

# LABOR UNDER BIDEN

## Speakers

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November 18, 2021

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# AGENDA AND SPEAKERS

## ➤ **Biden Legislative Agenda**

- Infrastructure Bill, PRO Act and Build Back Better Act

## ➤ **Uptick in Labor Organizing, Union Activity, and ULPs**

- Increase in Labor Union Approval and Union Membership
- Watershed Moments
- Recent Strike Activity

## ➤ **Recent NLRB Developments**

- Change of Guard
- Updates from the Board, General Counsel, and Division of Advice

## ➤ **Workplace Activism and Protected Concerted Activity**

- What is Driving Workplace Activism?
- Increased Employee Activism



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**Note regarding Q&A:** please use the Q&A feature in the Zoom window to submit your questions. All attendees will be muted and will be unable to verbally ask questions. Questions answered during the call will not be attributed to the participant who submitted the question. In the event we are unable to address all questions due to the time constraints, we will follow-up with you after the webinar.

# BIDEN LEGISLATIVE AGENDA

## Legislation



# BIDEN LEGISLATIVE AGENDA

## Legislation – Infrastructure Investment and Jobs Act

### Infrastructure Bill

- Neutrality
  - Task Force for Implementation of Bipartisan Infrastructure Law
  - Promises to create good-paying job opportunities for Americans by providing prevailing wages and a “free and fair chance” to join a union
  - DOL Secretary Marty Walsh sits on Task Force



# BIDEN LEGISLATIVE AGENDA

## Policy and Legislation – PRO Act

### Protect the Right to Organize Act

- Proposed changes
  - Election rules
  - Employee use of employer communication systems
  - Eliminating right-to-work laws
  - Codifying the ABC test
  - Broadening the definition of joint employer
  - Allowing secondary boycotts

IIB

117<sup>TH</sup> CONGRESS  
1<sup>ST</sup> SESSION

**H. R. 842**

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IN THE SENATE OF THE UNITED STATES

MARCH 11, 2021

Received; read twice and referred to the Committee on Health, Education,  
Labor, and Pensions

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### **AN ACT**

To amend the National Labor Relations Act, the Labor Management Relations Act, 1947, and the Labor-Management Reporting and Disclosure Act of 1959, and for other purposes.

# BIDEN LEGISLATIVE AGENDA

## Policy and Legislation –Build Back Better Act

- **Build Back Better Act**

- \$1.7 trillion dollar spending plan
- Includes topics such as immigration, healthcare, and climate change

- **NLRA provisions**

- Civil penalties for employers:
  - Up to \$50,000 for an unfair labor practice
  - An additional penalty up to \$100,000 for termination or serious economic harm
- New director and officer liability provisions
- Goes into effect on January 22, 2022 (if signed into law)



# BIDEN LEGISLATIVE AGENDA

## Policy and Legislation –Build Back Better Act

### Current Status

- To pass, the Build Back Better Act needs a simple majority in both the House and Senate
- The House has already delayed voting on the Build Back Better Act twice
  - They are expected to vote sometime this week
- Senate Republicans likely to challenge the new civil penalties in the NLRA per the Byrd Rule





