

Hot Topics & Trends In Labor & Employment Law

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Agenda

- What To Watch
 - Labor Landscape
 - Internal Investigations
 - FLSA White Collar Exemptions
 - Non-Compete Agreements
 - Challenges to DEI Initiatives
- Agency Updates – DOL & EEOC

What to Watch

Labor Landscape

The Labor Landscape in 2024

Last year, we witnessed continued increases in employee activism, protected concerted activity, union organizing activities, and *many* Board decisions. Here's what the numbers tell us.

- Union representation petitions were up by 3% in Fiscal Year 2023. ULP charges increased by 10%.
- The average union win rate for representation petitions in FY 2023 was 76%. This is still high so far in 2024.
- There is a very real youth movement. Younger employees have different workplace issues, which unions can exploit.

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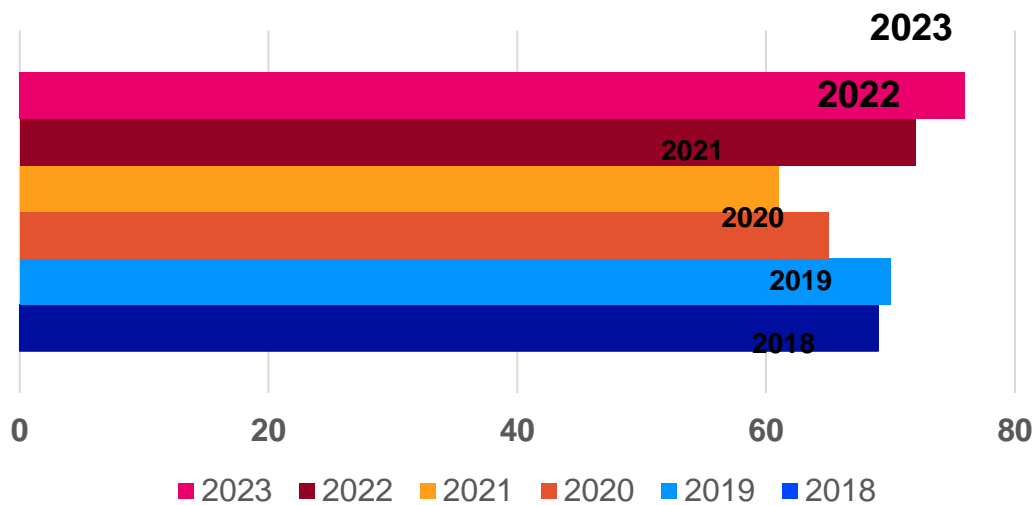
Organizing Activity Keeps Rising



- Over **2,500** petitions filed during FY 2023
- FY 2022 saw a **53%** petition increase and a **19%** ULP increase (up from 1,638 petitions filed in FY 2021)
- Dramatic increase in Employer-filed petitions after being asked to voluntarily recognize a union, although the pace of the rise is slowing
- Strikes are WAY up

Unions are Winning

Percentage of NLRB Union Representation Elections Won by Union



www.nlr.gov

- Unions prevailed in **76%** of elections in 2023. That continues today.
- Unions have won more than **60%** of all elections in each of the past 17 years.

#StandUpUAW

UAW @UAW · Sep 14
WHICH SIDE ARE YOU ON?
#StandUpUAW

Side	Percentage
UNITED AUTO WORKERS	75%
U.S. AUTO COMPANIES	19%
NEITHER	2%

BREAKING NEWS
BIDEN SPEAKS WITH AUTO LEADERS; STRIKE DEADLINE JUST HOURS AWAY; AUTO WORKERS SEEK PENSIONS, 40% PAY HIKE
ESEBRO, WILL BE TRIED IN OCTOBER, PER THEIR REQUESTS FOR SPEEDY TRIAL;

LIVE
CNN
7:48 PM ET
ERIN BURNETT
OUTFRONT

1,147 3,982 19.3K 3.5M

What Has Changed?

- Pent up worker demands, exacerbated by the challenges of the pandemic.
- Issues driving union interest: voice, respect, work life balance issues, “lack of recognition”, especially with essential workers.
- Most effective messages bring public shame to “progressive” employers, like Starbucks, Amazon, Apple.
- Current labor market makes it easier to speak out and protest.
- Social media is a game-changer. With it, immediate communication with colleagues across different geographic areas and easy access.
- The rise of the “independent” and “local” union, and the rejection of large traditional unions (who may join the effort later, like with Workers United). Undercuts employer argument of the problems of a “third party”.

