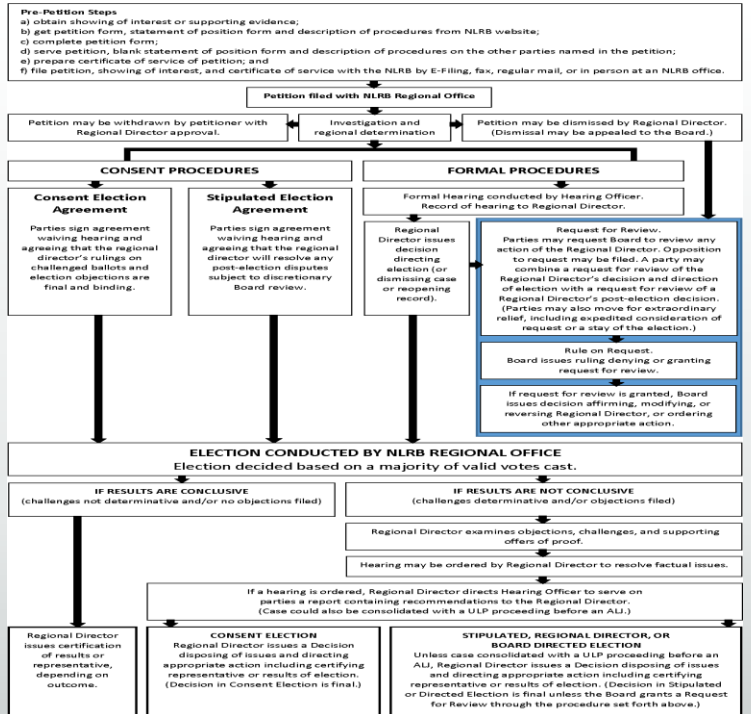
Idaho and Surrounding states

- Idaho and Utah – 4.9% or less
- Arizona, New Mexico, Colorado and Wyoming - 5.0% to 9.9%
- Nevada and Montana – 10.0% to 14.9%
- Washington, Oregon and California - 15.0% to 19.9%

14

Petition Process

NLRB.gov/resources/nlrb-process



15

Union Representation -

- Under Section 9(a) of the NLRA, employers must recognize and bargain in good faith with a union that has been certified as the exclusive bargaining representative for an appropriate unit of employees.

16

Case Handling Manual, Part 2, Section 11700

Jurisdiction will be asserted over any retail operations with a gross volume of business in excess of \$500,000 annually and which has some business, greater than de minimis, across State lines. The nonretail standard requires \$50,000 of direct or indirect inflow or outflow of goods or services across State lines.

17

Union Elections

- Filing of Petition (RC Case) with at least 30% showing of interest
- Election Agreement – Stipulation preferred
- Pre-election hearing
- Decision and Direction of Election
- Election – manual election or mail ballot election
- Post-election challenges and objections
- Certification of Representative

18

Appropriate Bargaining Units

- Community of Interest Issues
 - ✓ Supervisors – Section 2 (11)
 - ✓ Similarity on wages, hours and terms and conditions of employment
- *American Steel Construction, Inc.* 372 NLRB No. 23 (2022) - Return to *Specialty Healthcare* Standard 357 NLRB 934 (2011)— party contesting petitioned for unit must demonstrate that excluded employees share a “overwhelming community of interest” with employees in the petitioned for unit.

19

Appropriate Bargaining Units

Board will approve a petitioned for unit if it;

1. Shares an internal community of interest
2. Is readily identifiable as a group based on job classifications, department, functions, work locations, skills or similar factors, and
3. It is sufficiently distinct

