BUILDING WORKER POWER

A PROJECT OF THE AFL-CIO AND THE ECONOMIC POLICY INSTITUTE

Frequently Asked Questions About Unions, Organizing and the Law

FAQ About Unions

What exactly is a union? Broadly speaking, a union is a group of workers who join together to advocate for improvements at the workplace—higher pay, better benefits, training and promotional opportunities, and protections against sexual harassment—and around other issues that concern them. By acting collectively, workers have a more powerful voice when approaching their employer about the changes they want. Workers most typically form a union with an existing union in their industry or area, so they then can draw upon the union's expertise and strength in their negotiations with their employer. Under U.S. labor law, "labor organizations" are required to follow rules on governance, financial disclosure and other aspects of their operations. They are democratic membership organizations whose members elect their leaders and set the direction of the union.[1]

FAQs About Organizing a Union

How do workers go about getting union representation if they want it?
There are two paths for workers interested in forming a union:

- **Majority signup, or "card-check" recognition.** Workers collect petitions, cards or other written statements from a majority of a designated group of workers (called a "bargaining unit") and ask their employer to voluntarily recognize their union. Employers do sometimes agree to recognize the wishes of their employees based on the petitions or cards. But under current law, employers can refuse to voluntarily recognize their workers' choice, and can require workers to hold a secret

ballot election to determine whether a majority wishes to be represented by a union.

- **Secret ballot election.** Workers file a **petition** with the National Labor Relations Board, or a state agency for state government employees, showing that at least 30% of the bargaining unit wants a union. The NLRB investigates the petition and schedules an election. If a majority of workers votes for a union, the union will be certified by the NLRB. The election process is fraught with problems.

What is the NLRB election process? If an employer refuses to voluntarily recognize a union designated by a majority of employees as their representative (i.e., majority signup or card-check), then the workers need to file a petition for an election overseen by the NLRB or relevant state agency. Employers often manipulate and delay the NLRB process to slow down elections, because this gives them more time to campaign against the union. Three-quarters or more of private employers hire union avoidance consultants (union-busters) to quash the union campaign.[2] In 2015, the NLRB adopted modest reforms to streamline the election process and eliminate some of the unnecessary delays. The rules were upheld twice in federal court, and have helped to reduce delay in the election process. Republicans have tried for years to overturn the election rules, and the Republican majority on the NLRB has asked for public comments on overturning or weakening the rules.[3]

Can workers be fired for trying to organize a union? Not legally, but employers fire workers who are union activists all the time, because they know what a chilling effect this has on the organizing campaign, and they know the consequences they will face are little more than a slap on the wrist. Data show that one-third of employers fire workers during organizing campaigns.[4] This is illegal, and the NLRB investigates hundreds of charges of illegal firings and retaliation each year. In fiscal year 2018, the NLRB obtained 1,270 reinstatement orders from employers for workers who were illegally fired for exercising their rights under labor law, and the NLRB collected $54 million in back pay for workers.[5] But there are **no monetary penalties** against employers who illegally fire workers—only the back pay that the employer would have been paying the worker all along, *minus* any wages the worker did or could have earned in the meantime.

FAQs About Employer Interference in Organizing Campaigns

What is a union-buster? Union-busters are hired by employers to discourage workers from forming a union, or to turn workers against the union that already represents them. Union-busting is a big industry in the United States. Three-fourths or more of private employers hire union-busters when their workers are seeking to form a union, and they pay these union-busters $200 million a year.[6] Union-busters prepare anti-union propaganda (videos and other materials), and they advise employers on tactics to discourage unionization, such as one-on-one meetings where supervisors pressure workers not to support the union, and mandatory meetings where employers make dire predictions about adverse consequences if workers choose to organize. The union-busting industry operates in the shadows. An Obama administration rule to bring about more transparency and disclosure of union-busters and their work—known as the "persuader rule"—was repealed by the Trump administration in July 2018.[7]