New Organizing Tactics

QR Codes, E-Cards, Text Messages, Apps & More



It's Syd from Working America. COVID has shown CEOs get richer, even when the rest of us are going broke. What do you think is the best way to change that?



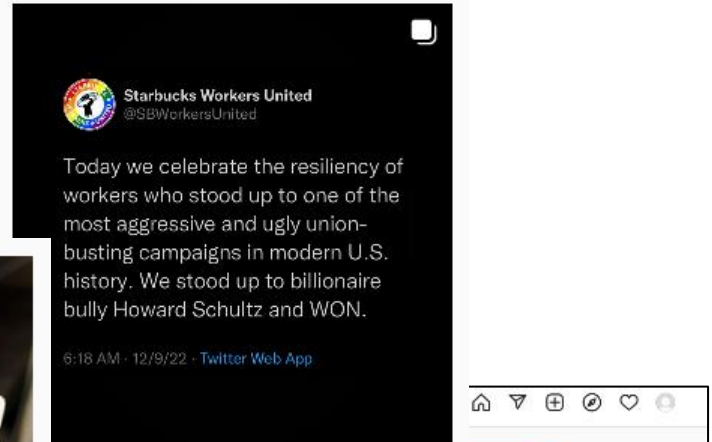
About the Union Strong Mobile App | Connect Instantly

<https://www.unionstrongapp.com/about>

Web With the Union Strong app your updates hit the front screen of your members' phones instantly. Through push notifications, tags, and geo-location, your messages reach the ...

A screenshot of a "Union Authorization Card" form for UFCW Local 1000. The form includes fields for Name (First and Last), Phone, Email, and Employer Name/Address. There are two radio button options: "Yes, I want a union and I hereby authorize United Food and Commercial Workers' International Union, or its chartered Local Union (U) to represent me for the purpose of collective bargaining." and "Yes, keep me informed!". A "Signatures" field is also present. At the bottom, there is a button that says "I want a union!".

The Social Media Connections



Top News Stories

- According to a Bloomberg Law report, collective bargaining agreements negotiated in 2023 yielded the highest average pay raises in decades. Union contracts provided workers an average first-year wage increase of 6.6%. With signing bonuses and other lump-sum payments factored in the average jumped to 7.3%. The calculations are based on over 950 CBAs ratified in 2023 that cover 2.8 million union-represented workers. Comparatively, contracts negotiated in 2022 provided a 5.7% average increase, while 2021 contracted averaged a mere 3.7%. Although raises were higher across all sectors, the largest wage increases occurred in state and local government union contracts.
- Union membership continued its overall decline, according to a Bureau of Labor Statistics report. Overall union membership dropped from 10.1% in 2022 to 10% in 2023, signaling a continued decline since it peaked in the 1950s. The private sector union membership rate remained at 6.0%, the same as the 2022 rate. The report also indicated the industries with the highest union membership rates, including transportation and utilities, construction, motion pictures and sound recording, and education and health services. Despite the overall decline, union membership increased across many southern states, where union membership is traditionally low.

News & Analysis: Strike News

- 2023 strike activity was the highest single-year total in 20 years, according to a Bloomberg Law report. The database recorded 347 work stoppages in 2023, marking the first time since at least 1990 that annual strikes increased three years in a row. May and September saw the most strike activity. Most strikes in 2023 occurred while unions were negotiating successor contracts rather than first contracts. The report also confirmed that the Service Employees International Union (SEIU) and the International Brotherhood of Teamsters (IBT) called the most strikes, initiating 99 and 43, respectively. The report further highlighted the trend of shorter strikes, with two-thirds resolving within seven days of their start date.
- Expiring contracts in 2024 signal another potential wave of labor unrest after 2023's record-breaking strikes. The series of strikes in 2023 may embolden the more than 1.1 million workers covered by large union contracts expiring in 2024. Two of the largest employee groups with expiring contracts—U.S. postal workers and rail workers—have contracts that either ban or severely restrict workers from striking, limiting the possibility of large-scale walkouts. However, a combined 55,000 workers in two of the nation's largest public school districts, Los Angeles and Chicago, may walk off the job, as could 30,000 aircraft machinists at Boeing. If employees strike in 2024 at similar rates to 2023, employers may be more willing to make bargaining concessions to avoid a prolonged work stoppage.

