



# The Biden Administration's “Whole of Government” Approach To Promoting Labor Unions



U.S. Chamber of Commerce

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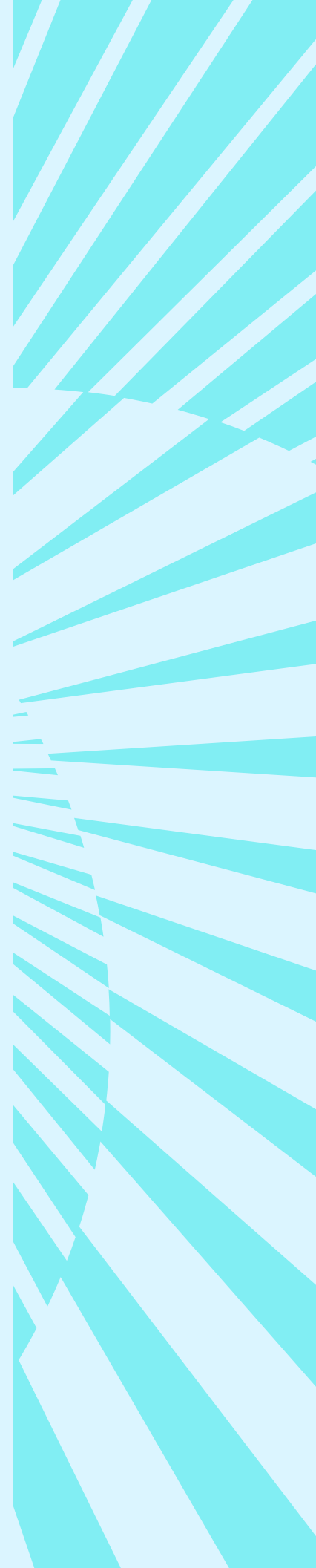
As a candidate in 2020, President Biden regularly stated that he would be the most pro-union president in history and would make increased unionization a top priority of his administration. To meet this pledge, the president has employed a “whole of government” approach that has mobilized the entire apparatus of the federal government to promote unions. By doing so, the Biden administration has put its thumb firmly on the scale for unions above all others. Even though some federal policies historically have favored one group or another, President Biden’s utilization of the whole executive branch to promote a single special interest over everything else is unprecedented. As will be discussed in this paper, the administration’s approach is harmful to workers, employers, and the economy. Moreover, it has led to an emboldened labor movement that has pushed a “summer of strikes” culminating in the United Auto Workers going on strike against all of the Detroit three at the same time. These strikes are causing collateral damage to a host of local businesses and communities. Illustrating the extent of the President’s determination to promote unions above all others, the President decided to personally picket Detroit Three automakers as part of this strike activity, a step no president has ever taken.

The Biden administration’s “whole of government” approach has involved executive orders, memoranda of understanding, interagency task forces and councils, initiatives, reports, agency rulemaking, federal funding, a concerted enforcement strategy, and a congressional strategy. This White Paper details the various elements of the Biden administration’s advocacy for unions. It is important to note that this White Paper may not cover every single executive and agency action and will be updated periodically.



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# Introduction

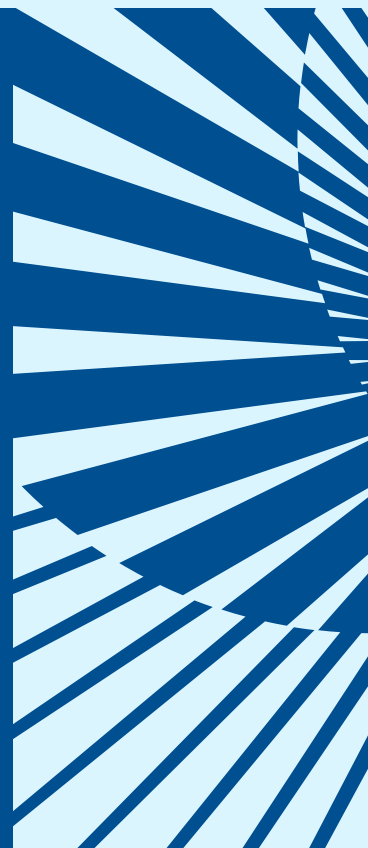
The “whole of government” approach, also commonly referred to as an “all-hands-on-deck” or “all of government” approach, is an unprecedented effort to promote the Biden administration’s pro-union agenda across the entire spectrum of the government. Regardless of the precise label, the White House’s actions embody President Biden’s vow to be “the most pro-union President leading the most pro-union administration in American history.”<sup>1</sup> To carry out this central campaign promise and theme, the “whole of government” approach has relied on presidential encouragement and engagement as well as coordination and execution across the executive branch and the vast administrative state. More specifically, the “whole of government” approach has involved executive orders, interagency task forces, councils, Memoranda of Understanding (MOUs),

individual agency actions such as rulemaking and enforcement strategies, attempts to influence Congress, and a host of other ways to achieve a pro-union agenda at all costs.

When discussing the whole of government approach to promoting unions, it is critical to remember that the cornerstone of U.S. labor law is the right of employees to make their own decisions about unions. Indeed, the law does not (and should not) dictate the choice of unionization for employees; instead, it is up to each employee to make that decision for themselves. But the Biden administration’s whole of government approach undermines that touchstone of American law.

The Biden administration’s unions-at-all-costs approach starts at the top, mainly through

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executive orders. Most notably, the White House, via executive order, has formed a multiagency Task Force on Worker Organizing and Empowerment. In another executive order, President Biden directed the federal government’s “full authority” to promote and implement policies that “encourage worker organizing and collective bargaining.” These executive orders have resulted in broad directives to a wide variety of federal agencies to encourage projects that promote union density and “encourage” businesses that apply for funding on such projects to surrender to union demands. In other words, the Biden administration has weaponized government funding to promote union membership across the country.

Another key element of the Biden administration’s whole of government approach is the use of MOUs among agencies to enhance their information sharing, investigations, enforcement, training, and outreach. These MOUs ensure greater coordination and collaboration among federal agencies as they maximize their pro-union agenda.

In addition, the whole of government approach has relied on specific federal agency action. Perhaps not surprisingly, the National Labor Relations Board (NLRB) is the most active agency supporting the approach. Since the very beginning of his administration, President Biden’s NLRB, including its General Counsel, has launched a concerted campaign against employer free speech rights, seeking to prevent workers from hearing any voice other than that of labor unions. At the same time, the NLRB has overturned precedents that prevented unions from gerrymandering their own bargaining units in workplace elections and that allowed employers to discipline employees who used profanity and hate speech in the workplace. Furthermore, the NLRB has attempted to convert independent contractors into formal employees to ensure that unions can organize them and collect dues. Perhaps most significantly, the Board has granted itself the discretion to impose card check certification on workers and employers.

1 See, e.g., Remarks by President Biden in Honor of Labor Unions (Sept. 8, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/08/remarks-by-president-biden-in-honor-of-labor-unions/>.

Ultimately, the Biden administration’s whole of government approach is an unprecedented effort to harness the vast power of the federal government to promote unionization. It goes well beyond the text of the National Labor Relations Act (NLRA), which states merely that the purpose of the statute is to: “eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining[.]”

In addition to the NLRB, countless other federal agencies are involved with supporting President Biden’s whole of government approach. For example, the Federal Trade Commission (FTC) is exploring ways to regulate the gig economy and trying to ban all non-compete agreements, both important union priorities. Meanwhile, the U.S. Department of Labor’s (DOL) website prominently features information on joining unions and actively promotes the “union advantage” even though DOL does not enforce the relevant statute at issue. DOL is also pursuing an independent contractor regulation and a “walk-around” rule that would grant union organizers access to non-union workplaces.

The Biden administration’s whole of government approach has also utilized congressional action. President Biden has repeatedly demanded that Congress increase union power through the Protecting the Right to Organize Act, a radical proposal that would upend American labor law, sought additional funding for the NLRB and DOL, and promoted union priorities in legislation like the Infrastructure and Jobs Act and other bills.

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# I. Setting the Stage

In order to understand the whole of government approach, it is important to set the stage for how the framework was established. As noted earlier, President Biden made a campaign pledge to be “the most pro-union President leading the most pro-union administration in American history.”<sup>3</sup> Furthermore, unions spent an estimated \$1.8 billion on political and lobbying efforts during the 2020 election cycle.<sup>4</sup> As a presidential candidate, Biden issued a labor plan stating that his administration “will ensure federal contracts only go to employers who sign neutrality agreements committing not to run anti-union campaigns.”<sup>5</sup>

To ensure that his campaign promises regarding unions were fulfilled, Biden handpicked union advocates for key positions throughout the federal agencies. For instance, President Biden appointed Gwynne Wilcox and David Prouty

to the NLRB. Both Member Wilcox and Member Prouty came to the NLRB after having served as counsel to unions for decades.<sup>6</sup> President Biden also appointed Jennifer Abruzzo, a former NLRB career attorney who had spent over 20 years at the agency and had most recently served as General Counsel for the Communication Workers of America, to serve as the NLRB’s General Counsel.<sup>7</sup> DOL’s Wage and Hour Division (WHD) has been led by Jessica Looman, the former executive director of the Minnesota State Building and Construction Trades Council.

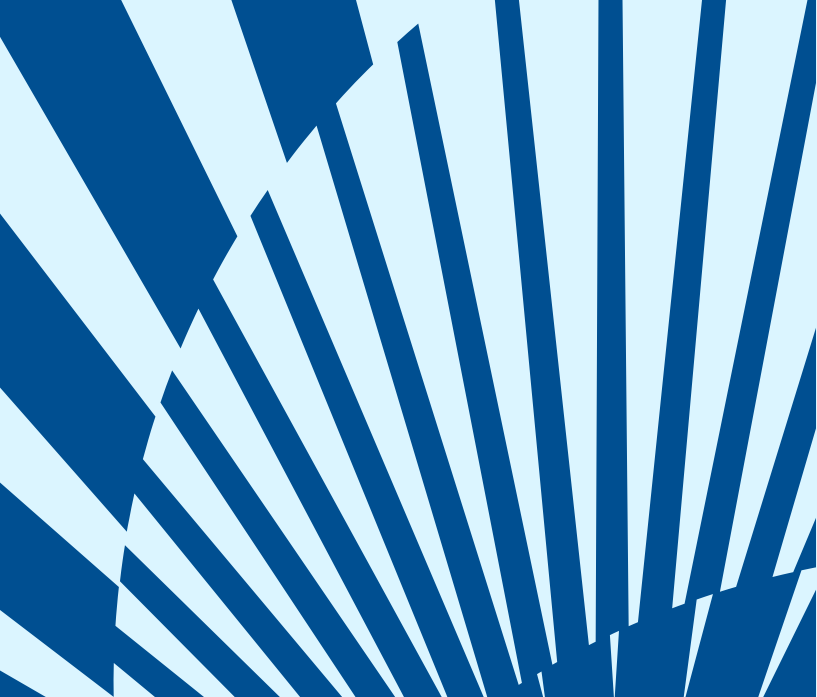
President Biden’s selections within the White House have also been labor union veterans. For example, President Biden named Celeste Drake, a longtime trade expert at the AFL-CIO, to serve as the director of the Office of Management and Budget’s newly created “Made in America”



program, which is designed to direct more federal money to U.S. manufacturers.<sup>8</sup> Ms. Drake was later promoted to Deputy Assistant to the president and deputy director of the National Economic Council. Because of Ms. Drake's longtime role at the AFL-CIO, the White House had to file two separate waivers of Executive Order 13989, titled "Ethics Commitments by Executive Branch Personnel," which prohibited her from working on AFL-CIO matters because of the conflicts of interest that were triggered with her White House position and her former union role.<sup>9</sup> The restriction requiring a waiver prevented Ms. Drake from "discussions, meetings, and other communications" involving the AFL-CIO and its affiliates, including discussions related to "labor rights and manufacturing."<sup>10</sup> The White House document claims that a waiver was "necessary and in the public interest" because "[i]n her role as a [White House] Deputy Director, Ms. Drake will need to meet with labor entities, and [the] AFL-CIO is one of the largest labor groups in the United States."<sup>11</sup> Ms. Drake left the White House in August of 2023 and was immediately replaced by another longtime

union official.<sup>12</sup> Other Biden administration political appointees have been required to get waivers because of their strong union ties. For instance, in 2021, the Office of Personnel Management's director of intergovernmental affairs, Alethea Predeoux, was required to receive a waiver from the ethics executive order because she had previously served as the top lobbyist for the American Federation of Government Employees, the largest federal employee union.<sup>13</sup> These waivers have enabled former union leaders to serve in key positions in which they will interact directly with their former employers, thus undoubtedly creating a problematic situation whereby unions directly benefit from Biden administration policies.