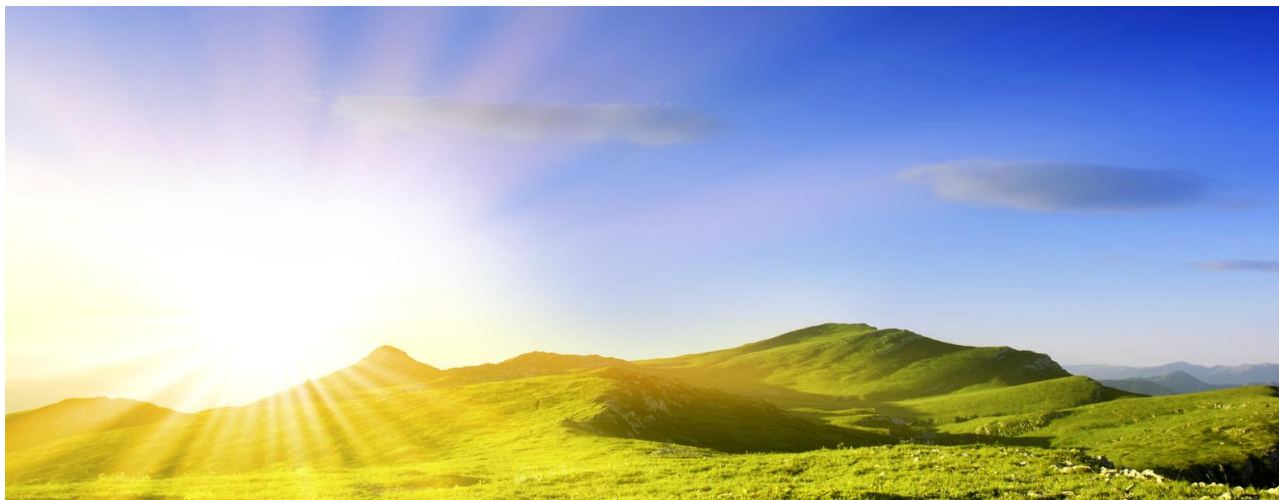
20

Appropriate Bargaining Units

Healthcare Units (8 presumptively appropriate units in acute care hospitals) – determined by NLRB rulemaking after a very difficulty history and adaptation of various standards

- 1) Physicians
- 2) RNs
- 3) All other professionals excluding physicians and RNs
- 4) Technical employees
- 5) Skilled maintenance employees
- 6) Business clerical employees
- 7) Guards
- 8) All nonprofessional employees excluding 4, 5, 6, and 7.

21

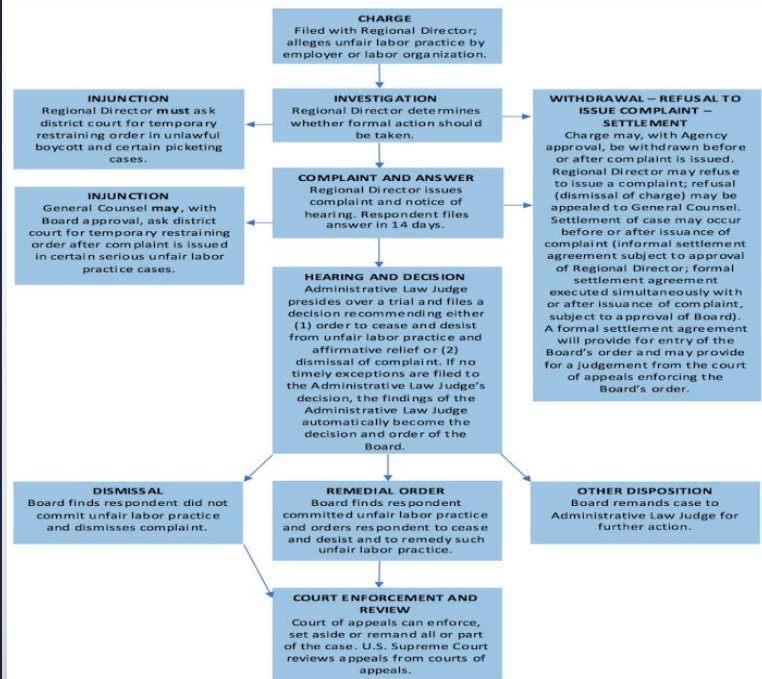


Unfair Labor Practices and Employee Investigations

22

Process for Unfair Labor Practices

PROCESS



23

General Counsel and Regional Attorneys – Enforcement Arm

- Unfair Labor Practices by Employers – generally under Section 8 (a) of NLRA
 - ✓ 8 (a) 1 – Interference with Section 7 Rights
 - ✓ 8 (a) 2 – Domination or Illegal Assistance and support of a Labor Organization
 - ✓ 8 (a) 3 – Discrimination against employees
 - ✓ 8 (a) 4 – Discrimination because of NLRB activity
 - ✓ 8 (a) 5 – Failure or refusal to bargain in good faith
 - Includes duty to meet and confer, supply relevant information and refrain from making unilateral changes to wages, hours and other terms and conditions of employment

24

General Counsel and Regional Attorneys – Enforcement Arm

- Unfair Labor Practices by Unions – generally under Section 8 (b) of NLRA
 - ✓ 8 (b) 1 A – Restraint and Coercion of Employees – 1B - Employers
 - ✓ 8 (b) 2 – Causing or attempting to cause discrimination (i.e. illegal hiring hall agreements, illegal unions security agreements)
 - ✓ 8 (b) 3 – Refusal to bargain in good faith
 - ✓ 8 (b) 4 – Prohibited strikes and boycotts
 - ✓ 8 (b) 7 – Organizational or recognitional picketing by noncertified unions
 - ✓ 8 (e) – Striking or picketing a health care institution without notice

25

Employee Investigations

- Employees have rights to representation by exclusive representative during investigative interview – NLRB v. Weingarten, Inc. 420 US 251 (1975) (Weingarten Rights)
- Employees are entitled to Weingarten rights in the following situations:
 - "Investigatory interviews," in which the supervisor is seeking to elicit facts, to have the employee explain his or her conduct, to discover the employee's "side of the story" or to obtain admissions or other evidence.
 - A supervisor's request for a written statement or written answers to questions about an incident or accident in which the employee's own conduct may be at issue.
 - A meeting or discussion in which the employer either has not yet decided whether to impose discipline or is seeking information to support that decision.