What to Watch

Internal Investigations

Phase 1 – Receipt of Information

- How did you receive the information?
 - Rumor?
 - Official complaint form?
 - Your gut?
- Who shared it with you?
 - Alleged victim? Co-worker? The accused? 3rd party?
Another mgr?
- What form did it arrive in?
 - Verbal? Written? Email?

Phase 2 – Fact Finding Investigation

- Deciding who investigates
- Document/evidence review
- Interviews
 - Complainant, other witnesses, the accused
- Fact Finding Report
 - What form? Template? Custom? Hand written?

Phase 3 – Deliberation/Decision

- Who is your decision-maker?
 - The fact-finding investigator?
 - Others?
 - Picking your decision-maker beforehand
 - What are you looking for in a decision-maker?
- How many decision-makers?
 - Pros & Cons

Phase 4 – Communication

- Notifying the complainant
- Notifying the accused
- Notifying leadership/managers
- Notifying employees
- How to notify?
 - In writing?
 - Verbal with talking points?
 - What about a copy of the investigation report?

Confidentiality of Investigations

- Special codes of conduct (or other secret/important work rules and matters).
- A rule prohibiting employees from discussing internal complaints under investigation violates the National Labor Relations Act.
 - The supervisor can advise employees that the investigation is a very serious matter, and the Company plans to keep the investigation confidential.
 - Supervisors cannot tell employees to keep the investigation confidential, and you cannot prohibit employees from discussing.

Attorney-Client Privilege

- Can it be privileged?
 - There are rules that control if/when it can be privileged
 - Hints:
 - You don't get to just deem it so
 - Just because an attorney is involved does not “privilege something”
- Should it be privileged?

What To Watch

FLSA White Collar Exemptions

FLSA White-Collar Exemption Requirements: A Refresher

Salary basis test

Employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed

Salary level test

The amount of salary paid must meet a minimum specified in the regulations

Duties test

Primary duties must involve executive, administrative, or professional duties, as defined in regulations

DOL Issues White-Collar Exemption Final Rule (Eff. 07/01/2024)

- **04/23/2024** US DOL issued [Final Rule](#) (“Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees”) which is awaiting publication in Federal Register
 - Approximately **4 million** workers will be impacted during first year
 - Projected annualized income transfer from employers to employees of **\$1.5 billion**
 - Industries most affected:
 - Highest number of affected workers: professional and business services (827,000)
 - Highest *percentage* of workers affected: leisure and hospitality (24%)
 - **Possible Complications:** Potential legal challenges regarding DOL’s authority to impose a salary threshold increase and to implement automatic updates
 - *Mayfield v. Dept. of Labor* currently pending before the 5th Circuit challenges the DOL’s authority to impose **any** salary threshold
 - Possible federal court may enjoin DOL from enforcing rule while challenges are pending

Major Changes

Salary Increase To Take Effect in 2 Phases

Minimum salary increases from \$35,568/year (\$684/week) to:

1. **07/01/2024**: \$43,888/year (\$844/week)
 2. **01/01/2025**: \$58,656/year (\$1,128/week)
- 64.91%** increase over current salary floor

Highly Compensated Exemption (HCE) minimum increases from \$107,432 to:

1. **07/01/2024**: \$132,964/year
 2. **01/01/2025**: \$151,164/year
- 40.72%** increase over current salary floor

- Automatic adjustments (increases) every 3 years based on current wage data, beginning 07/01/2027
 - But may be delayed if warranted by unforeseen economic or other conditions
- No changes to the duties tests or the salary basis requirement for the exemptions

What To Do Now?