- 3 Remarks by President Biden in Honor of Labor Unions (Sept. 8, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/08/remarks-by-president-biden-in-honor-of-labor-unions/>.
- 4 Audrey Conklin, US organized labor spent over \$1.8 billion on politics, lobbying during 2020 election: report, Fox Business (July 23, 2021), <https://www.foxbusiness.com/politics/organized-labor-political-spending-2020-election>.
- 5 Daniel V. Johns, The Coddling of the American Worker's Mind: The Anti-Free Speech Nature of Popular Labor Law Reforms, 30 Wm. & Mary Bill Rts. J. 755, 768 (2022).
- 6 See Daniel Wiessner & David Shepardson, U.S. Senate approves union lawyers to NLRB, giving Democrats control, Reuters (July 28, 2021), <https://www.reuters.com/legal/legalindustry/senate-approves-union-lawyer-wilcox-nlr-seat-2021-07-28/>.
- 7 Id.; President Biden Announces Key Nomination on Jobs Team (Feb. 17, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/17/president-biden-announces-key-nomination-on-jobs-team/>.
- 8 White House, President Biden Announces Key Hire at the Office of Management and Budget (Apr. 27, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/27/president-biden-announces-key-hire-at-the-office-of-management-and-budget/>.
- 9 See White House, Memorandum for Celeste Drake (Apr. 29, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/04/Celeste-Drake-Pledge-Waiver.pdf>; White House, Memorandum for Celeste Drake (Nov. 14, 2022), <https://www.whitehouse.gov/wp-content/uploads/2022/11/Drake-waiver.pdf>.
- 10 Id.
- 11 Id.
- 12 See Jordan Fabian, Biden Names Veteran Union Official as Labor Policy Adviser, Bloomberg Law (Aug. 21, 2023), <https://news.bloomberglaw.com/safety/biden-names-long-serving-union-official-as-top-labor-adviser>.
- 13 See Courtney Buble, Were Biden's Ethics Waivers for Labor Ties Justified?, Government Executive (May 11, 2021), <https://www.govexec.com/oversight/2021/05/were-bidens-ethics-waivers-labor-ties-justified/173958/>.



Following his inauguration, President Biden almost immediately initiated the process to deliver on his campaign promise to be the most pro-union president in the nation's history. On January 20, 2021, within minutes of taking office, President Biden requested the resignation of NLRB General Counsel Peter Robb. The White House fired Mr. Robb after he refused to resign.

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The very next day, the president requested the resignation of Acting General Counsel Alice Stock, who was elevated from her previous position as Deputy General Counsel after Mr. Robb was fired. Because she also refused to resign, she also was fired. While it is common for an incoming administration to make certain personnel changes, no president had fired the incumbent NLRB General Counsel prior to the end of their Senate-confirmed four-year term. Shortly after Mr. Robb was fired, President Biden nominated Ms. Abruzzo for the position. In July of 2021, she was confirmed by the Senate on a 51-50 vote, with Vice President Kamala Harris casting the tie-breaking vote.

In part, President Biden's whole of government approach is driven by academics. For instance, in a recent essay, Hiba Hafiz and Ioana Marinescu lauded the Biden administration's approach and argue that "[r]egulatory agencies' 'whole-of-government' approach . . . would greatly benefit from improved coordination based on a unifying framework identifying indicators of employer and worker power for use in triggering investigations, setting enforcement priorities, and shaping substantive policy."<sup>14</sup>

<sup>14</sup> See, e.g., Hiba Hafiz & Ioana Marinescu, Labor Market Regulation and Worker Power, 90 U. Chi. L. Rev. 469, 472 (2023). See also Richard A. Epstein, The Application of Antitrust Law to Labor Markets - Then and Now, 15 NYU J.L. & Liberty 327, 327-28 (2022) (discussing the important role that academics have had within the Biden administration).



# II. Executive Orders and Actions

A central focus of the Biden administration's whole of government approach has been utilizing executive orders. In a nutshell, an executive order is a signed, written, and published directive from the president that manages operations of the federal government. President Biden has used executive orders to lay out the executive level framework and initial steps to promote unions. After his inauguration, President Biden immediately turned to executive orders to deliver on his campaign promise to be the most pro-union president in the nation's history. Two days after being sworn in, President Biden issued Executive Order 14003, entitled "Protecting the Federal Workforce," which stated that it is "the policy of the United States to encourage union organizing and collective bargaining."<sup>15</sup>

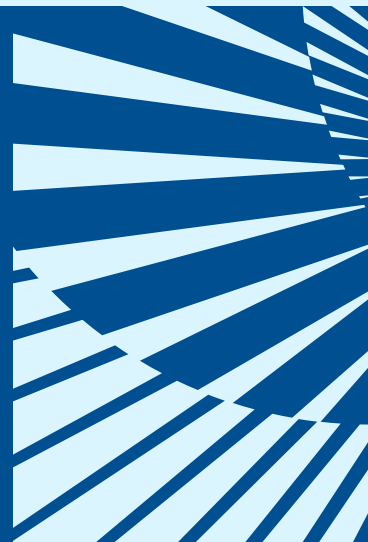
## A. The White House Task Force on Worker Organizing and Empowerment

Three months after his inauguration, on April 26, 2021, President Biden issued Executive Order 14025 entitled "Worker Organizing and

Empowerment," establishing a White House Task Force to promote unions.<sup>16</sup> Led by Vice President Kamala Harris and then-Labor Secretary Marty Walsh, the Task Force was charged with leading a "whole-of-government approach to empower workers."<sup>17</sup> According to the White House announcement regarding the Task Force's mission, President Biden believes the decline of union membership is contributing to "serious societal and economic problems." The announcement proudly declared that the approach laid out in the executive order was unrivaled historically, stating: "While some administrations have taken selected actions to strengthen workers' rights, no previous administration has taken a comprehensive approach to determining how the executive branch can advance worker organizing and collective bargaining."<sup>18</sup>

To deploy the full extent of government, the Task Force identified four goals: (1) identify ways to make the federal government a model employer with respect to encouraging worker organizing and collective bargaining among its

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workforce; (2) facilitate “an all-of-government approach to mobilize the federal government’s policies, programs, and practices to provide workers the opportunity to organize and bargain collectively”; (3) address challenges to worker organizing in jurisdictions with restrictive labor laws as well as for marginalized workers; and (4) increase union membership across the country.<sup>19</sup>

On February 7, 2022, the Task Force on Worker Organizing and Empowerment issued a long-awaited report recommending 70 actions that executive branch agencies and departments could implement to promote pro-union policies and practices in the public and private sectors.<sup>20</sup> Therein, the Task Force makes several notable recommendations:

- Encourages the use of project labor agreements (i.e., project-specific collective bargaining agreements) on projects receiving federal assistance from the Treasury Department, the Environmental Protection Agency, Department of Transportation, Department of Commerce, Department of the Interior, and Department of Veterans Affairs.
- Suggests a future executive order that would establish targets or preferences for the use of registered apprenticeships and training for recipients of federal funds.

- Highlights that unions are eligible grantees of American Rescue Plan “Good Jobs Challenge Funds,” which may be used for starting or scaling apprenticeship programs.
- Recommends that President Biden instruct DOL to strengthen its rules and enforcement with respect to the Labor Management and Disclosure Act’s “persuader rule.” Generally, the persuader rule requires labor consultants and employers that hire them to file reports with the Office of Labor Management Standards (OLMS) detailing the nature of the persuader activity and monies spent.
- Recommends that federal contractors that file persuader reports must disclose whether they are a federal contractor so that federal contracting agencies are aware of the reports and ensure that federal monies are not spent on persuader activities.
- Recommends that the president should strongly encourage the NLRB, Federal Labor Relations Authority, Federal Mediation and Conciliation Services, and National Mediation Board to prioritize expanded outreach at the national and regional levels and post updated, visible, and accessible materials on agency websites and social media platforms about workers’ organizing and bargaining rights.

<sup>15</sup> Exec. Order No. 14003 (Jan. 22, 2021).

<sup>16</sup> FACT SHEET: Executive Order Establishing the White House Task Force on Worker Organizing and Empowerment, White House (Apr. 26, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/26/fact-sheet-executive-order-establishing-the-white-house-task-force-on-worker-organizing-and-empowerment/>.

<sup>17</sup> Id.

<sup>18</sup> Id.

<sup>19</sup> Id.

<sup>20</sup> See White House Task Force on Worker Organizing and Empowerment, Report to the President, <https://www.whitehouse.gov/wp-content/uploads/2022/02/White-House-Task-Force-on-Worker-Organizing-and-Empowerment-Report.pdf>.

- Recommends that the General Services Administration (GSA) facilitate training or listening sessions for federal contractors' employees about the benefits of collective bargaining and unions. To implement this recommendation, in September 2022, GSA issued a final rule allowing union organizers access to GSA controlled property to talk to workers of private sector contractors about the benefits of joining a union.<sup>21</sup>
- Directs the Treasury Department to (1) encourage jurisdictions to use federal funds for initiatives that strengthen worker skills and use union labor, and (2) investigate reporting mechanisms to examine the impact of this encouragement to the extent it is relevant to the type of financial assistance provided.<sup>22</sup>

In March of 2023, the White House issued an update on the Task Force and alleged that the agencies had advanced the Task Force's recommendations actions "with significant results both inside and outside government."<sup>23</sup> Significantly, the update claimed that the number of federal government employees in a union had increased by nearly 20%.

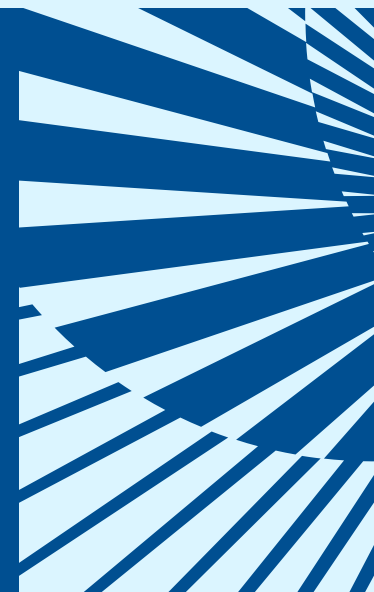
## **B. Antitrust Actions to Promote the Union Agenda**

Another part of the Biden administration's

concerted push is to expand the application of antitrust law against major employers.<sup>24</sup> This effort is supported by prominent academics and mainly involves attacks on non-compete agreements and the gig economy, and a more intense review of mergers.<sup>25</sup>

Much of this antitrust push has been done by executive orders. On July 9, 2021, President Biden signed a sweeping executive order entitled "Promoting Competition in the American Economy" which alleged that a "whole-of-government approach" was needed to counter "[c]onsolidation [that] has increased the power of corporate employers, making it harder for workers to bargain for higher wages and better working conditions."<sup>26</sup> This executive order outlined a systematic approach to address alleged over-concentration, monopolization, and unfair competition in the American economy. Importantly, the executive order encourages the FTC to ban or limit non-compete agreements "and other clauses or agreements that may unfairly limit worker mobility." As part of the systematic approach, the executive order directed the Secretary of the Treasury, in consultation with the Attorney General, the Secretary of Labor, and the Chair of the FTC, to produce a report on the effects of lack of competition on labor markets. The order also establishes a White House

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Competition Council, led by the Director of the National Economic Council, to “coordinate, promote, and advance Federal Government efforts to address overconcentration, monopolization, and unfair competition in or directly affecting the American economy.”

The momentous impact of Biden’s antitrust executive order across the entire government was immediate. After the executive order was signed, Attorney General Merrick Garland issued a press release stating: “The Department of Justice welcomes the Executive Order, which furthers a fair, open and competitive economy through a ‘whole of government’ approach.”<sup>27</sup> Attorney General Garland further noted that he would “immediately begin implementing the interagency collaborations called for in the Executive Order, and we look forward to helping our agency partners use their regulatory authorities to bring greater competition to the U.S. economy.”<sup>28</sup> Meanwhile, the U.S. Chamber of Commerce sharply criticized the executive order for adhering to a government-knows-best approach that failed to advocate for market-based competition.<sup>29</sup> Legal scholars have pointed out that those advocating for applying the antitrust laws against employers “are strangely quiet when it comes to curbing the monopoly power of public and private unions.”<sup>30</sup>

- 21 News Release, GSA Announces Rule Enabling Union Organizers to Access Federal Contractors in GSA-Controlled Facilities, GSA (Sept. 2, 2022), <https://www.gsa.gov/about-us/newsroom/news-releases/gsa-announces-rule-enabling-union-organizers-to-access-federal-contractors-in-gsacontrolled-facilities-09022022>.
- 22 See White House Task Force on Worker Organizing and Empowerment, Report to the President, <https://www.whitehouse.gov/wp-content/uploads/2022/02/White-House-Task-Force-on-Worker-Organizing-and-Empowerment-Report.pdf>.
- 23 The White House Task Force on Worker Organizing and Empowerment: Update on Implementation of Approved Actions, <https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/17/the-white-house-task-force-on-worker-organizing-and-empowermentupdate-on-implementation-of-approved-actions/>.
- 24 See Richard A. Epstein, The Application of Antitrust Law to Labor Markets - Then and Now, 15 NYU J.L. & Liberty 327, 327-28 (2022).
- 25 Id.; Hiba Hafiz, A Whole-of-Government Approach to Increasing Worker Power, Roosevelt Institute (Dec. 2022), [https://rooseveltinstitute.org/wp-content/uploads/2022/12/RI\\_WholeofGovernmentApproachtolncreasingWorkerPower\\_Brief\\_202212.pdf](https://rooseveltinstitute.org/wp-content/uploads/2022/12/RI_WholeofGovernmentApproachtolncreasingWorkerPower_Brief_202212.pdf). See also Hiba Hafiz, Rethinking Breakups, 71 Duke L.J. 1491, 1501 (2022) (noting that “the Biden administration has appointed leading progressive antitrust advocates in the White House, DOJ, and FTC to preside over the ‘Trust-Busting Biden Presidency.’”).
- 26 Exec. Order No. 14,036, 86 Fed. Reg. 36,987 § 1-2 (July 9, 2021).
- 27 Press Release: Statement of Attorney General Merrick B. Garland on the Justice Department’s Implementation of the Executive Order on Promoting Competition in the American Economy, U.S. Dep’t of Justice (July 9, 2021), <https://www.justice.gov/opa/pr/statement-attorney-general-merrick-b-garland-justice-department-s-implementation-executive>.
- 28 Id.
- 29 U.S. Chamber Believes Executive Order on Competition Fails to Advocate for Market-Based Competition, Instead Follows a ‘Government Knows Best’ Approach, U.S. Chamber of Commerce (July 9, 2021), <https://www.uschamber.com/finance/us-chamber-believes-executive-order-competition-fails-advocate-market-based>.
- 30 Richard A. Epstein, The Application of Antitrust Law to Labor Markets - Then and Now, 15 NYU J.L. & Liberty 327, 365 (2022).