# UPTICK IN LABOR ACTIVITY

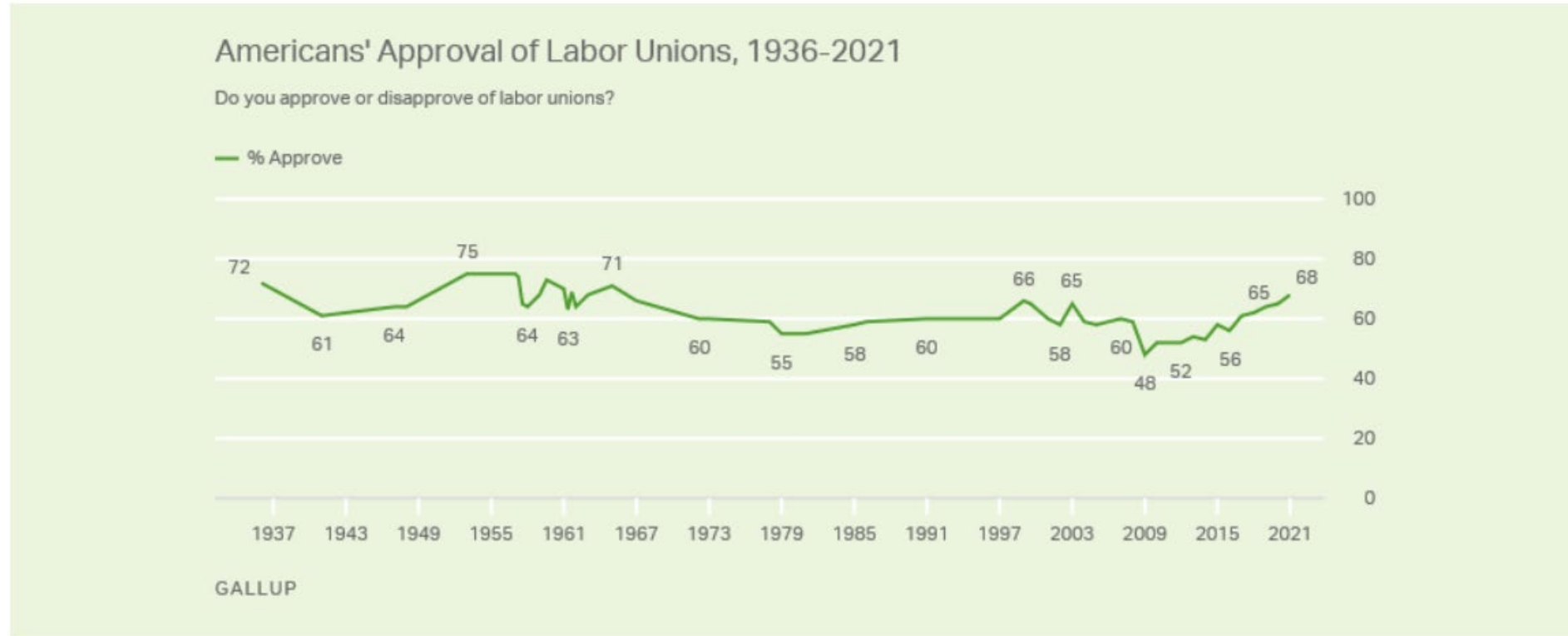
Renewed Interest in Labor





# UPTICK IN LABOR ACTIVITY

## Increase in Labor Union Approval



Gallup Poll (August 2021)

# UPTICK IN LABOR ACTIVITY

## Recent Increase in Union Membership

Year	% Wage and Salary Workers in Unions
1983	20.1%
2012	11.3%
2013	11.3%
2014	11.1%
2015	11.1%
2016	11.1%
2017	10.7%
2019	10.3%
2020	10.8%
2021	TBD - we expect an increase

# WATERSHED MOMENTS

## Amazon Update

### Recent Updates

- Bessemer
  - Amazon facility in Bessemer, Alabama voted against unionizing
  - Union challenged the results
- Petition Withdrawal
  - New York, Staten Island workers withdrew their election petition