- Identify all exempt employees and current salary levels
- Identify employees in each job title below projected salary level and potential salary level
- Identify total cost to raise salaries to minimum level
- Evaluate options:
 - Increase salary so affected employees retain exempt status (assuming they satisfy the duties test)
 - Reclassify as non-exempt/overtime-eligible and pay overtime
 - Reclassify as non-exempt and adjust hourly pay rate to account for anticipated overtime (so overall pay is consistent and reclassification is cost-neutral)
 - Reduce hours to avoid overtime, shift work to other employees
 - US DOL Resources available [here](#) (including FAQs, Small Entity Compliance Guide)

Reminder: Some states have their own, higher minimum salary levels for their white-collar exemptions

What To Watch Non-Compete Agreements

FTC Issues Final Rule on Noncompete Agreements 04/23/2024

Major Changes to Proposed Rule Issued in 01/2023

04/23/2024 FTC Voted 3-2 on [Final Rule](#) to ban essentially all noncompete agreements

- Existing non-competes for senior executives can remain in effect, but new ones cannot be implemented after the effective date
- Formal rescission is not needed, but notice will be required
- 25% threshold for applicability of the sale of business exception eliminated
- Rule does not apply “where a cause of action related to a non-compete clause accrued prior to the effective date”
- Legal challenges are expected questioning the limits of the FTC’s authority
 - 04/24/2024 U.S. Chamber of Commerce filed suit in Texas seeking injunctive relief

Effective Date: 120 days following publication of Final Rule in Federal Register (pending)

What Employers Should Do Now

Final Rule is not yet effective and the legal challenges to it are significant but for now – no change to recommendations. But:

1. All restrictive covenants should be drafted narrowly to protect a legitimate business interest of the employer, e.g., trade secrets, confidential information, or customer goodwill
2. Restrictions themselves should be no broader than necessary to protect those legitimate interests, and they must be reasonable in terms of duration, geography, and scope of activities prohibited
3. Draft agreements in a way to increase likelihood that any provisions found to be unlawful can be severed from the agreement, leaving other restrictions intact
4. Restrictive covenants generally should not be used with lower-level workers absent legitimate reasons to do so

If Final Rule ultimately becomes effective, all true non-competes will be barred, as well as clauses that function to prevent a worker from competing or penalize a worker for competing

Employer Takeaways

- Consider your risk tolerance
- Pay attention to temporal, geographic and functional scope in restrictive covenants
- Think carefully about what you really need to protect against and whether a more limited non-solicitation covenant would achieve that goal
- Use separate, clearly severable sections
- Narrowly tailor confidentiality provisions
- Analyze consideration options



What To Watch

Challenges to DEI Initiatives

2023: A Year of Challenges and Opportunities

- DEI programs are not the same as affirmative action
- DEI in the employment context generally relates to companies having policies and practices geared toward ensuring equal opportunities and expanding outreach
- Supreme Court’s decision in *Students for Fair Admission v. Harvard* (June 29, 2023) triggered a wave of legal challenges to DEI initiatives from legal advocacy groups
- Former EEOC general counsel indicates that myriad “complaints” filed with the EEOC by legal advocacy groups which garner significant press carry no legal weight
- These aren’t legal complaints that require response or investigation; if a charge is filed, the EEOC will investigate as with any other charge
- Litigation outcomes to date lack a clear pattern

EEOC's Interpretation Of *SFFA* Decision



EEOC Vice Chair Jocelyn Samuels recently said:

- There is “nothing about” the Supreme Court’s recent SFFA decisions that affects employment programs, and it doesn’t apply to the “vast majority” of private employers’ DEI efforts
- The decisions should not deter employers’ efforts to broaden applicant pools and pursue EEO programs in the workplace
- Also emphasized statement by EEOC Chair Charlotte Burrows issued after the SFFA decisions which stated in part: “it remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace”

Agency Update

U.S. Department of Labor (DOL)

PUMP for Nursing Mothers Act: Recap

- PUMP (which was eff. 04/28/2023) applies to **ALL** employees (exempt and non-exempt), expanding 2010 rule that applied only to non-exempt employees:
 - Reasonable break time mandated for nursing mothers to express breast milk during the first 1 year after birth, and a private place (other than a bathroom) to express breast milk
 - Break time may be unpaid for non-exempt employees, with exceptions
- DOL issues industry-specific guidance and compliance documents : [FLSA Protections to Pump at Work | U.S. Department of Labor \(dol.gov\)](#)
 - Tailored guidance for guidance for the education industry and the restaurant/retail industry published on 02/27/2024 and 03/01/2024 (including [recorded webinars, presentation slides, and FAQs](#))

Independent Contractor Final Rule (Eff. 03/11/2024)

