

Podcast

The Year Ahead 2024: Labor

By Laura A. Pierson-Scheinberg & Edward V. Jeffrey

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Alitia Faccione:

Welcome to We get work™ and The Year Ahead 2024 podcast series. Covering workplace issues from both subject matter and industry perspectives, the 19 episodes in our series provide both big picture trends and detailed tactics that can help employers achieve their workplace ideal, while remaining real about regulations, compliance challenges, and more in 2024. Jackson Lewis invites you and others at your organization to experience the report's legislative, regulatory, and litigation insights in full at our website, JacksonLewis.com, or listen to the podcast series on whichever platform you turn to for compelling content.

Laura Pierson-Scheinberg:

Thank you for joining us. I am Laura Pierson-Scheinberg, and I am in the San Francisco and Baltimore offices.

Ed Jeffrey:

This is Ed Jeffrey. I am from the White Plains, New York office.

Laura Pierson-Scheinberg:

Well, Ed, I'm excited to talk today about one of our favorite topics, and that's labor. It's been quite a year in 2023, and just to level set all of us, I do believe it's still the labor renaissance. There have been over 2,500 petitions filed during fiscal year 2023. There was a 53% increase on petitions and a 19% increase on unfair labor practices as compared to the year before.

So the average union win rate for election petitions in the first half of fiscal year 2023 was 71%. We see a continued increase in employee activism, protected concerted activity, and union organizing activities are up. So as we look at this, Ed, what do you envision we should expect to see in 2024 as far as whether this is going to cool off, stay the same, or heat up?

Ed Jeffrey:

I think there's no question that it's going to continue to heat up. I think a number of factors are converging to make this a reality. Those factors include demographic changes and especially the younger generation and their view of unions, and perhaps more importantly of the workplace. I think changes in the view of work generally, one study noted the pandemic permanently affected traditional expectations of work, and I think that's true. I think we've both seen that. A couple of other factors, high profile union successes, both in organizing drives and contract negotiations and the significant public support from the administration and of course from agencies like the NLRB, which we'll be talking about.

Laura Pierson-Scheinberg:

Yeah, well let's talk about it now and dive right in. So the NLRB has already issued a steady stream of decisions over the last year at least, and many of which have been favorable to union organizing. There have been important decisions. Ed, can you share a little bit about the decision, what it was about, and the impact you've seen since that decision has come out?

Ed Jeffrey:

Sure. I'd start by noting what unions and those publications that advance the union perspective have said about it. They've called it a landmark decision, a game changer, a seismic shift in the balance of power for workers. They've said that it will "substantially lower the legal hurdles to union recognition", and I think they're right. I'd say that it will expand the use of bargaining orders based on signed cards. And as the dissent noted, "it will predictably result in many more card-based bargaining orders and far fewer representation elections."

So what does it do? Well, the case adopts a new standard for unions seeking to organize workers. Under this new standard, if a union makes a demand for recognition based on claim to majority support, which will usually come in the form of signed union cards, the employer has two options. The employer must either recognize and bargain with the union or promptly file a petition with the NLRB requesting an election in which their employees can vote on whether they wish to be represented by the union.

But the really radical change in this new standard is the standard for issuing a bargaining order. Bargain order is when an employer is required to recognize the union as the representative of its employees, even though the employees didn't vote for the union in an election. Prior to the case, this extreme remedy of ordering an employer to bargain with a union that employees had not voted for was limited to cases in which an employer engaged in violations of federal law that were so severe and pervasive that it would be impossible to conduct a fair election.

The NLRB in the case has now expanded the use of this extreme remedy to any case in which there's an allegation of even a single unfair labor practice. So the mere existence of a handbook rule, maybe one that was

implemented years before any union activity, maybe one that employees didn't even know about, could result in employees losing their right to vote in an election.

And I would just note this is inconsistent with the historical view of both the NLRB and the federal courts as they have long held. That official secret ballot elections conducted by the NLRB are the gold standard and the preferred method for ascertaining whether a union has majority support the unreliability of signed cards has been widely noted yet this is where we are.

Laura Pierson-Scheinberg:

And I have to say I've been practicing for over 20 years. I'm not going to give away my age that quickly, but in that time when I look at the last six months, I've routinely told clients I have had to relearn more labor law in the last six months than I probably have over the entire career because it's that different and it's that much change. I can say in my career, the kind of extreme remedy that was referred to as a Gissel order. I mean, Ed, how many Gissel orders have you even seen in your career? I think I've seen two in my entire career. And it was where there were massive amounts of, it was a shutdown and there were massive amounts of terminations, purely extreme situations, but I mean they were rare. How about you?