### C. Executive Orders regarding Federal Funding

On November 15, 2021, President Biden issued Executive Order 14052, “Implementation of the Infrastructure Investment and Jobs Act,” which states that federal investments should incorporate strict labor standards and create good jobs with the “free and fair choice to join a union.”<sup>31</sup> A few months later, on February 4, 2022, President Biden issued Executive Order 14063, “Use of Project Labor Agreements for Federal Construction Projects,” which requires the use of project labor agreements on federal construction projects of \$35 million or more.<sup>32</sup>

These executive orders are highly important in laying the groundwork for the pro-union provisions that would be attached to federal funding. As will be detailed later in this paper, these executive orders have been used to “encourage” or force businesses to agree to a myriad of pro-union conditions. And this reality is hardly a secret. Steve Smith, a national spokesman for the AFL-CIO, has explained that this funding is enormously beneficial to unions and that the unions now “have federal money rolling in, a friendly administration

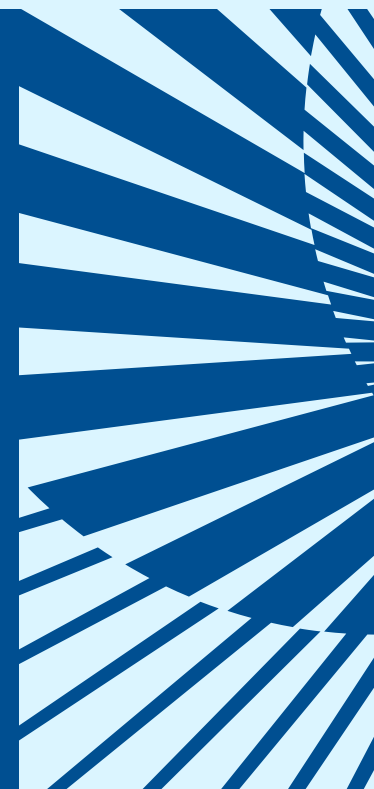
and a chance to make inroads like we have never had before.”<sup>33</sup> These anti-competitive and costly executive orders reward union interests at the expense of taxpayers and businesses that benefit from fair and open competition on taxpayer-funded projects.

### D. White House Office Actions

The Biden administration has also turned to specialized offices within the White House to aggressively push its pro-union agenda. The real or perceived proximity to the president provides these offices with significant influence and equips them with an impressive inventory of both formal and informal tools of persuasion. A few White House office actions are illustrative.

- The White House Office of Domestic Climate Policy, which implements the president’s climate agenda, emphasizes that part of its “all-of-government approach to tackle the climate crisis” involves creating “good-paying, union jobs.”<sup>34</sup>
- The White House’s Gender Policy Council, which was created by President Biden to advance gender equity and equality in both

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domestic and foreign policy development and implementation, has put forth a National Strategy on Gender Equity and Equality in the U.S. which states that one of its goals is to “ensure that women have a free and fair choice to join a union.”<sup>35</sup>

- In 2022, the White House’s Office of Science and Technology Policy (OSTP) issued its “Blueprint for an AI Bill of Rights,” which addressed contexts in which automation could lead to bias and discrimination, including at the workplace.<sup>36</sup> The blueprint cites instances where employers had reportedly used “surveillance software to track employee discussions about union activity and use the resulting data to surveil individual employees and surreptitiously intervene in discussions.”<sup>37</sup>
- In 2023, OSTP issued a request for information on the impacts of automated surveillance and management technologies on workers.<sup>38</sup> The request alleges, without any citation, that “[e]merging research suggests that certain applications of these systems may undermine ... workers’ ability

to organize and work collectively with their coworkers to improve working conditions, including through labor unions.”

- The White House later hosted a briefing for unions on the request for information in partnership with AFL-CIO Tech Institute.<sup>39</sup>

The White House has also used meetings and listening sessions to further implement and advance its whole of government approach to promoting unions. For instance, the White House hosted a listening session on July 3, 2023, with union leaders to discuss the impact of artificial intelligence on workers, job quality, and civil rights.<sup>40</sup> The listening session included officials from the White House National Economic Council, Office of Science and Technology Policy, and Office of the Vice President.<sup>41</sup>

31 Exec. Order No. 14052, 86 Fed. Reg. 86 FR 64335 (Nov. 15, 2021).

32 Exec. Order No. 14063 (Feb. 4, 2022).

33 Jonathan Weisman, Flush With Federal Money, Strings Attached, a Deep South Factory Votes to Unionize, NY Times (May 15, 2023), <https://www.nytimes.com/2023/05/12/us/politics/clean-energy-unions.html>.

34 See White House Climate Policy Office, <https://www.whitehouse.gov/cpo/>.

35 See White House National Strategy on Gender Equity and Equality in the U.S., <https://www.whitehouse.gov/wp-content/uploads/2021/10/National-Strategy-on-Gender-Equity-and-Equality.pdf>.

36 Blueprint for an AI Bill of Rights, <https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf>.

37 Id.

38 Request for Information; Automated Worker Surveillance and Management, OSTP, <https://www.federalregister.gov/documents/2023/05/03/2023-09353/request-for-information-automated-worker-surveillance-and-management>.

39 The White House, Readout of White House Listening Session with Union Leaders on Advancing Responsible Artificial Intelligence Innovation (July 3, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/07/03/readout-of-white-house-listening-session-with-union-leaders-on-advancing-responsible-artificial-intelligence-innovation/>.

40 Id.

41 Id.

# III. Memoranda of Understanding

The Biden administration has also used MOUs to further support its pro-union agenda. In brief, MOUs are generally unenforceable, non-binding agreements signed between various agencies that clarify agencies' respective jurisdictions, assign regulatory tasks, and establish ground rules for information-sharing, investigations, training, public outreach, enforcement, and other informal arrangements. In practical terms, MOUs function as the network of contracts that aim to bring together interagency coordination within the administrative state and help streamline the process for investigating and penalizing businesses on a wide range of issues such as misclassification.<sup>42</sup> Agencies also have agreed to enhance their coordinated efforts in investigations and enforcement for both individual matters and larger investigations. MOUs enable agencies to refer complaints between agencies and allow each agency to advise employees about rights they may

have under laws enforced by the other agency if alleged misconduct is believed to have occurred. For example, if an NLRB investigator suspects that an employer has violated laws enforced by the DOL, an MOU may allow an investigator to advise the impacted employee of his or her rights. MOUs have been a key feature of the Biden administration's whole of government approach.<sup>43</sup>

Most notably, the NLRB has MOUs with many other federal agencies, even those whose scope would appear to have very little to do with the NLRB's statutory purpose, including DOL's WHD, the FTC, the Consumer Financial Protection Bureau (CFPB), and the Department of Justice's Antitrust Division. Many of these MOUs have focused on particular areas of union concern such as targeting the gig economy. For instance, in 2022, the NLRB and the FTC entered into an MOU regarding

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information sharing, cross-agency training, and outreach in areas of common regulatory interest that largely focused on the gig economy.<sup>44</sup> A year later, the NLRB and CFPB also entered into an MOU, stressing the need for the two agencies to address alleged (although unidentified) harm underlying the gig economy.<sup>45</sup> The agreement suggests that gig economy companies will increasingly become targets of government investigations that can easily expand to other agencies. This focus on independent contractors is highly important to unions. The reason underlying the attack on the gig economy is that independent contractors generally cannot bargain collectively, and so do not join unions.<sup>46</sup> That means unions forgo potential members and thus potential membership dues.

Biden administration officials have not shied away from boasting that they are using a whole of government approach to push their pro-union agenda with the use of MOUs. In an MOU announcement between the NLRB and the CFPB in March 2023, NLRB General Counsel Abruzzo explained that the NLRB was “excited to work with CFPB to strengthen our whole-of-government approach...”<sup>47</sup>

MOUs are also used to ensure that the Biden administration’s whole of government approach affects state and local jurisdictions as well. Many of the MOUs between agencies include sections regarding state programs. For example, in an MOU between WHD and the Occupational Safety and Health Administration (OSHA), the state program requires OSHA and WHD regional administrators to “work together to facilitate referrals of potential violations to WHD from the relevant state agencies in those states which operate their own occupational safety and health programs under a plan approved by OSHA.”<sup>48</sup> MOUs are also meant to improve federal agencies’ influence with state agencies. Notably, the WHD website stresses that the agency uses MOUs to “build and maintain[] strong relationships with state” agencies and to “foster communication.”<sup>49</sup> WHD also emphasizes that the agency “has MOUs with states across the country concerning the various laws that WHD enforces, including MOUs that address misclassification.”<sup>50</sup> These MOUs are not limited to comparable state-level agencies as WHD has MOUs with state attorney generals’ offices, counties, and district attorneys’ offices across the country as well. For instance, WHD

42 See Bradford J. Kelley, *Wage Against the Machine: Artificial Intelligence and the Fair Labor Standards Act*, 34 *Stan. L. & Pol’y Rev.* 261, 291 (2023) (discussing the purpose of MOUs by various agencies).

43 Hiba Hafiz & Ioana Marinescu, *Labor Market Regulation and Worker Power*, 90 *U. Chi. L. Rev.* 469, 504–05 (2023) (arguing that “[i]nformation sharing and referrals between agencies can institutionalize labor agency cooperation and strengthen a whole-of-government approach to deter employer noncompliance and alert regulators to issues or facts they might otherwise overlook.”).

44 See Kelley, *supra* note 41 (contending that MOUs will become increasingly important in the future); Memorandum of Understanding Between The Federal Trade Commission (FTC) and the National Labor Relations Board (NLRB) Regarding Information Sharing, Cross-Agency Training, and Outreach in Areas of Common Regulatory Interest, <https://www.nlr.gov/sites/default/files/attachments/pages/node-7857/ftcnlr-mou-71922.pdf>.

45 CFPB and NLRB Announce Information Sharing Agreement to Protect American Consumers and Workers from Illegal Practices (Mar. 7, 2023), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-nlr-announce-information-sharing-agreement-to-protect-american-consumers-and-workers-from-illegal-practices/>.

46 See 29 U.S.C. § 152(3) (excluding independent contractors from definition of “employee” under federal labor law); *Columbia River Packers Ass’n v. Hinton*, 315 U.S. 143, 145—46 (1942) (holding that antitrust exemption for labor unions did not apply to collection of independent contractors, and therefore collective bargaining by contractors amounted to an unlawful restraint of trade).

47 CFPB and NLRB Announce Information Sharing Agreement to Protect American Consumers and Workers from Illegal Practices (Mar. 7, 2023), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-nlr-announce-information-sharing-agreement-to-protect-american-consumers-and-workers-from-illegal-practices/>.

48 Memorandum of Understanding between the United States Department of Labor, Occupational Safety and Health Administration and the United States Department of Labor, Wage and Hour Division (Aug. 4, 2021), <https://www.osha.gov/laws-regs/mou/2021-08-04>.

49 WHD, State Enforcement and Outreach Coordination, <https://www.dol.gov/agencies/whd/about/state-coordination>.

50 *Id.*

has entered into MOUs with the Minnesota Department of Labor and Industry, the City of Minneapolis Department of Civil Rights, and the Minnesota Attorney General's office.<sup>51</sup> Regional offices have also entered MOUs with non-governmental entities. One example is the WHD New Orleans District Office and the Workplace Justice Project, a non-profit worker advocacy organization partnered with at least 10 unions, which signed an MOU in 2023 "to improve both organizations' effectiveness."<sup>52</sup>

Moreover, MOUs provide the Biden administration's whole of government approach with a global reach. For example, the U.S. Equal Opportunity Commission (EEOC) regularly enters into MOUs with foreign embassies and consulates to enhance cooperation on matters involving employment discrimination. In 2022 alone, the EEOC entered into MOUs with the Ministry of Foreign Affairs of the Republic of Guatemala, the Ministry of Foreign Affairs of the Republic of El Salvador, and the Secretariat of Foreign Relations and International Cooperation of the Republic of Honduras.<sup>53</sup>

51 Id.

52 DOL News Brief, Partnership Between Department of Labor, Workplace Justice Project Will Help Expand Outreach to New Orleans' Low-wage Workers (Aug. 23, 2023), <https://www.dol.gov/newsroom/releases/whd/whd20230823-0>.