What is a captive-audience meeting? In the face of a unionization effort, employers often call mandatory meetings that workers are required to attend or be disciplined or fired. At these meetings, employers try to discourage workers from forming a union, often by making dire statements about the consequences if workers organize, e.g., the employer will close the facility. Nine out of 10 employers require employees to attend mandatory captive-audience meetings during organizing campaigns.[8]

FAQs About Collective Bargaining

What is a collective bargaining agreement and who decides what is in it? A collective bargaining agreement is a written contract between an employer and a union that represents a group of employees (bargaining unit) in a workplace. It typically addresses wages, benefits such as health insurance and paid sick days and vacation, health and safety issues, "just cause" protections from arbitrary discipline[9] and other workplace issues. What is in a particular collective bargaining agreement is up to the workers and the employer—the law establishes a process for collective bargaining but does not require any particular subjects or terms in a collective agreement. Collective bargaining agreements generally also include procedures for addressing problems in the workplace through a grievance and arbitration procedure, joint labor-management committees and other structures, which provide a much quicker and more streamlined method for resolving disputes than relying

on government agencies. Collective bargaining agreements are legally enforceable contracts. This is one of the reasons workers choose to form a union—so they have a legally binding contract protecting their pay and benefits.

Do collective bargaining agreements protect workers from harassment and discrimination? Yes. Anti-discrimination and anti-harassment provisions are typical in collective bargaining agreements, and they often are more expansive than the rights and protections provided under federal and state law. For example, many collective bargaining agreements explicitly protect LGBTQ workers from discrimination and harassment, and workers facing these problems have access to a grievance and arbitration process to address the problem. This provides far stronger protection and far faster recourse than exists for workers who aren't covered by a union contract.

FAQs About Strikes, Lockouts, and Other Protest Activity

What is a strike? A strike is when a group of workers stops working and withholds its labor from the employer. Workers strike to put economic pressure on the employer to take some action—agree to higher wages, adopt a stronger anti-harassment program or, as we saw with the recent Google strikes, end forced arbitration.[10] Workers on strike do not get paid. Sometimes employers who want to "break" the strike hire what are called "permanent replacements"—in other words, replacements who take the strikers' jobs. The ability of employers to hire permanent replacements dramatically undermines workers' right to strike, because workers know they could lose their jobs. Sometimes workers go on strike over unfair labor practices by employers. For example, workers might strike if the employer illegally fires union activists. If the strike is found to be an unfair labor practice strike, workers cannot be permanently replaced by the employer and are entitled to get their jobs back.

Are strikes legal? The National Labor Relations Act protects private-sector workers' right to strike, with some limitations. For example, workers who have a collective bargaining agreement in place with a no-strike clause in it are not protected if they go on strike. Under current law, a strike may be illegal if it is against a so-called "secondary" employer. For example, if workers at a manufacturing plant go on strike against their employer, it most likely would be illegal for workers at a bank that provides loans to the manufacturer to go on strike in order to pressure the bank to stop doing business with the manufacturing plant, even though this sort of solidarity action would be very helpful to the manufacturing plant workers. Federal employees

do not have the right to strike, and most state and local public employees are prohibited from striking.

What is a lockout? A lockout is when an employer prohibits employees from working (and being paid) in order to pressure employees to accept the employer's demands in bargaining. It is an aggressive move by an employer to use its power and economic leverage against its employees. Lockouts used to be extremely rare, but have been used more frequently by employers in recent years.

FAQs About Labor Law

What law protects workers' right to organize? For private-sector workers, the primary law establishing their right to form unions and engage in collective bargaining is the National Labor Relations Act. Workers in the airline and railroad industry are covered by the Railway Labor Act. Federal-sector workers are covered by the Civil Service Reform Act of 1978. The rights of state and local public employees, such as teachers, firefighters and other public service workers, are determined by state and local law. These rights vary widely from state to state, and public-sector workers only have comprehensive collective bargaining rights in 23 of the 50 states.[11] In some states, there is no comprehensive collective bargaining law for public employees, but cities and counties within the state might provide these rights for some or all public employees in their jurisdiction.