# WATERSHED MOMENTS

## Striketober

### Major 2021 Labor Disruptions

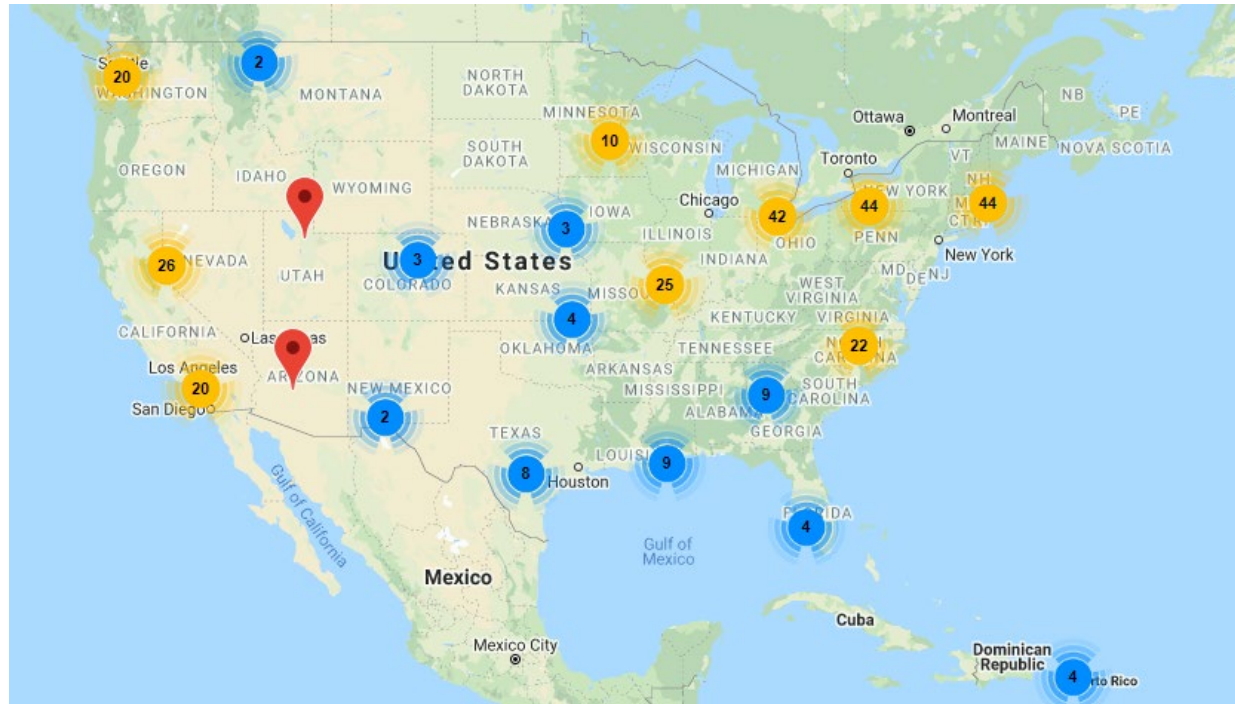
- John Deere
  - 10,000 workers, lasting five weeks
    - Deal reached on November 17, 2021
- Volvo Trucks
  - 2,900 workers, lasting 35 workdays
- Kaiser Permanente
  - Deal reached on a three-year contract to avert strike but more than 60,000 workers may potentially walk off their jobs today and tomorrow



# UPTICK IN LABOR ACTIVITY

## Labor Disruptions

**Recent Strike Activity** | 303 strikes between January 1, 2021 to November 17, 2021



Source: Labor Action Tracker, Cornell ILR School

# RECENT NLRB DEVELOPMENTS

## Change of Guard and the Labor Pendulum

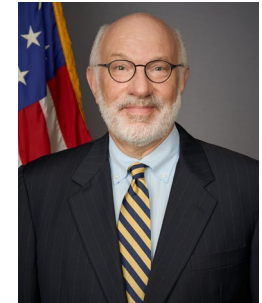


# RECENT NLRB DEVELOPMENTS

## Change of Guard

### A Five-Member Board and New Faces

- Five-Member Board
  - First five-member Board since August 2018
  - New Members:
    - Member Gwynne Wilcox
    - Member David Prouty
- General Counsel Office – New Additions:
  - GC Jennifer Abruzzo
  - Deputy GC Peter Sung Ohr



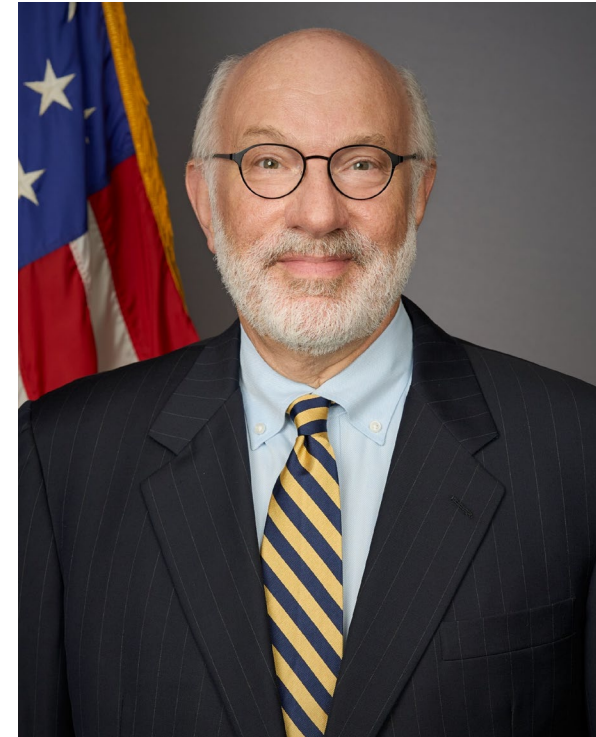


# RECENT NLRB DEVELOPMENTS

## Change of Guard

### Prouty - Nomination Concerns

- Delayed Term
  - A swearing-in administrative error
- Conflicts of Interest?
  - Questions as to Prouty's ability to stay neutral in any matters with SEIU
  - Prouty was previously General Counsel for SEIU
  - SEIU lawsuit against NLRB – no recusal to date



