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LABOUR UNIONS IN THE UNITED STATES: CHALLENGES AND OPPORTUNITIES

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This brief takes stock of the current state of labour unions and worker power in the United States. In 2023, it is the best of times, and the worst of times, for the American labour movement: union approval and interest from workers has reached highs not achieved in many decades, but private sector union density sits near all-time lows. It remains an open question whether widespread public support and encouraging moves from the political establishment will translate to on-the-ground successes in worker organizing and empowerment.

Even as public support for unions is high and many workers file for their first union elections, American labour law remains fundamentally broken, making it far harder to form a union and bargain collectively than it needs to be. Employers have a large degree of leeway to resist unionization efforts, as national labour protections are inadequate. States too are limited in their ability to go further to protect the right to organize, and many are taking steps to undermine private-sector unions.

Nevertheless, workers continue to organize, and some politicians have taken steps to help overcome these obstacles. President Biden has worked to implement policies on the federal level that would facilitate unionization and Congress has considered measures that would modernize labour law nationwide, with some states making encouraging moves to protect worker organizing. Whether or not these efforts will succeed and bring about a lasting restoration of worker voice in the United States remains to be seen.

TRENDS IN UNION DENSITY AND COVERAGE IN THE UNITED STATES

The American labour force numbered 158 million in 2022, with an increasing share employed in services. The service sector has grown significantly in recent years and today employs 109 million workers. The public sector employs over 21 million workers, and construction and manufacturing, both traditional strongholds of organized labour in the United States, employ 11.8 million and 15.2 million workers respectively. Workers without college degrees make up 61.7 per cent of the labour force. Part-time workers, who face additional obstacles to organizing, totalled 26 million in 2022. While many workers lost their jobs during the Covid-19 pandemic, the labour market has largely recovered and remains strong through 2023.

Union density, and likewise collective bargaining coverage, is at its lowest today since the early 1930s and private sector density is lower than it has been in well over 100 years. In 2022, labour unions represented about 10.1 per cent of all workers in the US labour market, including 6.0 per cent of private sector workers and 33.2 per cent of public sector workers. This marks a steep decline from the peak union density achieved in 1954, when 34.8 per cent of wage and salary workers were members of labour unions, and is the product of steady decline over decades. Coverage has declined in every major sector of the economy: only transportation, communication, and utilities at 17.9 per cent and construction at 12.6 per cent exceed the national membership rate, and manufacturing (7.9 per cent), retail (4.2 per cent), and other services (9.6 per cent) all fall below.

The percentage of workers covered by union contracts is generally quite close to the membership rate: in 2022, the coverage rate was 11.3 per cent (compared to a membership rate of 10.1 per cent). Unlike the rest of the world, union membership in the US is almost always linked to a collective bargaining relationship — there is no right for the union to represent a worker without a collective bargaining agreement, often called a "union contract." Further, the vast majority of workers covered by a collective bargaining agreement are required to pay fees to the union. The key exceptions are in the "right to work" states, where the payment of fees is entirely voluntary.

Unions in the private sector grew sharply after passage of the National Labor Relations Act (NLRA) in 1935 and throughout World War II, and reached a peak of just over one third of workers in the mid-1940s and held that high rate through the mid-1950s. Private sector union density began to decline slowly in the late 1950s and 1960s, and then declined much more quickly in the 1970s through the present day. Private sector density is now lower than it was before passage of the NLRA, which provided some of the first legal protections for union activity.

Public sector union density increased in the 1960s and 1970s as these workers gained the right to unionize and bargain collectively. After an initial period of increase, density largely held constant at around 37 per cent for decades, but has declined somewhat over the past few years to 33 per cent as a number of states have restricted public sector bargaining, as discussed later in the brief.

Within these general trends of private sector decline and public sector stability, there is significant variation by state. States with especially low union density are generally right to work and also limit public sector collective bargaining. It is rare for private sector density in a right to work state to even approach the national average.

AMERICAN LABOUR AND SOCIAL PROTECTION

Labour unions occupy a key role in providing social protections for their members, as the United States has very limited social protections on a national level, with little more even in progressive states. The most prominent and sweeping of American federal social protection programs is Social Security, which offers cash transfers for all Americans during disability and retirement; Medicare and Medicaid, respectively, offer health insurance for the elderly and those with disabilities or income below certain levels. Outside of these programs, retirement plans, and health insurance are most typically obtained through employers, making access to these benefits dependent on employment conditions, and especially membership in a union that can effectively negotiate for them.