Does the NLRA protect all workers? No. The NLRA protects workers in the private sector, not the public sector. Certain groups of workers are excluded from the NLRA's protections, including agricultural workers, domestic workers who work in a private household, supervisors, independent contractors and workers who are covered by the Railway Labor Act. Some of these workers may be covered by state law in some states.

Does labor law only protect workers in unions? No. The NLRA protects the right of all private-sector workers covered by the law to engage in "concerted activity" for their "mutual aid and protection," regardless of whether the workers are in a union or seeking to form a union. So, for example, the Google workers who recently went on strike to get Google to end forced arbitration were protected by labor law, because they were engaged in a group activity for their mutual aid and protection. Similarly, the law protects workers who protest safety conditions at their workplace, or wage

issues, or other issues of concern. It is illegal for employers to retaliate against workers engaged in concerted activity, but unfortunately it happens all the time, and many workers who do not have a union are unaware that the employer has broken the law and violated their rights.

Does the NLRA protect workers against sexual harassment? Not directly, but it contains rights and protections for workers who take action against sexual harassment. The NLRA protects the right of workers to join together in mutual aid and protection. So if a group of workers is concerned about sexual harassment, the workers can join together in demanding that their employer institute stronger measures to prevent and address harassment, and it is illegal for their employer to retaliate against them for engaging in this action. However, the NLRA does not require the employer to agree with its workers. Workers who form a union typically have protection against sexual harassment through their collective bargaining agreement, which usually includes anti-discrimination protections and prohibitions against sexual harassment. These provisions are enforced through the grievance procedure or other means at the workplace. Many unions have negotiated additional protections against sexual harassment for their members. For example, UNITE HERE, the hotel workers union, recently won panic buttons and other protections for housekeepers to protect them against harassment and assault at work.

What is the National Labor Relations Board? The NLRB is an independent federal agency that enforces the NLRA. It investigates, prosecutes and adjudicates unfair labor practices by employers and unions, and oversees elections in which workers vote on whether to form or retain a union. The NLRB has five Senate-confirmed members who decide cases, and a Senate-confirmed general counsel who investigates and prosecutes unfair labor practices. By tradition, three members of the NLRB are from the president's political party. The NLRB currently has three Republican members, one Democratic appointee and one vacancy, because of the failure of the Senate to confirm former NLRB member Mark Pearce to a new term. The next vacancy on the NLRB occurs in December 2019, with the expiration of Democrat Lauren McFerran's term, which would leave the NLRB with three Republican members and no Democratic members.

What is a joint employer? And why is the NLRB's *Browning-Ferris* decision so controversial? Under every labor and employment law, such as Title 7 (discrimination protections), the Fair Labor Standards Act (wage and hour

protections) and the NLRA, employees can have more than one employer. For example, temporary nurses hired by a temporary agency but placed at a hospital may be employed by both the temporary agency and the hospital, because both employers control aspects of the employee's work. As a result, both employers can be held liable for violations of workers' rights. So, for example, if the temporary agency fails to pay workers overtime that they are legally due, both the temporary agency and the hospital can be sued for the wage theft. The same is true under the National Labor Relations Act. Two or more employers may "share or codetermine" workers' pay, benefits or working conditions and be considered "joint employers," meaning both employers have an obligation to bargain in good faith with the workers and can be held liable for violating workers' rights. In *Browning-Ferris Industries of California, Inc.*,[12] the NLRB updated its test for determining whether two employers are joint employers, and ruled that a recycling company was a joint employer with a staffing service that provided 80% of the line workers to the recycling company. Republicans and business groups criticized the ruling, saying it was too broad and would lead to franchisees being found to be joint employers along with their franchisors. But *Browning-Ferris* was not a franchise case, and the NLRB made clear in *Browning-Ferris* that it was not addressing the franchise relationship. Nevertheless, Republicans have introduced numerous bills and appropriations riders to overturn *Browning-Ferris* and impose an extremely restrictive joint-employer test that is narrower than any test used under other laws. At the same time, the Republican majority on the NLRB is undertaking rulemaking to dramatically narrow the joint-employer test.[13] At stake is the ability of contract workers and temporary workers to engage in meaningful bargaining over their conditions at work.