# RECENT NLRB DEVELOPMENTS

## Change of Guard

### Peter Robb's Discharge

- Robb terminated at the beginning of President Biden's term
- Does the President have the authority to fire NLRB's General Counsel without cause?
- Fifth Circuit is being pressed to review his termination



# THE NLRB AND THE LABOR PENDULUM

## The Board

TOPIC	TRUMP BOARD	BIDEN BOARD
<b>Communications Systems</b>	Employer may prohibit non-business use of technology system.	Likely to expand the rights of employees to use company systems for workplace communications.
<b>Independent Contractor Status</b>	Return to the traditional independent contractor test to determine whether worker is an employee or independent contractor.	Expected to apply a standard that makes it easier to find employee status.
<b>Handbook</b>	Relaxed scrutiny over employee handbook rules.	More scrutiny over handbook rules.
<b>Protected Concerted Activity</b>	Limits on interpretation of protected concerted activity.	Likely expansion of protected concerted activity.
<b>Separation Agreements</b>	Permitting greater latitude in the terms of separation agreements.	Likely to more closely scrutinize separation agreements for terms that restrict exercise of NLRA rights.
<b>Campaigns</b>	Easier union campaign and election rules for employers.	Will likely restrict employer's ability to campaign and time available to campaign in an election.
<b>Weingarten Rights</b>	Non-unionized employees do not have a right to have a co-worker present during an investigatory interview.	Likely to expand <i>Weingarten</i> rights to allow non-unionized employees the right to have a co-worker present during an investigatory interview.
<b>Workplace Investigations/Confidentiality</b>	Requiring employees to maintain confidentiality for the duration of a workplace investigation is permissible.	Likely to prohibit confidentiality instructions for workplace investigations.

# RECENT NLRB DEVELOPMENTS

Office of General Counsel

## General Counsel Memoranda:

- Injunctions
  - Cases more likely to lead to remedial failure, and thus appropriate for injunctive relief:
    - Discharges during organizing campaigns
    - Violations during organizing campaigns that lead to a need for a *Gissel* bargaining order
    - Violations that occur during the period following certification when parties should be negotiating a first-contract
    - Withdrawal of recognition from incumbent unions

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 21-05

August 19, 2021

TO: All Regional Directors, Officers-in-Charge,  
and Resident Officers

FROM: Jennifer A. Abruzzo, General Counsel

SUBJECT: Utilization of Section 10(j) Proceedings

I believe that Section 10(j) injunctions are one of the most important tools available to effectively enforce the Act. Effective enforcement requires that we timely protect employees' Section 7 right to exercise their free choice regarding engaging in union and protected concerted activities, including organizing and collective bargaining. Section 10(j) provides the tool to ensure that employees' rights will be adequately protected from remedial failure due to the passage of time. During my tenure as General Counsel, I intend to aggressively seek Section 10(j) relief where necessary to preserve the status quo and the efficacy of final Board orders.

# RECENT NLRB DEVELOPMENTS

## The Board

### Recent Developments

- Remedies
  - Board in *Thryv* on November 10, 2021 issued a notice and an invitation to file briefs on the issue of whether the Board should modify its traditional make-whole remedy
  - Board to consider whether damages that are a direct and foreseeable result of the employer's unfair labor practice should be a part of the make-whole remedy

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 21-06

September 8, 2021

TO: All Regional Directors, Officers-in-Charge,  
and Resident Officers

FROM: Jennifer A. Abruzzo, General Counsel

SUBJECT: Seeking Full Remedies

*NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.*

**Thryv, Inc. and International Brotherhood of Electrical Workers, Local 1269.** Cases 20-CA-250250 and 20-CA-251105

November 10, 2021

NOTICE AND INVITATION TO FILE BRIEFS  
BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN,  
RING, WILCOX, AND PROUTY

In this case, the General Counsel alleges that the Respondent, Thryv, Inc., unlawfully laid off six employees without first bargaining to impasse with the Union, International Brotherhood of Electrical Workers, Local 1269. The Board's traditional remedy for this alleged violation would require, inter alia, that these employees be reinstated to their previous or substantially equivalent positions and be made whole for their loss of earnings and other benefits they incurred as a result of the unlawful layoff.<sup>1</sup>