53 See EEOC Memoranda of Understanding, <https://www.eeoc.gov/mou/memoranda-understanding>.



# IV. Specific Agency Actions

The Biden administration has directed federal agencies to carry out specific pieces of the whole of government approach. The specific agency actions include considerable overlap with the executive orders and MOUs, but simultaneously go even further, especially with rulemaking and the weaponization of funding programs to promote unionization. The executive orders established the mission and framework, the MOUs formed the necessary communication channels, and the agencies are implementing the tactical components of the larger strategy and addressing micro-level concerns.

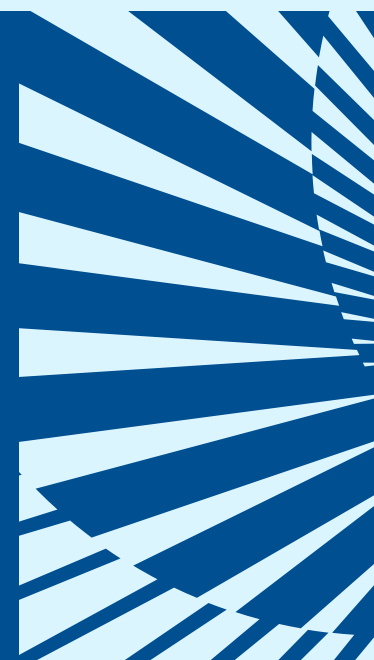
## A. The National Labor Relations Board

Not surprisingly, the NLRB has been the most active federal agency promoting specific aspects of President Biden's whole of government approach. The NLRB is the agency responsible for enforcing the NLRA, which protects the right "to form, join, or assist" a union, and it also protects "the right to refrain from any or all of such activities..."<sup>54</sup>

The bedrock principle underlying the NLRA is the right of employees to make their own decisions about whether to have union representation. Indeed, the Supreme Court has explained that the NLRA "is not intended to serve [either labor or business'] individual interest, but to foster in a neutral manner a system in which the conflict between [employer and employee] interests may be resolved."<sup>55</sup> Federal circuit courts have stressed that the NLRA "was not passed to encourage pro-union activity."<sup>56</sup> Federal appellate courts have similarly emphasized that "it is not the purpose of the statute to pressure employees into undertaking organizational efforts. Embodied in the statute is a principle of free choice."<sup>57</sup> The Biden administration's whole of government approach, and the specific policies being pursued by the NLRB, is antithetical to this long-held understanding.

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agency. The NLRB, including General Counsel Abruzzo, has, among other actions, launched a concerted campaign against employer free speech rights and attempted to prevent workers from hearing any voice other than that of unions.<sup>58</sup> The NLRB has also overturned longstanding precedent that had ensured unions could not gerrymander their own bargaining units in workplace elections and that had allowed employers to discipline employees for using profanity and hate speech in the workplace. It has also made radical changes to the union certification process, empowering itself to allow unions to organize by card check instead of secret ballot elections. Finally, the NLRB wants to convert independent contractors into statutory employees so that unions can organize them and collect dues.<sup>59</sup>

## 1. NLRB General Counsel Memoranda

After her appointment and confirmation, NLRB General Counsel Abruzzo immediately sought not only to reinstate Obama-era Board decisions, but also to implement significant changes in enforcement and policy chiefly through memoranda. The Board uses Office of General Counsel memoranda to provide policy guidance for employers, employees, and unions. Importantly, these memoranda provide notice

of the NLRB General Counsel's enforcement position and guidance for NLRB regional offices across the country to follow when handling cases. The reality is that many employers view NLRB General Counsel memoranda as a warning rather than as simply suggestions for the Board. A few of these memoranda are illustrative of President Biden's whole of government approach to promoting unions.

- On August 12, 2021, General Counsel Abruzzo issued a memorandum outlining dozens of areas where she potentially was looking to overturn NLRB precedent or change the direction of Board law.<sup>60</sup>
- General Counsel Abruzzo has issued several memoranda urging the Board's regional offices to pursue aggressive remedies against employers.
- On September 8, 2021, General Counsel Abruzzo issued a memorandum that urged the Board's regional offices to consider closely the full scope of aggressive remedies she deems available to them for issuance against employers.<sup>61</sup> The memorandum effectively directs the regional offices

54 See 29 U.S.C. § 157.

55 *First Nat. Maint. Corp. v. N.L.R.B.*, 452 U.S. 666, 680–81 (1981).

56 *Liberty Mut. Ins. Co. v. N.L.R.B.*, 592 F.2d 595, 602 (1st Cir. 1979).

57 *Waterbury Cmty. Antenna, Inc. v. N.L.R.B.*, 587 F.2d 90, 99 (2d Cir. 1978).

58 Glenn Spencer & Michael J. Lotito, Biden's union push limits workers' choices, *Wash. Times* (June 22, 2023), <https://www.washingtontimes.com/news/2023/jun/22/bidens-union-push-limits-workers-choices/>.

59 *Id.*

60 NLRB General Counsel Memorandum GC 21-04, "Mandatory Submissions to Advice," (Aug. 12, 2021), <https://www.nlr.gov/news-outreach/news-story/general-counsel-jennifer-abruzzo-releases-memorandum-presenting-issue>.

61 NLRB General Counsel Memorandum GC 21-06, "Seeking Full Remedies" (Sept. 8, 2021), <https://www.nlr.gov/guidance/memos-research/general-counsel-memos>.



- to adopt the General Counsel’s position that the Board possesses “broad discretionary authority under Section 10(c)” of the NLRA to seek a “full panoply” of remedies available against employers found to have committed unfair labor practices. The memorandum suggests that the Board’s remedial power is seemingly unlimited (at least in General Counsel Abruzzo’s view).
- Continuing her focus on seeking the “full panoply” of remedies, General Counsel Abruzzo issued another memorandum on September 15, 2021, directed at the issuance of full remedies in settlement agreements involving unfair labor practice charges.<sup>62</sup> This memorandum directed the regional offices to seek the “most full and effective relief” in both informal and formal settlement agreements. The directive states: [I]n negotiating settlement agreements, in addition to seeking no less than 100 percent of the backpay and benefits owed, Regions should always make sure to seek compensation for any and all damages, direct and consequential, attributable to an unfair labor practice.” The memorandum provided suggestions

for assessing consequential damages, including economic loss due to credit card interest or late fees incurred as a result of loss of income; loss of home or car because of inability to make payments; compensation for damage caused to an employee by a credit rating; and penalties incurred from having to prematurely withdraw money from a retirement account to cover living expenses.<sup>63</sup> The memorandum further highlighted some of the “full remedies” that Regions should consider such as issuing apology letters to reinstated employees.

- Building on past remedy memoranda, on June 23, 2022, General Counsel Abruzzo issued Memorandum GC 22-06 ordering prosecutors to seek “full remedies” in negotiated settlement agreements, including reimbursement for credit card late fees and for the loss of a home or car for failure to keep up with loan payments.<sup>64</sup> The memorandum highlighted remedies already secured in settlements include repaying the cost of baby formula because of the loss of lactation rooms in the workplace, issuing apology letters to reinstated employees, permitting union use of



employer bulletin boards; providing the contact information of employees to unions; training for supervisors and managers; repaying union bargaining costs during periods of alleged bad faith bargaining; and creating “a video recording of the Board agent reading the notice, in the presence of senior charged party official, to be distributed to employees at multiple facilities.”<sup>65</sup>

- On April 7, 2022, NLRB General Counsel Abruzzo issued a memorandum addressing so-called “captive audience meetings” where employers meet with employees during work time to address union representation.<sup>66</sup> General Counsel Abruzzo opined that such meetings violate the NLRA even though these meetings have generally been deemed lawful since 1948, when the NLRB issued its *Babcock & Wilcox Co.* decision (77 NLRB 577, 1948).
- On October 31, 2022, NLRB General Counsel Abruzzo released a memorandum proposing an amorphous burden-shifting framework of her own creation, whereby employers using electronic surveillance and automated management technology will be found to have presumptively violated employee rights under the NLRA.<sup>67</sup>

The memorandum also emphasizes that the General Counsel “is committed to an interagency approach to these issues” and that several federal agencies are targeting employers for their use of monitoring technologies and the NLRB will use interagency agreements with the other federal agencies, including DOL, DOJ, and FTC, to facilitate sharing and coordinated enforcement against employers.

- This memorandum was released shortly after the White House issued its “Blueprint for an AI Bill of Rights” which briefly addressed the possibility of employers using this technology for anti-union purposes, signaling that this was a White House priority and order.<sup>68</sup>
- On May 30, 2023, NLRB General Counsel Abruzzo issued Memorandum 23-08, titled “Non-Compete Agreements that Violate the National Labor Relations Act (NLRA).”<sup>69</sup> In the memorandum, she urges the Board to make new law declaring that the proffer, maintenance, and enforcement of employee non-compete agreements by employers is unlawful under the NLRA. By proclaiming that the Board has authority to outlaw employer agreements that have been legal since the founding of the republic, the General Counsel seeks an unprecedented expansion of her and the Board’s authority.

62 NLRB General Counsel Memorandum GC 21-07, “Full Remedies in Settlement Agreements” (Sept. 15, 2021).

63 *Id.*

64 NLRB General Counsel Memorandum GC 22-06, “Update on Efforts to Secure Full Remedies in Settlements” (June 23, 2022), <https://apps.nlr.gov/link/document.aspx/09031d45837c61b8>.

65 *Id.*

66 NLRB General Counsel Memorandum GC 22-04, “The Right to Refrain from Captive Audience and other Mandatory Meetings” (Apr. 7, 2022).

67 NLRB General Counsel Memorandum GC 23-02, “Electronic Monitoring and Algorithmic Management of Employees Interfering with the Exercise of Section 7 Rights” (Oct. 31, 2022).

68 Critics of the White House’s Artificial Intelligence “Bill of Rights” argue that it will encourage and “lead to increased regulatory adventurism.” Keith E. Sonderling, Bradford J. Kelley, Lance Casimir, *The Promise and the Peril: Artificial Intelligence and Employment Discrimination*, 77 U. Miami L. Rev. 1, 41 (2022)

69 NLRB General Counsel Memorandum GC 23-08, “Non-Compete Agreements that Violate the National Labor Relations Act” (May 30, 2023).

## 2. NLRB Decisions

Along with NLRB General Counsel memoranda, Board decisions have also been a key feature of the Biden administration’s whole of government approach. As noted earlier, the NLRB is required by the NLRA to act as a neutral party in labor disputes between employees and employers and not favor one party over the other.<sup>70</sup>

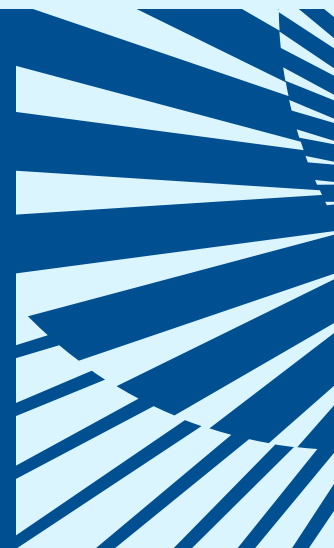
However, this is not what we are seeing with the Biden administration. This was especially the case when the Democratic Board got the majority in 2022, and became an active partner with the General Counsel in significantly reworking U.S. labor law. A few representative cases illustrate this point.

- *Cemex*: On August 25, 2023, the NLRB issued a decision in *Cemex Construction Materials Pacific, LLC* establishing a new rule for deciding when employers must bargain with unions without a representation election.<sup>71</sup> The new rule establishes that when a union requests recognition on the basis of signature cards, an employer must either recognize the union or file a petition for an election. Failure to file a petition within two weeks will result in an NLRB bargaining order. Even if an employer files a petition, the Board has reserved unto itself the discretion to dismiss the petition and demand recognition based on signature cards if there is even a single unfair labor

practice committed. *Cemex* is contrary to existing Supreme Court precedent, and the underlying purpose of the NLRA. The decision threatens to impose collective bargaining on employers and employees without a secret ballot election—a long-held dream of labor unions.<sup>72</sup> *Cemex* has already opened the door for unions to request a so-called *Cemex* bargaining order against companies.<sup>73</sup>

- *Stericycle*: On August 2, 2023, the Board issued a radical decision that undermines union and non-union employers’ ability to enforce longstanding and commonsense workplace rules and policies.<sup>74</sup> *Stericycle* involves “facially neutral” rules that do not expressly restrict employee rights under the NLRA such as promoting a respectful work environment or prohibiting the unauthorized disclosure of confidential business information to outside entities. The Board held that work rules are presumptively unlawful if an employee “could” (rather than “would”) interpret them to restrict Section 7 rights. The NLRB has already applied *Stericycle* to strike down handbook language that stated: “Partners are expected to communicate with other partners and customers in a professional and respectful manner at all times. The use of vulgar or profane language is not acceptable.”<sup>75</sup>

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- The new and significantly revised standard will open the floodgates for legal challenges to employee handbooks and other employee rules and policies in both non-union and unionized workforces. Under the *Stericycle* standard, so-called “workplace civility rules” such as prohibiting employees from using profanity with customers have already been challenged as unlawful by unions seeking to inspire organizing campaigns (see example above). Ultimately, this decision will lead to increased unfair labor practice charges, investigations, and litigation.
- *Bexar II*: On December 16, 2022, the Board issued a decision that expanded contractor employee access rights at client or customer sites.<sup>76</sup> In this case, the NLRB determined that non-employee Section 7 rights outweigh an employer’s ability to control its private property—requiring an employer to now demonstrate “significant interference” or another “legitimate business justification” for prohibiting off-duty contractor employees from engaging in Section 7 activity on the employer’s premises.<sup>77</sup> The decision gives employees greater access to a workplace not owned by their employers when engaging in activity such as labor protests or hand billing in a broad range of circumstances.