- DOL released [Final Rule](#) revising the standard for worker classification (employee v. independent contractor) under the FLSA
- The Final Rule rescinds the 2021 independent contractor rule issued during the Trump Administration
- New Final Rule adopts a 6-factor “economic realities” test that, according to DOL, allows consideration of independent contractor status based on the “totality of the circumstances” of the working relationship
- New Rule took effect on **03/11/2024** – though it’s facing a number of legal challenges

Six Factors in the Final Rule

- 1 Opportunity for profit or loss depending on managerial skill
- 2 Investments by the worker and the potential employer
- 3 Degree of permanence of the work relationship
- 4 Nature and degree of control
- 5 Extent to which the work performed is an integral part of the potential employer's business
- 6 Skill and initiative

Agency Update

Equal Employment Opportunity Commission (EEOC)

Discrimination Litigation Trends

- **FY 2023** (ending 09/30/2023), EEOC reported **81,055** total charges (up from 73,485 in FY 2022), a 5-year high following 6 years of declining charges
- **FY 2022**, percentage of total claims related to religious discrimination was 18.8%, up from 3.4% of total claims in FY2021*
- Retaliation continues to be the most common type of claim, comprising **51.6%** of all charges in **FY 2022**

The EEOC report notes FY2022 saw a significant increase in vaccine-related charges of religious discrimination being a possible source of data variation from prior years

EEOC Litigation Trends

FY 2023, EEOC filed **143** new employment discrimination lawsuits

- **50%** increase over FY 2022
- **25** systemic discrimination lawsuits (that target a “pattern or practice, policy and/or class where the discrimination has broad impact on an industry, profession, company, or geographic location”)
- **Oct. 2023** The EEOC settled a systemic discrimination lawsuit for **\$2.4 million** arising from alleged violations of the ADEA through an initiative to increase the headcount of millennial workers by denying positions to applicants over 40 years old
- EEOC claims a 100% success rate in systemic case resolutions, resolving 14 cases in FY2023 and obtaining \$11.7 million for 806 workers

Pregnant Workers Fairness Act (PWFA) (Eff. 06/27/23): Recap

- **04/15/2024** EEOC issued [Final Regulations](#) (which includes binding Interpretive Guidance)
 - Published in Federal Register **04/19/2024** (eff. 60 days after publication)
 - Applies to employers with 15 or more employees
- **Court challenge: 02/2024**, a federal court in Texas ruled in *State of Texas v. Department of Justice et al.*, that Congress improperly passed the Consolidated Appropriations Act of 2023, including PWFA
 - Court permanently enjoined the EEOC and DOJ from enforcing the PWFA *against the State of Texas and its agencies*

Note: EEOC is accepting charges and enforcing the PWFA now (except in Texas)

5 Key Rules – Employers Cannot:

1. Fail to “make **reasonable accommodations** to the **known limitations** related to **pregnancy, childbirth, or related medical conditions** of a **qualified employee**, unless such covered entity can demonstrate that the accommodation would impose an **undue hardship** on the operation of the business”
2. Require an employee to accept accommodations without engaging in the interactive process
3. Discriminate against employees based on their need for reasonable accommodations
4. Mandate leave for an employee when a reasonable alternative accommodation can be provided
5. Retaliate against an employee for requesting or utilizing a reasonable accommodation

Note: Remember some state laws may provide more protection than the PWFA and/or have affirmative policy and/or notice obligations

EEOC Says These Requests Do Not Require Medical Support

- Allowing an employee to carry water and drink, as needed, in the employee's work area
- Allowing an employee additional restroom breaks
- Allowing an employee whose work requires standing to sit and whose work requires sitting to stand
- Allowing an employee breaks, as needed, to eat and drink
- Requests related to lactation

Note: The EEOC takes the position requesting documentation, beyond a self-attestation, i.e., a signed request form, would not be reasonable

6 Steps for Employers to Consider



- Review final regulations
- Keep in mind that if another federal/state/local law provides greater protection or different requirements, those laws will also apply
- Covered employers are required to post notices describing the PWFA
- Consider whether changes are needed to policies, forms and practices to comply with the PWFA
- Consider training your HR professionals, managers, and first-line supervisors on how to identify and respond to requests for PWFA accommodations

Questions?