Similarly, federal labour protections that apply to all American workers are few and weak. Today, the Fair Labor Standards Act (FLSA) establishes nationwide standards for hours and overtime pay, as well as a minimum wage (which is quite low, leading many states to enact their own, higher minima), but no standards regarding paid leave or vacation time. Though there are few legal requirements, nearly 80 per cent of US workers receive some paid medical leave and about the same receive paid vacation days. Still, these benefits can be quite limited: private sector workers receive on average just seven paid sick days per year, and lower-income workers are much less likely to have these benefits. Access to other types of paid leave can be even more restricted. For example, just one in five private sector workers have access to paid family leave to care for a new child or a family member.

The FLSA also does not tie the minimum wage to inflation or cost of living; as a result, the federal minimum wage must be increased by Congress, and while it gradually did so over the course of decades since its passage, the last federal minimum wage increase was passed over fifteen years ago in 2007, raising the wage to $7.25 per

hour starting in 2009. The FLSA also sets penalties for the use of child labour. Many states and cities have passed higher minimum wages, and several have created paid leave programs, creating an uneven and incomplete set of workplace protections.

Another feature of the US labour model is that employment is considered to be "at will," meaning that either party can terminate the employment relationship if they choose to do so, and do so without any obligatory notice. There is no restriction against abusive dismissal, unless it involves discrimination on the basis of a protected status, such as gender or race. It is understood that workers can be fired "for any reason at all" apart from these limited protections. There is no labour court to address ordinary disputes over discipline. In fact, only the most highly paid workers have an individual employment contract.

The American labour movement plays a crucial role to address the gaps in these protections. Virtually every collective bargaining agreement contains a provision which limits dismissals and discipline to cases involving "just cause." A "union contract" is enforceable through binding arbitration, and the contract protects the individual rights of every covered worker. Especially at their peak of strength during the middle of the 20th century, unions negotiated quality benefits and protections for their workers, including the right to sick days, paid vacation, health insurance, and pensions, leading to what many view as a golden age for shared prosperity among capital and labour, and these benefits rippled out to non-union workers as well, though far from universally.

There is a large body of research that finds that unions in the United States raise wages and benefits for their members and when unions have sufficient density they increase compensation for non-union workers. Research also finds that unions have a significant impact reducing overall economic inequality, reduce executive compensation, increase the pay of mid and lower income workers, and push for more egalitarian public policies.

Research suggests that union decline has been a significant factor in the rise of economic inequality over recent decades. One academic estimate suggests that roughly one third of the rise of wage inequality among men is due to the decline of unions.

LEGAL BASIS FOR UNIONS IN THE US

For most private sector workers, the federal National Labor Relations Act (NLRA) of 1935 sets the legal basis for collective action by workers, including joining a union, bargaining collectively, and striking. Prior to the passage of the NLRA and several precursor laws in the early 1900s, unions were often legally viewed as an illegal restraint on trade.

The legal structure set up by the NLRA differs from that in most other countries along several different lines. Under the NLRA, if a majority of workers support a union at their workplace — demonstrated by voting in an election, or if the employer agrees through a show of signed cards — the union becomes the exclusive bargaining agent for all the workers in that group. Employers are not obliged to collectively bargain with a union if a majority is not achieved. In fact, unless the union can establish that it has support from the majority of workers, bargaining is not permitted — even if the employer is willing to do so. If the union achieves majority support, it must represent all workers equally, even those who do not pay fees (such as in a "right to work" state).

Most employers will insist that majority support be established through a secret ballot election, and it is common for employers to campaign vigorously against the union during the period leading up to the election, typically relying upon expert advisors in "union avoidance." US employers spend over $400 million a year on these consultants in union busting.

Corporations have a great deal of leeway for engaging in union busting without violating federal labour law. Corporations may, for instance, legally agitate for workers to vote against the union by predicting that unionization will force the closure of the business or firing of workers, often in the format of 'captive audience' audience meetings that workers are required to attend. Union organizers are restricted in their access to the worksite, while employers naturally are not. If employers violate labour law, the penalties are so low they are often viewed as an acceptable cost of doing business. Though firing an organizer may violate federal labour law, adjudication often takes years, and the employer will at most be required to offer that employee reinstatement and back wages less any earnings the worker received in the meantime, with no further monetary penalties. Employers are charged with violating the law in nearly 42 per cent of all union elections.