70 First Nat. Maint. Corp. v. N.L.R.B., 452 U.S. 666, 680–81 (1981).

71 *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130 (2023).

72 See Sean P. Redmond, NLRB’s *Cemex* Decision Denies Workers’ Rights to Make Free and Fair Choice About Unions, U.S. Chamber of Commerce (Aug. 31, 2023), <https://www.uschamber.com/employment-law/unions/nlrb-cemex-decision-denies-workers-rights-to-make-fair-choice-union>.

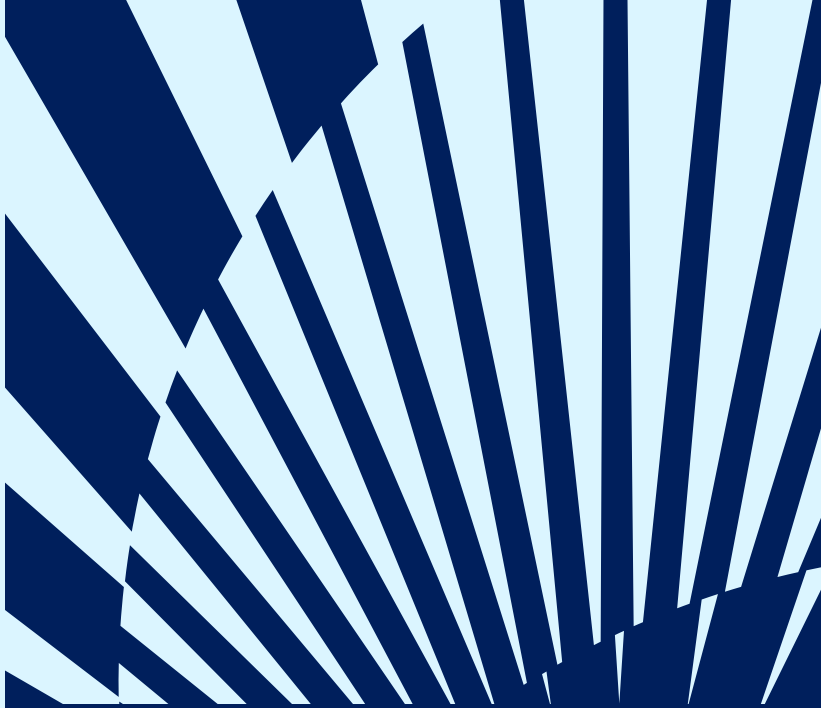
73 *Id.* (noting that days after *Cemex* was issued, Trader Joe’s United had become the first union to request a so-called *Cemex* bargaining order against the company).

74 *Stericycle*, 372 NLRB No. 113 (2023).

75 Starbucks Corporation and Workers United, NLRB Administrative Law Judges Decision (Aug. 10, 2023), <https://apps.nlrb.gov/link/document.aspx/09031d4583b0d84e>.

76 *Bexar County Performing Arts Center Foundation*, 372 NLRB No. 28 (2022) (*Bexar II*).

77 *Id.*



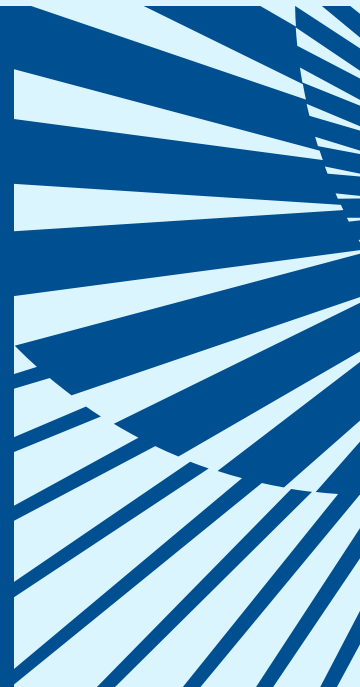
The NLRB has already applied *Stericycle* to strike down handbook language that stated: “Partners are expected to communicate with other partners and customers in a professional and respectful manner at all times. The use of vulgar or profane language is not acceptable.”

- *American Steel Construction*: On December 22, 2022, the Board issued its decision in *American Steel Construction, Inc.*, which reinstated another Obama-era precedent, often referred to as the “micro union” case.<sup>78</sup> Under *American Steel*, if a union’s petitioned-for unit consists of a clearly identifiable group of employees who share a community of interest, the NLRB will presume the unit is appropriate. The Board will not concern itself with whether it is the “most” appropriate unit, just if it is “an” appropriate unit. This means that the burden to show that a petitioned-for unit is inappropriate is now on the employer, which will have to present overwhelming evidence that its suggested unit is superior. The decision enables unions to petition for, and sustain, units that comprise any particular department/organization or any particular job description. “Micro-unions” allow unions that may have lost an election among a bargaining unit of all employees at a facility to pick off small groups of workers instead. Smaller units are easier to organize as a general matter, so *American Steel* will likely increase representation petitions or recognition demands by unions. Finally, the decision allows unions to create units that

represent only workers they know support them, which is contrary to the NLRA.

- *McLaren Macomb*: On February 21, 2023, the Board held that severance agreements that contain broad confidentiality and non-disparagement clauses are unlawful under the NLRA because the Board believes such clauses impermissibly infringe on employees’ rights under the Act. Additionally, the Board concluded that the mere proffering of a severance agreement that conditions receipt of its benefits on compliance with such provisions is itself a violation of the NLRA, regardless of whether an employee actually accepts the terms and signs the agreement.<sup>79</sup>
- On March 22, 2023, General Counsel Abruzzo issued GC Memo 23-05 to all regions which took an expansive view of the *McLaren Macomb* decision’s analysis.<sup>80</sup> In particular, the memorandum calls for a broad interpretation of what constitutes prohibited confidentiality and non-disparagement clauses. According to General Counsel Abruzzo’s memorandum, the *McLaren Macomb*

*Lion Elastomers LLC II*: On May 1, 2023, the Board reinstated specific standards for determining whether an employer’s response to “abusive conduct” by an employee in the course of their exercising Section 7 rights is lawful. The decision will make it harder for management to maintain workplaces free of profanity, or abusive and/or harassing language if it has any tie to Section 7 activity.



decision applies retroactively.<sup>81</sup> Another concerning feature is that the memorandum suggests that *McLaren's* prohibition on overly broad confidentiality and non-disparagement provisions could apply to statutory supervisors to the extent a severance agreement prohibited a supervisor from participating in a Board investigation. The memorandum also listed provisions typically included in severance and settlement agreements as ones that may also interfere with NLRA rights, including non-compete clauses, non-solicitation clauses, and no poaching clauses.

- *Lion Elastomers LLC II*: On May 1, 2023, the Board reinstated specific standards for determining whether an employer's response to "abusive conduct" by an employee in the course of their exercising Section 7 rights is lawful.<sup>82</sup> The decision will make it harder for management to maintain workplaces free of profanity, or abusive and/or harassing language if it has any tie to Section 7 activity.

- *The Atlanta Opera*: The NLRB overturned prior law and reinstated a narrower independent contractor test under the NLRA.<sup>83</sup> The practical effect of *Atlanta Opera* is that more workers are likely to be classified as employees under the NLRA—who, unlike independent contractors, are permitted to form and join a union and of course pay union dues.

### 3. NLRB Rulemaking

In addition to NLRB General Counsel Memoranda and Board decisions, the NLRB has also used rulemaking to advance its whole of government approach.

- *Joint Employer*: On September 7, 2022, the NLRB proposed a rule that would dramatically change the definition of "joint employer," replacing the prior legal standards with vastly broader ones that are likely to sweep many more business relationships under its coverage.<sup>84</sup> The importance of this proposed rule for unions should not be understated: Under the NLRA, joint employer status results in a shared obligation to bargain with a union representing jointly employed workers and a shared obligation to recognize a union newly certified at one of the employers.

78 *American Steel Construction, Inc.*, 372 NLRB No. 23 (2022).

79 *McLaren Macomb*, 327 NLRB No. 58 (2023).

80 NLRB General Counsel Memorandum GC 23-05, "Guidance in Response to Inquiries about the *McLaren Macomb* Decision" (Mar. 22, 2023).

81 *Id.*

82 *Lion Elastomers LLC II*, 372 NLRB No. 83 (2023).

83 *The Atlanta Opera, Inc.*, 372 NLRB No. 95 (2023).

84 87 Fed. Reg. 54,641 (Sept. 7, 2022).

- A joint employer may be subject to joint and several liability for unfair labor practices committed by the other employer and a joint employer may be subject to labor picketing that would otherwise be unlawful.<sup>85</sup>
- **Blocking Charges:** On November 3, 2022, the Board released a proposed rule seeking to change the 2020 election rule on blocking charges.<sup>86</sup> According to the proposed rule, the Board would return to prior blocking charge policy by permitting regional directors to decline to process an election petition at the request of the party filing an unfair labor practice charge alleging conduct that would interfere with the laboratory conditions of an election and the free choice of the employees. The proposed rule would allow unions to delay a pending election by filing unfair labor practice charges with an allegation that employees cannot exercise their free choice under the alleged coercive conditions. This maneuver would enable a union to postpone an election it expected to lose and to gain added time to campaign. Just as importantly, the proposed rule could also delay decertification petitions filed by employees who want to remove the union that currently represents them. This would

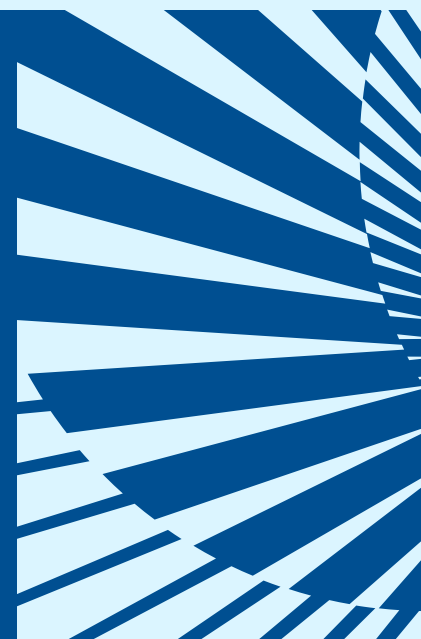
allow the Board to effectively prevent workers from ridding themselves of an unwanted union.

- **Quickie or Ambush Election Rule:** On August 24, 2023, the NLRB issued a final rule that restores the 2014 “quickie” or “ambush” election rules which will dramatically accelerate union representation elections and the certification process.<sup>87</sup> Specifically, the final rule ensures that elections are held more quickly, reduces the issues that can be litigated during a pre-election hearing, reduces the amount of time an employer can prepare for a pre-election hearing, shortens the deadline for when an employer must file a statement of position, and reinstates other pro-union provisions that favor “quickie” or “ambush” elections. Ultimately, the expedited election process will prevent employees from having the necessary time to make informed decisions regarding union representation. Absent a successful legal challenge, the final rule is scheduled to take effect on December 26, 2023.

## **B. The Federal Trade Commission**

Like the NLRB General Counsel’s unprecedented efforts to regulate non-competes, the FTC has proposed to ban

Just as importantly, the proposed rule could also delay decertification petitions filed by employees who want to remove the union that currently represents them. This would allow the Board to effectively prevent workers from ridding themselves of an unwanted union.



virtually all non-compete agreements in the workplace.<sup>88</sup> The FTC's proposed rule, which would supersede all contrary state laws, is remarkable for its sweeping definition of "non-compete clauses" that fall within the ban. The ban would extend to "de facto" non-compete clauses, meaning other contractual provisions that have the "effect" of prohibiting workers from seeking or accepting employment or operating a business after the conclusion of the worker's current employment. As such, the FTC's proposal may implicate broadly drafted non-disclosure-of-confidential-information restrictions, repayment-of-training-costs provisions, and customer non-solicitation restrictions. The restriction applies to employees, independent contractors, interns, and volunteers alike.

The FTC also wants to regulate the gig economy, a top target of the unions. As discussed above, the FTC has largely focused on targeting the gig economy through MOUs with other agencies. However, on September 15, 2022, the FTC also adopted a new policy statement and announced enforcement priorities to undermine the gig economy.<sup>89</sup> The policy statement, which was approved by Democratic commissioners in a 3-2 vote, emphasizes the FTC's "priority" of protecting gig economy workers from "unfair, deceptive,

and anticompetitive practices."<sup>90</sup> The policy statement notes that companies that fail to follow the laws governing unfair, deceptive, or anticompetitive practices could be obligated to pay consumer redress and civil penalties and may be ordered to cease unlawful business practices. The FTC also states that it will partner with other governmental agencies to protect gig workers.<sup>91</sup>

The FTC has been especially hostile to franchise relationships, which have been a top target for the unions, in particular the SEIU. On March 10, 2023, the FTC issued a request for information soliciting public comments on franchise agreements and franchisor business practices, including how franchisors may allegedly exert control over franchisees and their workers.<sup>92</sup> Ultimately, such efforts by the FTC to regulate in this space would impede a franchise system's ability to control its own brand and dramatically expand joint employer liability.