What is employment at will? In the United States (except for Montana and Puerto Rico), employers can terminate any employee at any time, without warning, for "a good reason, a bad reason, or no reason at all, except in the limited circumstances where there is a law preventing the termination." In particular, if there is a binding employment contract for a period of time, an employer cannot terminate somebody in violation of that agreement, and an employer may not terminate employees on grounds of race, gender, religion, support for a union, national origin or other protected characteristics. However, workers covered by a collective bargaining agreement typically are protected against termination unless the employer can show that it had "just cause"—that is, a good reason—for the termination. But unless there is a specific law or collective bargaining agreement providing protection, employers may lawfully fire workers for arbitrary and offensive reasons. For example, if the

employer doesn't like an employee's looks, or thinks an employee is too attractive or not attractive enough, or doesn't like the fact the employee refused to work overtime even if that meant missing a child's appointment at school, the employer can lawfully fire that employee.[14] Combating this arbitrariness and unfairness is one of the reasons workers form unions and get the protections of a collective bargaining agreement.

FAQs About Union Representation and Right to Work

What is "exclusive representation?" Under U.S. labor law, if a majority of workers in a bargaining unit (which can be any group of workers the NLRB or state agency says is appropriate) votes for union representation, then the union becomes the "exclusive representative" of all of the workers in the bargaining unit, regardless of whether a particular worker joins the union or pays dues. The union has a legal duty—called the "duty of fair representation"—to represent all workers, and it can be held liable in court if it fails to fulfill its duty. Because the union has a duty to represent all workers, the fairest system is for all workers in the bargaining unit to pay either dues or an agency fee to the union to cover the cost of representation. This "fair share" system is prohibited in states that have enacted "right to work" laws.

What is an "agency fee?" An agency fee is a fee paid by a worker to the union that represents her and her co-workers to help defray the cost of the union negotiating a collective bargaining agreement and handling grievances and other problems at the workplace. Agency fees are negotiated by unions with employers. A union cannot simply declare that there is an agency fee—the employer must agree to this arrangement, and many do, because of the fairness of the arrangement. Agency fees are legal in the private sector, except in right to work states. Because of the *Janus v. AFSCME Council 31* Supreme Court decision in 2018, agency fees are illegal in the public sector, meaning that workers can get the benefits of union representation (e.g., higher wages, better benefits and access to a grievance procedure to resolve disputes) without having to contribute anything toward the costs of this representation.

Can workers be forced to join a union? No. No worker can be required to join a union or face retaliation for refusing to join. In fair share states, workers who are represented by a union can be required to pay an agency fee toward the cost of that representation if the employer and the union agree to this arrangement. Also, no worker can be required to pay for political activity by a union.

What does right to work mean? Right to work is a system advocated by anti-union groups by which unions chosen by a majority of workers are legally prohibited from reaching an agreement with the employer that all workers represented by the union share in the costs of that representation, either through joining the union and paying union dues or paying the union an agency fee. Unions under a right to work system are required to represent all workers by negotiating collective bargaining agreements and handling grievances over workplace problems, but workers can choose to pay nothing for that representation. More than half of the states (27) now have this system for private-sector workers, and it has been accompanied by lower wages and worse benefits for workers.[15]

What is *Janus v. AFSCME Council 31?* *Janus* was a case brought by wealthy, anti-union organizations as part of a multifaceted campaign to try to weaken unions and workers' rights. In a 5–4 decision, the U.S. Supreme Court ruled that it is unconstitutional for employers and unions in the public sector to agree that all workers represented by the union should pay their fair share toward the cost of representation, in the form of union dues or agency fees. In other words, the majority in *Janus* made right to work the rule for the public sector. Four justices dissented, pointing out that fair share has been the law for decades and has worked well.[16]

Does the Public Workers Freedom to Negotiate Act fix *Janus*? The legislation does not change the ruling in *Janus*. Nothing in the legislation addresses the dues or fees that unions can charge workers the union represents. But importantly, the legislation provides the right to all public service workers to join together and form unions—a right that currently is lacking in half the states.