Even where unions are able to establish majority support and then "certified," the first collective bargaining agreement can be very difficult to achieve. Despite the law's requirement that the employer "bargain good faith" only about half of all certified unions are able to conclude a first contract and the remainder are eventually "decertified."

The structure of the NLRA tends to lead to enterprise bargaining. The NLRA does not provide for extension of union contracts to other employers, nor has it frequently led to the level of union density required to compel a group of employers to negotiate together. Further, the NLRA erects barriers to some types of multi-employer bargaining: unions typically must win a majority vote among employees of each employer they want to bargain with and each group of workers that form a union at separate firms are a separate bargaining unit which may not be combined except with the permission of the employer.

The NLRA blocks most state and local government actions to provide greater labour protections for workers. States are, however, legally allowed to pass "right to work" laws, which prohibit non-union workers from having to pay fees to the union, though the union is still required to represent non-members. Today, twenty-six states have right to work laws on the books. While southern states led the way in passing these laws in the 1940s and 1950s, in recent years there has been a renewal in their passage, although Michigan in 2023 became the first state in decades to repeal its right to work law.

The NLRA exempts several types of private sector workers — including workers in some industries that were historically performed by African Americans and other minorities, such as agriculture and domestic work, as well as independent contractors and supervisors. A few states have provided union rights to uncovered private sector workers.

Public sector workers are covered by a number of different laws that generally follow the NLRA framework: federal employees by the Federal Service Labor-Management Relations Statute, and state and local government employees by various state laws. The rights of public sector workers vary greatly by state, with some states placing significant restrictions on collective bargaining and other collective activities, and before 2018, states also determined whether or not public-sector unions could collect agency fees. In 2018, however, the public sector organizing landscape shifted dramatically with the Supreme Court ruling in Janus v AFSCME which effectively made all public-sector organizing right-to-work by declaring a state law in Illinois that had previously allowed unions to collect agency fees from non-union public-sector workers unconstitutional. Since 2018, the public sector union density has fallen by 0.7 percentage points and the decision may have widened the pay gap between public and private sector workers.

In short, under the NLRA structure, unions are the exclusive bargaining representative for a group of workers if a majority of them want a union, most bargaining occurs at the firm level or below, and states have little ability to act except for passing right-to-work laws, and when dealing with uncovered workers.

STATE OF DEBATE ABOUT UNIONS AND WHAT THE FUTURE HOLDS

The labour movement has reached heights of popular support and interest from both workers and political leaders, but unions face a number of obstacles to reversing the decline in union density and coverage and achieving lasting support. Still, there are a number of paths forward for building worker power currently in consideration by workers and lawmakers.

Public support for unions today is at its highest level since 1965, with 71 per cent of American's expressing approval for labour unions. Polling also suggests nearly half of workers would join a union today if they were able to. These levels of support are especially high amongst young workers and members of Generation Z, whose support for unions extends across class and ideological divides and even exceeds support among older generations at their age.

This revival in public interest in unions marks a break from the recent past, which saw union approval diminish in the aftermath of the 2007 financial crisis and ensuing Great Recession. This growing public support for unions also seems to be translating into collective action. The United States saw 417 documented strikes in 2022, with work stoppages increasing roughly 52 per cent from 2021. While low compared to historical levels, the trend in recent years has been positive, with a peak in 2018 including the largest numbers of workers on strike since 1986. The NLRB reported a 53 per cent increase in petitions for union elections in its 2022 fiscal year (the highest number since 2016). This notably includes large-scale organizing campaigns at employers like Starbucks, Amazon, and public and private universities.

Corporate America generally remains opposed to labour, though there have been some notable exceptions. Many of the United States' largest corporations remain engaged in anti-union activities, according to NLRB findings, including Starbucks, Google, and Amazon, and corporations have developed a number of novel approaches to labour in recent years that diminish worker power, such as hiring gig workers who function like employees but are classified as contractors (who do not enjoy the same benefits and protections as employees) and fissuring of workplaces, where layers of franchisees or subcontractors divide workers doing the same work into separate legal entities.

Still, a few companies have adopted a more neutral or even conciliatory stance to worker organizing. Both neutrality agreements and voluntary recognition — whereby companies agree not to engage in union-busting during an organizing campaign, or recognize the union and begin bargaining without an NLRB-supervised election — have become slightly more common, with companies as large as Microsoft and Ford striking deals with unions to implement less outwardly hostile organizing and bargaining campaigns. These examples remain exceptions to the rule of corporate hostility to organizing but point to changing arithmetic in some boardrooms regarding whether anti-union campaigns are worth the cost to shareholders.