The FTC's increased focus on employment relationships is a high priority for unions. As noted earlier, independent contractors generally cannot bargain collectively, and so do not join unions which means unions lose potential members and thus potential membership dues.<sup>93</sup> The FTC is authorized to

85 See Jim Paretti, Michael J. Lotito, & Maury Baskin, NLRB Proposes New Joint-Employer Standard That Would Dramatically Expand Scope of "Joint Employment" Under the National Labor Relations Act, Littler (Sept. 6, 2022), <https://www.littler.com/publication-press/publication/nlrb-proposes-new-joint-employer-standard-would-dramatically-expand>.

86 87 Fed. Reg. 66,890 (Nov. 4, 2022).

87 88 Fed. Reg. 58,076; see also NLRB, National Labor Relations Board Issues Final Rule to Restore Fair and Efficient Procedures for Union Elections (Aug. 24, 2023), <https://www.nlrb.gov/news-outreach/news-story/national-labor-relations-board-issues-final-rule-to-restore-fair-and>.

88 88 Fed. Reg. 3482 (Jan. 19, 2023).

89 Fed. Trade Comm'n, FTC Policy Statement on Enforcement Related to Gig Work (Sept. 15, 2022); FTC to Crack Down on Companies Taking Advantage of Gig Workers, FTC (Sept. 15, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/09/ftc-crack-down-companies-taking-advantage-gig-workers>.

90 Id.

91 Id.

92 FTC Press Release, FTC Seeks Public Comment on Franchisors Exerting Control Over Franchisees and Workers (Mar. 10, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-seeks-public-comment-franchisors-exerting-control-over-franchisees-workers>.

93 See 29 U.S.C. § 152(3).





As part of the Biden administration’s whole of government approach, the FTC is trying to transform itself into a labor market regulator even though it has no authority to do so. This overreach undermines the rule of law and simultaneously weakens the FTC’s role as an antitrust enforcer.

go after anticompetitive behavior and “unfair or deceptive” practices. The FTC is not authorized to regulate labor relations issues in employment relationships.<sup>94</sup> The claim that all workers are also consumers is an unprecedented stretch of authority. As part of the Biden administration’s whole of government approach, the FTC is trying to transform itself into a labor market regulator even though it has no authority to do so. This overreach undermines the rule of law and simultaneously weakens the FTC’s role as an antitrust enforcer.<sup>95</sup>

### **C. Department of Labor**

DOL is actively promoting unions in myriad ways. One notable, yet perplexing, example is DOL’s Worker Organizing Resource and Knowledge (WORK) Center which “is a one-stop shop for information and resources on unions and collective bargaining for workers, employers, unions, government agencies, students and anyone interested in unions and collective bargaining.”<sup>96</sup> It is puzzling that DOL established the WORK Center considering that the NLRA is enforced by an entirely separate, and independent, federal agency. The WORK website features sections including “Unions 101” and “The Union Advantage” in an attempt to demonstrate “how unions improve the lives of all workers, and how they support the Department of Labor’s mission.”<sup>97</sup> Most of the pro-union studies and reports prominently featured and cited on the WORK website were produced by the Economic Policy Institute, whose Board of Directors is currently chaired by the president of the AFL-CIO. Other Economic Policy Institute Board members include leaders of the United Steelworkers, the UAW, the Service Employees International Union, the International Association of Machinists and Aerospace Workers (IAM), Communications Workers of America, National Education Association, and the American Federation of Teachers.<sup>98</sup> The WORK Center is, to put it mildly, pure union propaganda being pushed at taxpayer expense.

DOL has also relied on agency-wide initiatives. For instance, DOL launched the “Good Jobs Initiative” to provide information to workers, employers, and government. This includes information about the “union advantage.”<sup>99</sup> The first goal of the initiative is to provide “easily accessible information to workers about their ..... right to form a union and bargain collectively with their employers and many others.” The initiative admits that this is a component of the Biden administration’s whole of government approach: “The Good Jobs Initiative coordinates work done since the beginning of this Administration—and often for decades before—under one umbrella to promote goods jobs.”<sup>100</sup>

Agencies within DOL are actively advancing the whole of government approach. For example, OSHA has proposed a rule to implement a so-called “walk around” policy that would allow union officials to accompany OSHA inspectors when they visit non-union workplaces.<sup>101</sup> At its core, the proposal threatens to undermine the credibility of OSHA’s workplace safety efforts by diverting attention away from the safety and health of employees. A union representative present during OSHA

inspections strongly suggests that the individual’s visit would be used to directly advance efforts to unionize the worksite, and union officials would gain valuable propaganda points for their organizing efforts. In addition, the proposal sends a message that OSHA is less interested in worker safety than in promoting organizing campaigns.<sup>102</sup>

94 See Alden Abbott, Federal Trade Commission should keep its hands off the gig economy, *The Hill* (Oct. 14, 2022), <https://thehill.com/opinion/finance/3687625-federal-trade-commission-should-keep-its-hands-off-the-gig-economy/>.

95 *Id.*

96 Worker Organizing Resource and Knowledge Center, U.S. Department of Labor, <https://www.dol.gov/general/workcenter/>.

97 *Id.*

98 Economic Policy Institute’s Board, <https://www.epi.org/about/board/>.

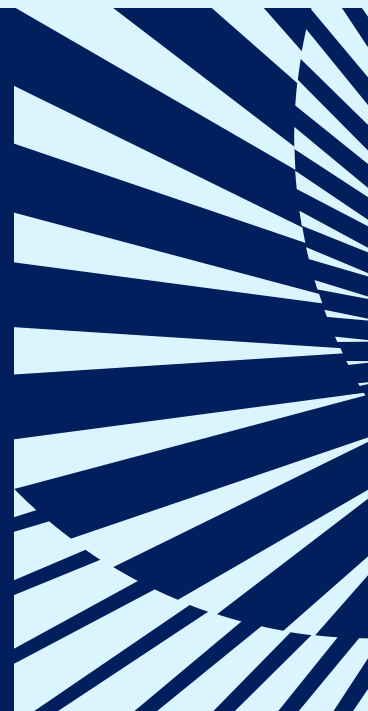
99 About the Good Jobs Initiative, <https://www.dol.gov/general/good-jobs/about-us>.

100 *Id.*

101 Marc Freedman, Possible OSHA Rule Would Hurt Agency Credibility, U.S. Chamber of Commerce (July 17, 2023), <https://www.uschamber.com/employment-law/unions/possible-osha-rule-would-hurt-agency-credibility>.

102 *Id.*

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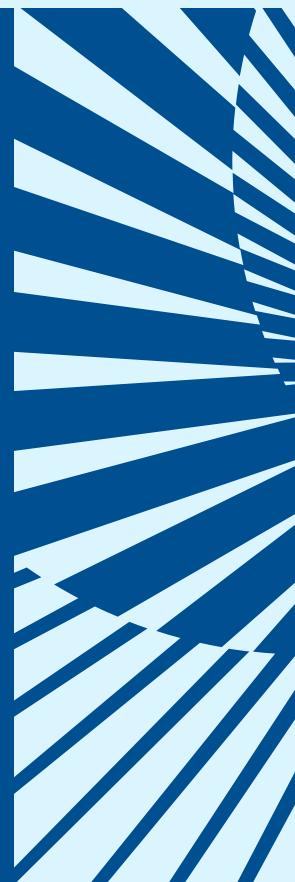
On July 17, 2023, OSHA released an updated rule that expands injury and illness reporting requirements and will make that data public.<sup>103</sup> OSHA's revised regulation reinstates the requirement for many employers to submit certain injury and illness information electronically directly to OSHA every year. Importantly, OSHA will require establishments to include their company name when making electronic submissions to OSHA and then plans to make the data publicly available in a searchable online database. OSHA argues that "expanded public access to establishment-specific, case specific injury and illness data" will allow various stakeholders to "make more informed decisions about workplace safety and health at a given establishment."<sup>104</sup> However, the true goal of OSHA's rule is to allow unions to exploit that information to assist in organizing campaigns.

Other agencies within DOL are actively engaged in rulemaking to carry out union priorities. DOL's WHD recently published final revisions to the Davis-Bacon Act (DBA) that are expected

to impose union wage rates on DBA-covered construction projects. As a consequence of the DBA revisions, although unions represent less than 12% of construction workers nationally, future DOL wage determinations are expected to declare union wage scales to be "prevailing" throughout the country.<sup>105</sup> This will lead to more expensive construction costs and fewer construction projects, thus hurting the construction industry and job creation. It will also undermine the purpose of legislation like the Infrastructure and Jobs Act, the CHIPS Act, and the so-called Inflation Reduction Act. All of these statutes envision significant construction projects, but with DBA wage rates, taxpayers will get less for their dollars.

Other union-supported rules are expected to be issued soon. Notably, WHD is finalizing a union-supported independent contractor rule that would create a stricter test for classifying workers as independent contractors under the Fair Labor Standards Act. WHD's proposed rule could cause many independent contractors to lose their flexible work arrangements and possibly their livelihoods.<sup>106</sup>

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In addition, DOL states that OLMS “is taking action to increase public disclosure of arrangements between employers and the anti-union consultants they hire to run campaigns to discourage workers from forming or joining unions.”<sup>107</sup> In 2023, OLMS issued its Revision of the Form LM-10 Employer Report which will now require those filing so-called “persuader” reports to indicate if they are government contractors.<sup>108</sup> OLMS has also demanded that employers file persuader reports related to company officials and supervisors who travel to company facilities to discuss union issues with workers. By statute, these company officers are exempt from filing persuader reports.<sup>109</sup> There have also been anecdotal reports suggesting that OLMS is now including subpoena requests with its demand letters.<sup>110</sup> The demand by OLMS for persuader reports where none are actually due is another way for the government to harass employers and create advantageous conditions for union activity.<sup>111</sup>

- 103 OSHA, “Improve Tracking of Workplace Injuries and Illnesses,” [https://public-inspection.federalregister.gov/2023-15091.pdf?utm\\_source=federalregister.gov&utm\\_medium=email&utm\\_campaign=pi+subscription+mailing+list](https://public-inspection.federalregister.gov/2023-15091.pdf?utm_source=federalregister.gov&utm_medium=email&utm_campaign=pi+subscription+mailing+list).
- 104 Id.
- 105 See Maury Baskin & David S. Ostern, USDOL Finalizes Rule Making Big Changes to Davis-Bacon Enforcement, *Little Insight* (Aug. 10, 2023).
- 106 Glenn Spencer & Michael J. Lotito, Biden’s union push limits workers’ choices, *Wash. Times* (June 22, 2023), <https://www.washingtontimes.com/news/2023/jun/22/bidens-union-push-limits-workers-choices/>.
- 107 White House Task Force on Worker Organizing and Empowerment, <https://www.dol.gov/general/labortaskforce>.
- 108 Id.
- 109 See Glenn Spencer, Not Persuaded: House Committee Questions Department of Labor’s Faulty Legal Theory, *U.S. Chamber of Commerce* (Aug. 9, 2023), <https://www.uschamber.com/employment-law/unions/not-persuaded-house-committee-questions-department-of-labor-faulty-legal-theory>.
- 110 Id.
- 111 Id.



Certain federal agencies, including DOL, are also using partnerships to carry out the whole of government approach to unions. On July 13, 2023, DOL launched its “High Road to the Middle Class,” which sets certain criteria to be designated by the DOL as “high road training programs.”<sup>112</sup> One of the criteria required for participation in the developmental programs is that the programs must include participation of unions or other worker organizations. Due to the union partnership requirements, any workforce development programs that do not involve unions are excluded from inclusion in the program. DOL’s OLMS has also reinstated a Labor-Management Partnership Program that advances the Biden administration’s whole of government approach in similar ways.<sup>113</sup>

#### D. Securities and Exchange Commission

On July 13, 2022, the Securities and Exchange Commission (SEC) issued a proposed rule to amend certain substantive bases for exclusion of shareholder proposals under the agency’s shareholder proposal rule.<sup>114</sup> The proposed amendments would narrow the bases for exclusion in favor of shareholder proponents, thereby opening up the shareholder proposal process to even greater risk of misuse. In a footnote, the proposed rule favorably cites to an academic article entitled, “Opportunistic

Proposals by Union Shareholders,” which argues that unions can and should use shareholder proposals “opportunistically” to influence contract negotiations.<sup>115</sup>

The SEC’s proposal is significant because it allows unions to introduce frivolous proposals that are antithetical to shareholder value, such as those requiring companies to remain neutral in union organizing campaigns, or mandating audits of labor practices.

112 Introducing the High Road to the Middle Class Map, Dep’t of Labor (July 13, 2023), <https://blog.dol.gov/2023/07/13/introducing-the-high-road-to-the-middle-class-map>.

113 Lynn Rhinehart, Latest Worker Organizing Task Force Report Shows Continued Progress, U.S. Dep’t of Labor Blog (Mar. 22, 2023), <https://blog.dol.gov/2023/03/22/latest-worker-organizing-task-force-report-shows-continued-progress>.