26

Employee Investigations

- Employees are not entitled to Weingarten rights in the following situations:
- Meeting or discussion is merely for the purpose of conveying work instructions, training or needed corrections.
- Purpose of the meeting is to inform the employee about a disciplinary decision that has already been made and no information is sought from the employee.
- Employer has clearly told the employee prior to the interview that no discipline or adverse consequences will result from the interview, if employer keeps that promise.
- When employee initiates further discussion after being disciplined.

27

Johnnie Poultry Warnings

In *Johnnie's Poultry*, 146 NLRB 770 (1964) the NLRB required employer representatives (e.g., labor relations personnel and attorneys) to make certain disclosures to union-represented employees in connection with investigating unfair labor charges before interviewing them, including:

- (1) Communicating to the worker the purpose of the employer's questioning;
- (2) Assuring the individual being questioned that the employer will not retaliate if the employee refuses to answer any question (or for any answer given); and
- (3) Notifying the worker that participation is voluntary and obtaining the individual's voluntary participation in the interview.

28

Johnnie's Poultry Admonitions Unchanged

- In *Sunbelt Rentals*, 372 NLRB 24 (2022), the Board considered two questions:
 - (1) whether the NLRB should continue to follow *Johnnie's Poultry*; and
 - (2) if not, what standard should apply instead?
- In a 3-2 decision—which was split down party lines—the NLRB upheld *Johnnie's Poultry*. In so doing, it reaffirmed “its longstanding approach to protecting employees from coercion when they are interviewed by employers preparing for unfair labor practice proceedings before the Board.”

29



Strikes and Injunctions

30

Strikes

Economic / Non-economic

Large Contract Expirations in 2023

At least 1.6 million workers will face contract expirations

■ Number of workers



Source: Bloomberg Law

Note: 1.6 million figure not fully reflected in chart data. Expiration dates recorded at the time the existing contract was signed.

Bloomberg Law

31

Section 7 & 13

Right to Strike

- Section 7 – right to engage in concerted ... activities for mutual aid or protection.
- Section 13 – Nothing in this Act... shall be construed so as either to interfere with or impede or diminish in any the right to strike, or to affect the limitations or qualifications on that right.

32

Object, Purpose and Timing

- **Strikes may be lawful or unlawful** depending on the object, or purpose of the strike, on its timing, or the conduct of the strikers or labor representatives.
- **Strikes for a lawful object.** Employees who strike for a lawful object fall into two classes “economic strikers” and “unfair labor practice strikers.” Both classes continue as employees, but unfair labor practice strikers have greater rights of reinstatement to their job

33

Object, Purpose and Timing

- **Strikes unlawful because of purpose** - Section 8(b)(4) of the Act prohibits strikes for certain objects like a union strike with an object of forcing an employer to do business with another company – secondary boycott.
- **Strikes unlawful because of timing** - Section 8(g) prohibits a labor organization from engaging in a strike, picketing, or other concerted refusal to work at any health care institution without first giving at least 10 days’ notice in writing to the institution and the Federal Mediation and Conciliation Service.

34



“Protecting Right to Organize (PRO) Act of 2023” Update

35

H.R. 20 Introduced in Congress February 28, 2023

- The House bill was introduced by the Committee on Education and the Workforce Ranking Member Robert C. “Bobby” Scott (D-VA-03) and Representative Brian Fitzpatrick (R-PA-01).
- The Senate companion was introduced by the Committee on Health, Education, Labor, and Pensions (HELP) Chair Bernie Sanders (I-VT).

36

H.R. 20 Introduced in Congress February 28, 2023

According to the proponents, the *PRO Act* protects the basic right to join a union:

- ✓ **Holds employers accountable for violating workers' rights** by authorizing meaningful penalties, facilitating initial collective bargaining agreements, and closing loopholes that allow employers to misclassify their employees as supervisors and independent contractors.
- ✓ **Empowers workers to exercise their right to organize** by strengthening support for workers who suffer retaliation for exercising their rights, protecting workers' right to support secondary boycotts, ensuring workers can collect "fair share" fees, and authorizing a private right of action for violation of workers' rights.
- ✓ **Secures free, fair, and safe union elections** by preventing employers from interfering in union elections, prohibiting captive audience meetings, and requiring employers to be transparent with their workers.

37

Appendix

Reference supplementary materials and resources:

See **NLRB.gov**

Case Handling Manuals,

Part 1 – ULP Proceedings

Part 2 – Representation Proceedings

38



Questions?

Thank you