Ed Jeffrey:

In my career of almost 30 years, I have not been involved in any case in which there was a Gissel bargaining order, not a single one.

Laura Pierson-Scheinberg:

And now every single case is questioned where they're asking questions in the charges. And so when we're looking at just routine mistakes, like honest, simple mistakes either by a frontline supervisor or by a work rule or a handbook rule can result in this extreme remedy and there not being an ability to have an election, what are you telling our clients that they should do now? What steps should they take?

Ed Jeffrey:

Well, I think the first thing that all employers should do is make sure they review their handbook and their work rules for anything that could be found violative under the other significant case that was decided last summer, the Stericycle case which limits an employer's ability to maintain common sense work rules. And so employers that look to their handbooks only after there's union activity may find out that it's too late.

Laura Pierson-Scheinberg:

I agree. And another thing, we really have to make sure everybody's trained because of the difference in the rules and the timings. And so we have been doing a ton of management training on what the new rules are because

they are different and what this can mean for the organization. And wait, wait, wait. There's more. This isn't just the only piece. So referring back, effective December 26, so happy holidays everybody. The NLRB has brought back the quickie election rules with an even more aggressive time constraints. So the standard is the elections are to be held the soonest practicable date. Previously elections were not scheduled before the 20th date after the direction of election. So they were averaging essentially about 35 days from the time a petition is filed until the election is held is what I was seeing. I don't know if you were seeing something different Ed, but that timeframe is now going to be as soon as possible, the soonest date practicable.

Additionally, the NLRB has shortened the amount of time before the date for the pre-election hearing and some other technical things that we really don't have time to get into today. But the point is that if an employer waits for there to be union activity before they decide what is their labor strategy, how are they going to respond? And particularly when you look at the win rates of over 71%, that will be too late. So I'm asking clients to proactively think about their labor strategy now.

We were joking among my family on New Year's for making resolutions, Ed, you've known me a long time. I'm the one that was the assigner of New Year's resolutions in my family and my assignment for our clients is to have a labor strategy. Any thoughts on what our employers should do proactively with the change in the new election rules?

Ed Jeffrey:

Yeah. And I think we encourage employers to really think about what their employees want and need from the workplace and from the employer, and then to ask themselves how they're doing in providing for those wants and needs. I mean, you've heard me say this before, Laura. This is simply the stuff of life. Really. That's what labor law is all about. What's important to our employees? What does the job mean to them? What do they want from the job and how does it fit into the rest of their life?

To think deeply about these questions and to respond meaningfully is to put the focus where it really needs to be on us as employers and what we're doing. Your employees will look to you first, but if that doesn't do it for them, they're going to look somewhere else. And today they have plenty of options. So we should do all these things and all the things you've described because it'll make the workplace better, it'll make the lives of our employees better, and it'll make our companies more successful.

Laura Pierson-Scheinberg:

I always say to focus on organizational wellness just like you do. I mean, we're very like-minded on that. I ask, are the company managers living the mission statement and the values every single day? Are we paying people fairly? Do we apply our rules consistently? Are we a good employer? And one of the things we do at Jackson Lewis is we help assist process to assess

that through training and vulnerability assessments to test how the company is doing, particularly around the issues driving union organizing. And so we really want to make the workplace better for our clients and we think that is the best medicine for any ailment. Anything you want to add to that Ed?

Ed Jeffrey:

I think you've heard me say this too, Laura. There's a line from a journalist that I read, and I think it applies to a fair amount of what we see in the world today, and the line is this. "We're living through a revolt against the future and the future will prevail." And you probably heard me say it more crudely, that we hear sometimes our clients raging against the future, but the future is going to happen anyway. And for many of us and for our clients, the future is here, meaning the world and the workplace is evolving. And this presents both challenges and opportunities. Employers need to work within this reality. We all do. And as you've indicated, there's much that employers can do if they focus on making the workplace better and working to achieve shared goals with their employees. In the end, this is better for employers and for employees and for the country overall I would submit.

Laura Pierson-Scheinberg:

Well, that is a great way to wrap it up. I know we wanted to just give an idea of what we're seeing as the year comes ahead and I don't think this is going away, and I really urge all of our clients to be proactive in thinking about what is your labor strategy? Are you doing the right things by your clients? Do your managers know what to do? Do you know if a union were to come tomorrow in the organization, what your bargaining unit would look like? I mean, these are all things that you won't have time to think about. If this were to occur in your organization, you won't have time to pre-think about it. And so you got to think about it now. I really appreciate always talking with you, Ed, and I look forward to talking more about this and hoping to hear from folks on what they're doing in their organization.

Ed Jeffrey:

It was a pleasure, Laura.

Alitia Faccione:

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