



# A Robinson+Cole Legal Update

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## Unions Are Adding Some Heat in the Kitchen for Food & Beverage Employers

Authored by [Natale V. DiNatale](#) and [Kayla N. West](#)

Currently, Americans view labor unions more favorably than they have in decades, leading to an increase in union activity. The National Labor Relations Board (NLRB) reported that for the first six months of fiscal year 2022 (October 1, 2021 – March 31, 2022), labor unions filed 57 percent more representation petitions than they did during the same period a year earlier. According to a National Public Radio analysis, the accommodations and food services industry makes up nearly 28 percent of new union election petitions (a huge jump from the fewer than 4 percent of union election petitions coming from the industry a decade ago). Prior to the COVID-19 pandemic, unionization among employees within the food and beverage industry was relatively low. However, many of these employees were deemed essential workers during the COVID-19 pandemic and were required to continue working as the virus spread. As a result, employees in the industry began to demand higher pay and better working conditions.

It also seems that just about every day we are seeing a headline about a labor union organizing employees at a national company with a well-recognized brand. For example, since August 2021, about 250 Starbucks stores have filed union election petitions and about 100 of those stores have voted to unionize. Additionally, Amy's Kitchen has been accused of unfair labor practices at one of its plants for its engagement in certain activities, such as required attendance for anti-union meetings, disciplining employees for participation in labor activities, and terminating two employees for supporting a union.

### Support from President Biden & Other Political Figures

President Biden has promised to be the most pro-union President, and within the first two months of his presidency advocated for the U.S. House of Representatives to pass the Protecting the Right to Organize (PRO) Act of 2021, which would make a number of union-friendly changes to the National Labor Relations Act (NLRA).[1] The NLRA guarantees employees the right to form, join, decertify, or assist a labor organization, and to bargain collectively through representatives of their own choosing, or to refrain from such activities. The law applies in the private sector and applies to both union and non-union employees.

Two of President Biden's appointees—NLRB General Counsel Jennifer Abruzzo and NLRB Chairman Loran McFerran—have been unwavering in their support for labor organizing rights, and without waiting for the PRO Act to pass have begun to interpret existing law in a dramatically different and pro-union manner. General Counsel Abruzzo has argued to the NLRB that, under current law, employers should be unable to require employees to attend meetings during which a company expresses its opinion concerning unionization or other statutorily-protected activity, meetings which have been labeled "captive-audience meetings."

State and local jurisdictions are considering similar initiatives. Connecticut recently passed legislation that proscribes employers from disciplining an employee, or threatening to discipline an employee, should the employee refuse to attend an employer-sponsored meeting, listen to a speech, or view communications

primarily intended to convey the employer's opinion about religious or political matters, including meetings during which employers share their opinion about labor unions and the facts about what it means to have a union. Oregon has similar legislation, but that statute is the subject of litigation on a claim that it conflicts with the NLRA, a federal law.

Secret-ballot elections about union representation are also at risk. Although for the past 50 years the NLRB has allowed employers to insist on secret-ballot elections to gain representational status (in which employees must cast their vote privately and anonymously), Abruzzo has expressed interest in overturning that precedent as well. If successful, employers could be required to recognize a union if presented with signed authorization cards from a majority of employees. Many argue that such a process is inherently more susceptible to intimidation and coercion as it is largely unregulated.

### **What Lies Ahead . . .**

With union favorability at heights not seen in decades and a union-friendly political climate, organizing is a very real possibility for food and beverage employers and having employees represented by a union carries with it very real implications. If employees select a labor organization as their bargaining representative, the NLRA requires that the employer deal exclusively with that union with respect to any and all mandatory subjects of bargaining (wages, hours, and conditions of employment). Also, employers would be required to give the labor organization notice and an opportunity to bargain before modifying any policies or processes that impact a mandatory subject of bargaining. Another consideration is that the NLRA provides employees with the right to strike, and such strike actions have recently seemed more prevalent. As an example, the NLRB has more than 170 open cases alleging anti-union threats, retaliation, and other violations against Starbucks. Starbucks employees have started going on strike, sometimes even before their union elections are complete, in order to draw attention to the charges.

Food and beverage employers should understand the significance of their workforce becoming organized. As food and beverage employers may not have been exposed to unionization efforts until recently, these employers may wish to speak with competent legal counsel to discuss how to anticipate and prepare for unionization and ensure that their business, operations, and supervisors are equipped with the understanding needed to appropriately and lawfully navigate these circumstances.

### **ENDNOTES**

[1] The PRO Act was passed in the U.S. House on March 9, 2021. President Biden said that he would sign the PRO Act into law if it passed in the U.S. Senate.

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