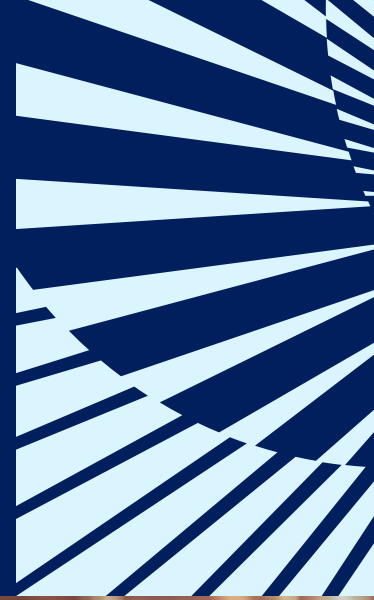
114 “Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8,” SEC Release No. 34-95267 (Jul. 13, 2022), <https://www.sec.gov/files/rules/proposed/2022/34-95267.pdf>. The proposed amendments would revise three of the substantive bases for exclusion: the “substantial implementation” exclusion in Rule 14a-8(i)(10), the “duplication” exclusion in Rule 14a-8(i)(1), and the “resubmission” exclusion in Rule 14a-8(i)(12).

115 Id.; John G. Matsusaka et al., Opportunistic Proposals by Union Shareholders, 32 Rev. Fin. Stud. 3215 (2019). The article contends that shareholder proposals can theoretically “be used as bargaining chips to extract side payments from management” and that “[u]nions are much more likely than other shareholders to make proposals concerning executive compensation, especially during expiration years.”

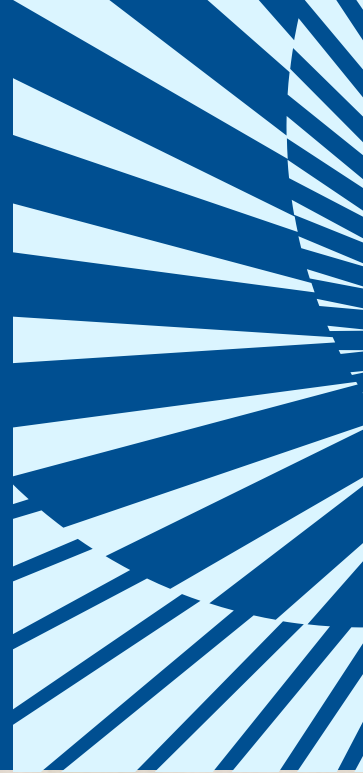
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The Department of Commerce is pushing grantees under the CHIPS Act to agree to many pro-union conditions, such as project labor agreements...As in the case of DBA projects, the Biden administration's whole of government approach to promoting unions will lead to more expensive construction costs and fewer construction projects, thus hurting the construction industry and job creation.



## E. Department of Commerce

In 2022, lawmakers passed the CHIPS and Science Act, which devoted \$52 billion to expanding U.S. semiconductor manufacturing and research with the goal to, among other things, boost semiconductor manufacturing in the United States. The CHIPS Act grants the Department of Commerce and the Department of the Treasury broad authority to interpret the statute and prescribe regulations and other guidance that is likely to significantly impact how the CHIPS Act is implemented. The Department of Commerce is pushing grantees under the CHIPS Act to agree to many pro-union conditions, such as project labor agreements. The CHIPS Program Office “strongly encourages the use of project labor agreements (PLAs) in connection with construction projects.”<sup>116</sup> Applicants that refuse to use a project labor agreement are required to submit workforce continuity plans and show that they have taken other undefined measures to reduce the risk of delays in project delivery. The Commerce Department’s “Workforce Development Planning Guide: Guidance for CHIPS Incentives Applicants” provides several model project labor agreements that were drafted mostly by unions and cites best practices created by the Economic Policy Institute.<sup>117</sup> As in the case of DBA projects, the Biden administration’s whole of government approach to promoting unions will lead to more expensive construction costs and fewer construction projects, thus hurting the construction industry and job creation.

116 Frequently Asked Questions, NIST, <https://www.nist.gov/chips/frequently-asked-questions#elig>.

117 Department of Commerce, “The Workforce Development Planning: Guide Guidance for CHIPS Incentives Applicants” (Mar. 27, 2023), <https://www.nist.gov/system/files/documents/2023/03/30/CHIPS%20Workforce%20Development%20Planning%20Guide%20%281%29.pdf>.

118 Emma Oppenheim, Shining a Spotlight on Workers’ Financial Experiences, CFPB (Mar. 9, 2022), <https://www.consumerfinance.gov/about-us/blog/shining-a-spotlight-on-workers-financial-experiences/>.

119 Id.

120 Press Release, CFPB Launches Inquiry into Practices that Leave Workers Indebted to Employers, Consumer Fin. Prot. Bureau (June 9, 2022).

121 US Department of Treasury, The State of Labor Market Competition (Mar. 7, 2022), <https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf>.

## F. Consumer Financial Protection Bureau

In March of 2022, the CFPB invited worker organizations and unions “to share their members’ experiences and challenges.”<sup>118</sup> In a press release detailing the “roundtable” with union leaders, the CFPB was unclear how it would proceed. But the CFPB was clear that it would “welcome further input from worker organizations, labor unions, and individual workers as we seek to use our tools to crack down on abuses.”<sup>119</sup>

In June of 2022, the CFPB released a request for information on worker experiences with what it called “employer-driven debt,” including requirements to repay the cost of training, the purchase of equipment and supplies, and other aspects commonly associated with independent contractor arrangements.<sup>120</sup> CFPB’s activity in this area signals the agency’s intent to challenge independent contractor practices with regard to employer-driven debt in labor contracting, such as training repayment agreements.

## G. Treasury Department

The Treasury Department is also involved in the whole of government approach. In March of 2022, as directed by one of Biden’s “whole of government” executive orders, the Treasury Department released a report entitled, “The State of Labor Market Competition.”<sup>121</sup> Importantly, the report argues that “when firms misclassify workers, they offload labor



costs and risks onto workers—for example, by avoiding unemployment insurance taxes and workers’ compensation premiums—and make it difficult for workers to organize or join a union and bargain collectively for better wages and conditions.”<sup>122</sup> The Treasury Department’s report relies heavily on Economic Policy Institute studies and reports. On August 28, 2023, the Treasury Department released a second report entitled, “Labor Unions and the Middle Class,” which was touted as the “first-of-its-kind” report on the alleged benefits of unions to the American economy.<sup>123</sup>

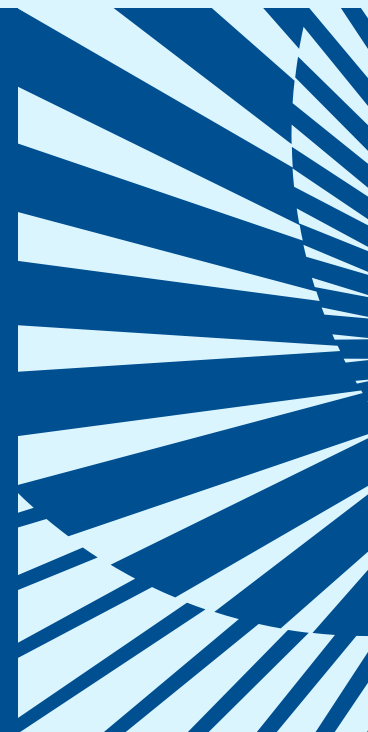
The Biden administration’s Treasury Department has also used tax credits for private clean energy projects funded by the Inflation Reduction Act to promote unionization. The Inflation Reduction Act was signed into law in 2022 and provides over \$270 billion in tax credits for the construction of solar, wind, hydrogen, carbon sequestration, electric vehicle charging stations, and other clean energy projects. Developers and taxpayers can receive a bonus tax credit, but eligibility is conditioned on requirements that project contractors pay prevailing wages and utilize apprentices enrolled in government-registered

apprenticeship programs. The Treasury Department and the Internal Revenue Service issued initial guidance on these requirements on November 30, 2022. On August 29, 2023, the day after the pro-union report was released, the Treasury Department and IRS released proposed rules and frequently asked questions reinforcing the Biden administration’s policy.<sup>124</sup> Ultimately, the Biden administration’s policy is an unprecedented expansion of Davis-Bacon and registered apprenticeship requirements/enticements onto private construction projects via the federal tax code.

## H. Environmental Protection Agency

The Biden administration has used infrastructure funding to promote the whole of government approach by enlisting federal agencies like the U.S. Environmental Protection Agency (EPA) to do the grunt work. For example, under the Clean School Bus Program, the EPA received \$5 billion for the replacement of diesel-powered school buses with zero- and low-emission buses. The EPA has used the funding to push pro-union demands on all recipients of federal subsidies.<sup>125</sup> Businesses that receive money

The Biden administration’s Treasury Department has also used tax credits for private clean energy projects funded by the Inflation Reduction Act to promote unionization.



under the program are “encouraged” to “remain neutral in any organizing campaign and/or to voluntarily recognize a union based on a show of majority support.”<sup>126</sup> And under the rules of the infrastructure bill, no federal money is to be used to contest a union election. The EPA alleges that these requirements are consistent with President Biden’s “vision set forth in Executive Order 14025, Worker Organizing and Empowerment (86 FR 22829), and Executive Order 14052, Implementation of the Infrastructure Investment and Jobs Act (86 FR 64335).”<sup>127</sup>

The EPA’s aggressive pro-union move did not go unnoticed and had an immediate and undeniable impact. In fact, shortly after the EPA’s move, the New York Times published an article titled, “Flush With Federal Money, Strings Attached, a Deep South Factory Votes to Unionize.”<sup>128</sup> The New York Times article emphasized that the EPA’s funding “came with strings attached — strings that subtly tilted the playing field toward the union.”<sup>129</sup>

122 Id.

123 Press Release, U.S. Dept. of the Treasury, FACT SHEET: Treasury Department Releases First-Of-Its-Kind Report on Benefits of Unions to the U.S. Economy (Aug. 28, 2023).

124 Press Release, U.S. Department of the Treasury, IRS Release Guidance on Inflation Reduction Act Provision to Ensure Good-Paying Clean Energy Jobs, Expand Clean Energy Workforce (Aug. 29, 2023), <https://home.treasury.gov/news/press-releases/jy1708>.

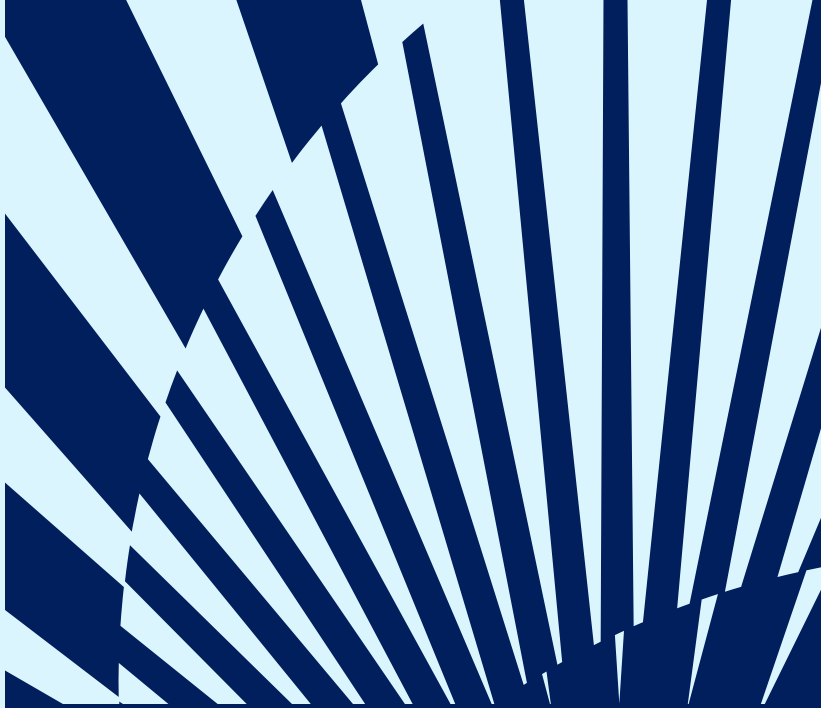
125 Request for Information about OEM Job Quality and Workforce Development Practices, EPA (Apr. 2023), <https://www.epa.gov/system/files/documents/2023-04/fy23-csb-oem-workforce-req-info-2024-04.pdf>.

126 Id. at 2.

127 Id. at 1.

128 Jonathan Weisman, Flush With Federal Money, Strings Attached, a Deep South Factory Votes to Unionize, NY Times (May 15, 2023), <https://www.nytimes.com/2023/05/12/us/politics/clean-energy-unions.html>.

129 Id.



Under the Clean School Bus Program, the EPA received \$5 billion for the replacement of diesel-powered school buses with zero- and low-emission buses. The EPA has used the funding to push pro-union demands on all recipients of federal subsidies. Businesses that receive money under the program are “encouraged” to “remain neutral in any organizing campaign and/or to voluntarily recognize a union based on a show of majority support.”

## I. Department of Energy

The Department of Energy has used similar funding mechanisms to advance the Biden administration’s whole of government approach. On July 17, 2023, the Biden administration issued a guidance document outlining the funding requirements for the Department of Energy’s State-Based Home Energy Efficiency Contractor Training Grant Program. The document stated that the requirements were part of the administration’s “whole-of-government approach to advance equity and encourage worker organizing and collective bargaining.”<sup>130</sup> The Department of Energy further explained that “this funding action and any related activities will seek to encourage meaningful engagement and participation of workforce organizations, including labor unions....” The document lists a specific funding restriction: “By accepting funds under this award, you agree that none of the funds obligated on the award shall be expended, directly or indirectly, to support or oppose union organizing.”<sup>131</sup> The requirements also recommend the use of project labor agreements.