FAQs on the Relevance of Unions in the 21st Century

Why has the labor movement shrunk so much? Is it because workers no longer want unions? Workers still want unions. In fact, recent polls show that public support for unions is higher than it has been in decades, and young people are the most pro-union of all. A recent study by the National Opinion Research Corp. found that 48% of workers who don't currently have a union would like one.

The actual number of union members has held relatively steady for the past decade.[17] But union density—the percentage of workers who have union representation—has declined as the overall workforce has increased.

Union density has eroded for three main reasons. First, trade policies and outsourcing have eliminated millions of good union jobs in the manufacturing sector and related industries. Second, employers have gotten much more aggressive about resisting organizing campaigns by their employees. They hire union-busters and engage in aggressive anti-union tactics that previously were stigmatized. Third, anti-union politicians and anti-union special interests like the Koch brothers and the National Right to Work Committee have attacked unions through policy initiatives and the courts. They have spearheaded legislation to eliminate or weaken unions, which has passed in a number of states.

Do workers still need unions? Don't we have laws providing the protections unions used to provide? Workers form unions with their co-workers because they want a voice on the job and a way to negotiate with their employers on the issues that most concern them. Some of these issues are covered by other laws, but many are not, such as anti-discrimination for LGBTQ workers, scheduling issues, promotional opportunities and input on technological change. Having a union strengthens a worker's legal protections and gives workers a collective voice. This is why workers today, in all sorts of industries, are coming together to form unions.

Can workers in the gig economy organize a union? Yes. Construction workers, actors, musicians and writers have worked "gig" jobs and been in unions for decades. Forming a union and working in the gig economy fit well together. There is nothing about working through an online platform that automatically takes away workers' right to form a union. Some workers in the gig economy are classified—or misclassified—by their employers as independent contractors. Independent contractors are not covered by the NLRA. Nevertheless, some workers who currently are denied coverage under existing law have found ways to organize and exercise collective power. For example, for-hire drivers in New York City recently persuaded the New York City Taxi and Limousine Commission to pass a minimum wage for drivers.

FAQS on the Structure of the U.S. Labor Movement

How is the labor movement structured in the United States? Most unions in the United States have a national organization with local unions that are chartered by and are part of the national union. Some unions also have state councils or chapters as part of the national organization. Each of these unions has its own governance

and officers who are elected by the union's members. The Department of Labor administers comprehensive rules governing the operation of unions.[18]

Is the AFL-CIO a union? The AFL-CIO is not a union—it is a federation of 55 separate unions, like the United Mine Workers, AFT and the Machinists union, and also actors, musicians and writers unions. These unions voluntarily participate in the AFL-CIO. The AFL-CIO has a national headquarters in Washington, D.C., a state AFL-CIO in each of the 50 states and Puerto Rico, and local AFL-CIO organizations in almost 400 cities across the country.[19]

Are all national unions in the AFL-CIO? No. Most national unions are in the AFL-CIO, but not all. Examples of major unions that are not part of the AFL-CIO at the national level are the National Education Association, SEIU, the International Brotherhood of Teamsters, the United Brotherhood of Carpenters and the International Longshore and Warehouse Union. Locals of some of these unions belong to the AFL-CIO's state and local organizations in many states and cities through a "Solidarity Charter" program.