Equally exceptional is the support the labour movement has received from the Biden administration. President Biden has repeatedly renewed his promise to be 'the most pro-union President leading the most pro-union administration in American history.' His administration has adopted a whole-of-government approach to building worker power in both words and deeds.

While reform of federal labour law would require an act of Congress, President Biden, and his appointed officials leading federal agencies have a range of tools at their disposal to shape how they implement existing law in practice. This has led to concrete steps for supporting organizing rights across the federal government from Biden's appointees. The establishment of the White House Task Force on Worker Organizing and Empowerment produced a report detailing nearly 70 specific recommendations for federal agencies to better protect organizing, which the administration is in the process of implementing. The NLRB, which oversees union elections and adjudicates many labour disputes, has advanced a number of pro-

worker policies as well as achieved its first funding increase in nearly a decade, giving it more resources to pursue violations of federal labour law. The NLRB has also extended its pro-worker efforts to other branches of government via the completion of a number of memoranda of understanding between the NLRB and other agencies, including the Department of Labor, Department of Justice, and Department of Homeland Security, as part of an effort to align federal agencies' efforts to protect worker organizing.

The administration has also made unions a central part of its industrial policy approach. The Biden administration has passed a large industrial policy program intended to invest in infrastructure and manufacturing while combating climate change, with the stated intention of creating good, union jobs through building infrastructure and manufacturing facilities. Although Biden's original plans for industrial policy included more explicitly pro-union features like strengthened penalties for violations of federal labour law, the program enacted into law by Congress still has several features beneficial to unions and the Biden administration is attempting to make the most of these provisions.

The administration has already made a number of commitments to create pro-union jobs. Federal agencies tasked with implementation have in many instances tailored their grants, loans, and tax incentives towards recipients that will create jobs that allow workers a free choice to join a union. These efforts include selecting funding recipients that agree to pre-hire collective bargaining agreements with labour unions on construction projects that help support a well-qualified workforce, as well as taking significant actions to make sure firms adhere to the required job quality standards in the three laws and encourage recipients to go above the minimum requirements. Nevertheless, the implementation of the industrial policy program is still in its infancy, and the risk exists that the programs create many jobs but few opportunities to join unions.

The unsuccessful attempt by the administration to implement more explicitly pro-union features in its industrial policy program demonstrates how difficult reforming labour law will be. Federal labour law remains weak and gets weaker as the Supreme Court continues to undermine worker's rights through rulings that, for instance, allowed an employer to sue for damages incurred during a strike.

There do exist possible paths forward for the labour movement to overcome some of these obstacles. Congress has considered — and in some instances, one chamber of Congress has actually passed — a number of bills that would modernize federal labour law. The Protecting the Right to Organize (PRO) Act is arguably the most consequential of these, as it would enhance legal protections for worker organizing and allow the government to levy meaningful penalties for violations. For public sector workers, the Public Service Freedom to Negotiate Act would establish a nationwide legal baseline for collective bargaining for public-sector employees. A number of other measures like eliminating corporations' ability to deduct union-avoidance costs from their taxes have also been introduced.

More states are moving in a promising direction as well. Connecticut banned the practice of 'captive audience meetings,' a union-busting tactic employers force their workers to attend mandatory meetings subjecting them to anti-union material, though due to the strong free-speech protections afforded corporations the law has been challenged in court. Several states are also reviving the nearly century-old practice of assembling workers' boards that include representatives from employers and workers to set statewide standards for an industry, as in the fast food sector in California.

CONCLUSION

While unions in most countries of the world have lost membership or density over recent decades, membership in US unions is particularly low. Moreover, the structure of US union and bargaining law means that when unions have low membership, they have limited ability to shape the labour market. In part because of these weaknesses, US unions have been experimenting with a range of strategies and tactics to grow their membership and gain greater influence over the labour market. These efforts have led to a few successes, but none has succeeded in reversing the basic trends of declining membership and influence.

Nevertheless, even as it is in many ways the worst of times for labour, unions have seen a renewed interest and growth in public support in recent years, leading to on-the-ground organizing successes as well as greater consideration of labour law reform that would reverse the decline in union density. Whether or not the obstacles facing labour can be overcome, and growing interest in unions can be turned into sustainable growth in union membership, remain open questions.

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