## J. Centers for Medicare and Medicaid Services

On June 28, 2023, the Centers for Medicare and Medicaid Services (CMS) issued a request for information on the potential inclusion of a labor harmony clause in future contracts for contact center operations.<sup>132</sup> The inclusion of labor harmony clauses in contact center operations contracts would almost certainly lead to unnecessary government interference with contractual agreements in the private sector and would be used to discriminate against vendors based on labor affiliation (or lack thereof). The inclusion of such clauses would also force a business to get a union to sign off on whether the company meets the requirement for maintaining a contract, which would obviously give unions enormous leverage to demand organizing concessions. Another concerning part of CMS’s request for information is that it included an attachment that contained specific language for a labor harmony clause.

130 Department of Energy’s State-Based Home Energy Efficiency Contractor Training Grant Program (July 17, 2023), <https://www.energy.gov/sites/default/files/2023-07/IRA-50123-ALRD-Contractor-Training-Program.pdf>.

131 Id.

132 CMS RFI, <https://www.highergov.com/document/rfi-and-labor-harmony-provisions-pdf-039ee8/>.



# V. Additional Tactics

There are additional tactics the Biden administration has used to advance the whole of government approach to promoting unions, including enforcement actions, congressional action, and even an amicus brief strategy.

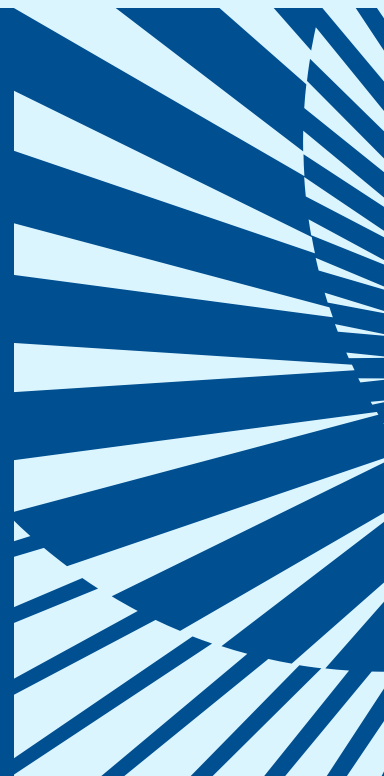
## A. Enforcement

The Biden administration's whole of government approach has relied on aggressive enforcement strategies to promote unions. Advocates of the whole of government approach have argued that pro-union enforcement efforts by the NLRB are critical in signaling to unions that they have an ally in the federal government.<sup>133</sup> In a 2023 Senate Health, Education, Labor and Pensions Committee hearing on labor relations, Ranking Member Bill Cassidy, a Republican senator from Louisiana, explained how the NLRB has weaponized its enforcement power to target employers and implement policies favored by labor unions.<sup>134</sup> Senator Cassidy cited reports

of widespread and systematic misconduct by NLRB officials, including providing duplicate ballots in union elections, supplying union organizers with confidential voter information, and providing voter accommodations to employees selected by the union without offering them to all employees.<sup>135</sup>

The Biden administration's enforcement strategy can also be carried out in a more clandestine way. Two former WHD administrators have criticized WHD under the Biden administration's leadership as mainly engaged in "gotcha" enforcement whereby enforcement priorities and actions are largely secretive and new requirements are imposed without any prior notice.<sup>136</sup> This is particularly concerning since several federal agencies are looking to unions to help guide their enforcement strategy. Several DOL initiatives are noteworthy in this area. In 2022,

Senator Cassidy cited reports of widespread and systematic misconduct by NLRB officials, including providing duplicate ballots in union elections, supplying union organizers with confidential voter information, and providing voter accommodations to employees selected by the union without offering them to all employees.



WHD issued a news release announcing its “Warehouse and Logistics Worker Initiative” that will “take heightened action to ensure that warehouse and logistics workers’ wages and workplace rights are protected.”<sup>137</sup> According to the announcement, WHD will focus on enforcing the rights of warehouse workers, delivery drivers, and truck drivers, and “will also target misclassification of employees as independent contractors.” The new initiative “will use education, outreach and vigorous enforcement to increase compliance and reduce industry violations.”<sup>138</sup> This WHD initiative is an important component of the whole of government approach because warehouse workers in numerous regions have mounted union campaigns in recent years.

- 133 See Hiba Hafiz, A Whole-of-Government Approach to Increasing Worker Power, Roosevelt Institute (Dec. 2022), [https://rooseveltinstitute.org/wp-content/uploads/2022/12/RI\\_WholeofGovernmentApproachtoIncreasingWorkerPower\\_Brief\\_202212.pdf](https://rooseveltinstitute.org/wp-content/uploads/2022/12/RI_WholeofGovernmentApproachtoIncreasingWorkerPower_Brief_202212.pdf) (noting that “[t]hese enforcement actions have contributed to the 58 percent increase in union election petitions in the first three quarters of fiscal year 2022 and a 76 percent increase in strikes in the first half of 2022 compared to 2021, nearly tripling the number of workers on strike.”).
- 134 Ranking Member Cassidy, Blackburn, Colleagues Introduce Bill to End Weaponization of National Labor Relations Board, Senate HELP Committee (Apr. 17, 2023), <https://www.help.senate.gov/ranking/newsroom/press/ranking-member-cassidy-blackburn-colleagues-introduce-bill-to-end-weaponization-of-national-labor-relations-board#>.
- 135 Id.
- 136 See Cheryl Stanton & Tammy McCutchen, Opinion, A Return to ‘Gotcha’ Enforcement, Wash. Times (Mar. 22, 2021).
- 137 News Release, U.S. Department of Labor Announces Worker Initiative to Safeguard Rights, Ensure Protections for Workers in Warehouse, Logistics Industries, DOL (Feb. 8, 2022), <https://www.dol.gov/newsroom/releases/whd/whd20220208-1>.
- 138 Id.



## B. Calls for Congressional Action to Increase Union Density

The Biden administration has urged Congress advance union-backed proposals like the Protecting the Right to Organize Act (PRO Act) and other legislation. In a 2021 statement, President Biden claimed, “We should all remember that the National Labor Relations Act didn’t just say that we shouldn’t hamstring unions or merely tolerate them. It said that we should encourage unions. The PRO Act would take critical steps to help restore this intent.”<sup>139</sup> Of course, what the law says is that the federal government should seek to “eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining...”<sup>140</sup> It does not say that the federal government should be promoting unions, or imposing union-friendly requirements via the procurement or grant-making process.

The PRO Act would explicitly ban employer meetings to discuss unionization and states “[t]hat it shall be an unfair labor practice under the [NLRA] for any employer to

require or coerce an employee to attend or participate in such employer’s campaign activities unrelated to the employee’s job duties.”<sup>141</sup> It also includes mandatory card check certification, first contract arbitration, an ABC test for independent contractors, and many other provisions unions have sought for years. And the president has indicated that he sees the PRO Act as helping ensure the whole of government approach impacts state and local governments by “extend[ing] organizing and collective bargaining rights to state and local government employees.”<sup>142</sup>

President Biden has supported other legislation that unions strongly support as part of his whole of government approach. For instance, President Biden has lobbied to raise the federal minimum wage to \$15, and when that legislation failed used an executive order setting a \$15 minimum wage for federal contractors.<sup>143</sup>

## C. Amicus Briefs

Agencies have used amicus briefs to advance a pro-union agenda. Such amicus briefs have been filed with agencies and with courts. In 2021, the DOJ’s antitrust division filed an



amicus in *Atlanta Opera*, an NLRB case that reinstated a narrower test for determining independent contractor status under the NLRA.<sup>144</sup> In its brief, DOJ mainly argued that Congress intended to protect collective bargaining and labor union activities from antitrust scrutiny. The brief signaled DOJ's continued interest in gig economy issues and expressed its view that independent contractors should be allowed to unionize without violating antitrust law. Not surprisingly, the NLRB has used amicus briefs to push its agenda in the courts. For instance, the NLRB has filed amicus briefs in federal courts arguing for vastly greater confidentiality protections for NLRA activity during discovery and criticized federal courts for limiting their inquiry to whether confidential information specifically relates to union activity.<sup>145</sup> The NLRB's brief argues that “[p]erhaps owing to limited experience with NLRA cases and lack of appellate guidance, other district courts have similarly misapprehended the interests involved, leading to the derogation of statutory rights.”<sup>146</sup> Not surprisingly, plaintiffs’ lawyers were “very pleased” with the NLRB’s amicus brief.<sup>147</sup>

Other federal agencies have focused on their amicus brief strategy to advance the whole of government approach. In 2023, the EEOC filed an amicus brief in support of an Uber driver who alleged he was an employee of the company.<sup>148</sup> Although the EEOC included a footnote stating that it was not taking a position on whether Uber drivers are generally employees or independent contractors, the fact that the amicus brief was even filed sends a clear message that the EEOC was in fact taking an anti-independent contractor position.

Many have argued that pursuing policy, and especially changes in policy, through court filings rather than a rulemaking or through public guidance undermines the accountability, transparency, public participation, and reflective, reasoned decision-making required by the Administrative Procedure Act.<sup>149</sup> Furthermore, promoting positions via amicus filings often results in sharper political fluctuations that are not subject to public scrutiny or the compromises inherent in deliberative processes like rulemaking.<sup>150</sup>

139 Statement by President Joe Biden on the House Taking Up the PRO Act (Mar. 9, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/09/statement-by-president-joe-biden-on-the-house-taking-up-the-pro-act/>.

140 29 U.S.C. § 151 (emphasis added).

141 Protecting the Right to Organize Act of 2019, H.R. 2474, 116th Cong. (2019-20).

142 Remarks by President Biden in Honor of Labor Unions (Sept. 8, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/08/remarks-by-president-biden-in-honor-of-labor-unions/>.

143 See Statement by President Joe Biden on \$15 Minimum Wage for Federal Workers and Contractors Going into Effect (Jan. 28, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/28/statement-by-president-joe-biden-on-15-minimum-wage-for-federal-workers-and-contractors-going-into-effect/#:~:text=These%20directives%20go%20into%20effect,the%20course%20of%20the%20year.>

144 Brief for United States Department of Justice as Amici Curiae in Support of Neither Party, *The Atlanta Opera, Inc. & Make-Up Artists & Hair Stylists Union*, Loc. 798, IATSE, 371 NLRB No. 45 (Dec. 27, 2021) (No. 10-RC-276292). <https://apps.nlr.gov/link/document.aspx/09031d458369c7e3>.

145 Brief of NLRB in *Kinzer, et al v. Whole Foods Market, Inc.*, Nos. 23-1100, 22-1064 (1st Cir. 2023), 2023 WL 4814978.

146 *Id.*

147 See Julie Manganis, NLRB Urges 1st Circ. To Protect Whole Foods Workers’ Texts, *Law360* (July 13, 2023), <https://www.law360.com/articles/1699113/nlr-urges-1st-circ-to-protect-whole-foods-workers-texts>.

148 Brief of EEOC in *Liu v. Uber Techs. Inc.*, No. 22-16507 (9th Cir. 2023).

149 See Keith E. Sonderling & Bradford J. Kelley, *The Sword and the Shield: The Benefits of Opinion Letters by Employment and Labor Agencies*, 86 *Mo. L. Rev.* 1171, 1200–01 (2021).

150 *Id.*

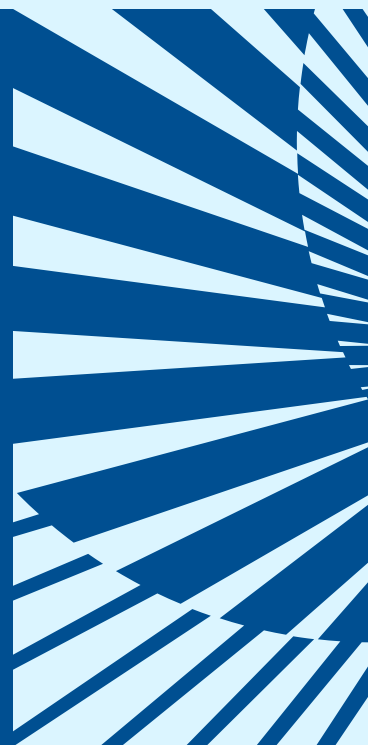


# Conclusion

Joe Biden pledged to be the most pro-union president in history. And with his whole of government approach to promoting unions, he is certainly living up to that pledge. While unions are no doubt thrilled, the rest of us shouldn't be. Workers lose when they are pressured into unions without being able to hear both sides of the story and make an informed choice. Taxpayers lose out when government artificially inflates the cost of projects funded through legislation like the CHIPS Act, the infrastructure bill, and the so-called Inflation Reduction Act. They lose out doubly when agencies spend public funds to promote policies that have little or nothing to do with their core functions. Employers lose out when they are pressured into making union concessions, and faced with one-sided enforcement and regulations.

Finally, we all lose out when the federal government misunderstands its statutory mandate and actively promotes one interest group above everyone else. The whole of government approach to promoting labor unions is unprecedented. Its negative economic consequences may be as well.

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