FAQs on Worker Centers

What is a worker center? Is a worker center a union? A worker center is a not-for-profit organization that provides services to, and advocates for, workers. Most worker centers are focused on particular populations of workers, such as immigrant workers, African American workers, restaurant workers or domestic workers. Worker centers are resource centers where workers can get help with immigration issues, wage and hour issues, housing issues and the like. Worker centers differ from unions in that worker centers do not negotiate or administer collective bargaining agreements with employers. And, unlike unions, worker centers typically are not membership organizations. In recent years, the Chamber of Commerce and others have tried to persuade the U.S. Department of Labor to define worker centers as unions, which would mean that all the legal requirements and restrictions applicable to unions—extensive financial reporting requirements, etc.—would apply to worker centers. The Department of Labor has rejected this categorical argument and continues to review whether an organization is a union on a case-by-case, fact-specific basis. Worker centers are sometimes referred to as "alt-labor," as in an alternative to traditional unions.

What are some examples of worker centers? The National Domestic Workers Alliance, Restaurant Opportunities Centers United, CASA and the Workers Defense Project are all examples of worker centers.

1 The law governing private-sector unions (Labor-Management Reporting and Disclosure Act of 1959) can be found on the U.S. Department of Labor's website at www.dol.gov/olms/regs/compliance/compllmrda.htm.
2 Josh Bivens et al., "How today's unions help working people: Giving workers the power to improve their jobs and unrig the economy," Economic Policy Institute, August 2017.
3 Notice of Proposed Rulemaking, Representation-Case Procedures, 82 Fed. Reg. 58783, Dec. 14, 2017, Docket Number: 2017-26904; RIN 3142-AA12.
4 Josh Bivens et al., "How today's unions help working people."
5 National Labor Relations Board, NLRB Performance Reports Monetary Remedies/Reinstatement Offers, accessed February 2019.
6 Kate Bronfenbrenner, "No Holds Barred: The Intensification of Employer Opposition to Organizing," Economic Policy Institute and American Rights at Work Education Fund, May 2009 at 3; John Logan, "Consultants, Lawyers, and the 'Union Free' Movement," Industrial Relations Journal 33; 197 (2002).
7 The Obama administration issued a rule to provide more transparency on the use of union-busters, but the Trump administration rescinded that rule. *See* Marni von Wilpert, "By rescinding the persuader rule, Trump is once again siding with corporate interests over working people," Working Economics (Economic Policy Institute blog), June 13, 2017.
8 Bronfenbrenner, "No Holds Barred, " n. 7.
9 *See* later discussion of "Employment at Will."
10 Jena McGregor, "Google and Facebook Ended Forced Arbitration for Sexual Harassment Claims. Why More Companies Could Follow," The Washington Post, Nov. 12, 2018.
11 Milla Sanes and John Schmitt, "Regulation of Public Sector Collective Bargaining in the States," Center for Economic and Policy Research, March 2014.
12 362 NLRB No. 186 (2015). The NLRB's *Browning-Ferris* decision was upheld by the U.S. Court of Appeals for the D.C. Circuit in December 2018.
13 *See* 83 FR 46681, Proposed Rule: The Standard for Determining Joint-Employer Status (RIN 3142-AA13).
14 *See* Steven Greenhouse, "Fired for Not Smiling Enough? US Fast Food Workers Fight Unjust Dismissals," The Guardian, Feb. 15, 2019.
15 Janelle Jones and Heidi Shierholz, "Right-to-work is wrong for Missouri," Economic Policy Institute, July 2018.
16 *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, et al., 585 U.S. ___ (2018), Docket No. 16-1466, www.supremecourt.gov/opinions/17pdf/16-1466_2b3j.pdf.
17 The law governing private-sector unions can be found on the Department of Labor website at www.dol.gov/olms/regs/compliance/compllmrda.htm.
18 The law governing private-sector unions can be found on the Department of Labor website at www.dol.gov/olms/regs/compliance/compllmrda.htm.
19 A list of the AFL-CIO's affiliated unions and state and local organizations can be found on the AFL-CIO website at https://aflcio.org/about/our-unions-and-allies/our-affiliated-unions.