# RECENT NLRB DEVELOPMENTS

Office of General Counsel

## General Counsel Memoranda:

- Vaccination and Bargaining
  - **Discretionary v. Non-Discretionary Terms**
    - If the employer **has discretion** in implementing a certain aspect of the new ETS, the employer is required to bargain with the Union before implementing that aspect of the ETS
    - Even if the employer **has no discretion**, employer must still bargain over the effects of the decision

OFFICE OF THE GENERAL COUNSEL  
Division of Operations Management

MEMORANDUM OM 22-03

November 10, 2021

TO: All Regional Directors, Officers-in-Charge,  
and Resident Officers

FROM: Joan A. Sullivan, Acting Associate General Counsel

SUBJECT: Responding to Inquiries Regarding Bargaining Obligations Under the Department of Labor's Emergency Temporary Standard to Protect Workers From Coronavirus

On November 5, 2021, the U.S. Department of Labor issued an Emergency Temporary Standard to Protect Workers from Coronavirus (ETS).<sup>1</sup> This Memorandum contains a brief summary of the ETS and provides Information Officers with the basic legal framework for answering questions concerning employers' duty to bargain regarding the ETS's requirements.

# RECENT NLRB DEVELOPMENTS

Division of Advice

## Advice Memoranda:

- Employer Communication Systems
  - Employers cannot restrict an employee from participating in a work group on a third-party application that the employer requires employees to download on their personal phones and which the employees use to check in and out of shifts, communicate daily sales statistics, view Employer announcements, etc.





# RECENT NLRB DEVELOPMENTS

## Division of Advice

### Advice Memoranda:

- Protected Concerted Activity
  - Employee made comment to fellow employee (who the employee believed was a supervisor) about a raise. Employee had also mentioned this to a co-worker before, and co-worker responded by saying you need to earn a raise
  - Division concludes that this is inherently concerted activity

**From:** [REDACTED]  
**To:** [Muth, Jessica T.](#); [Hitteman, Paul](#); [Hofstra, Joyce A.](#); [Mols, Christina](#); [Nelson, Daniel N.](#)  
**Cc:** [Bock, Richard](#); [Compton, Kavce R.](#); [Dodds, Amy L.](#); [Shorter, LaDonna](#)  
**Bcc:** [Doyle, John D.](#)  
**Subject:** Care Park of River Oaks Association II, 13-CA-274570 (case closing email)  
**Date:** Tuesday, September 7, 2021 4:41:00 PM

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The Region submits this case to Advice on the issue of whether the Charging Party was unlawfully discharged because [REDACTED] engaged in activity which was inherently concerted by virtue of [REDACTED] repeated conversations with [REDACTED] co-worker-- albeit Charging Party mistakenly believed [REDACTED] to be [REDACTED] supervisor-- to assist [REDACTED] in getting a raise. We conclude that the Charging Party's conduct was inherently concerted, and was for mutual aid and protection. Nonetheless, we conclude that the Employer meets its *Wright Line* defense, and accordingly, the charges should be dismissed, absent withdrawal.

# RECENT NLRB DEVELOPMENTS

Division of Advice

## Protected Concerted Activity Historically

- I.e., discussing with one or more co-workers issues about working conditions
- Meyers I: “[T]o find an employee’s activity to be ‘concerted,’ we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.”

### Example

- *Alstate Maintenance, LLC*, 367 NLRB No. 68 (2019)
- “We did a similar job a year prior and we didn’t receive a tip for it.”
  - Not protected concerted activity
    - Not a group complaint
    - No indication that employee sought to initiate or induce group action

## POLLING QUESTION

**An employee says to management: “I’m afraid the building is unsafe.”  
Is that considered protected concerted activity today?**

- A. Yes
- B. No
- C. Not sure

# WORKPLACE ACTIVISM

## Employee Activism



# WORKPLACE ACTIVISM

## What is Driving Workplace Activism?

### Pandemic accelerated a power shift to employees

- **60%** of employees agree that *employees have more power and leverage* to create change within an organization than before the pandemic

### Employees expect their employers to fit their values and beliefs

- **61%** choose their employers based on their *values and beliefs*.
- **50%** agree that a large group of employees exerting strong pressure from within *can make an organization change almost anything* about itself

### Workplace activism has become the norm

- **76%** say they would *take action* to produce or motivate urgently necessary changes within my organization
- **40%** say they would *go public* — through whistleblowing, strikes or work slow-downs, leaks of internal documents or emails, social media campaigns, or protests outside their offices or factories



# WORKPLACE ACTIVISM

## Increased Employee Activism in Technology Sector

### Companies

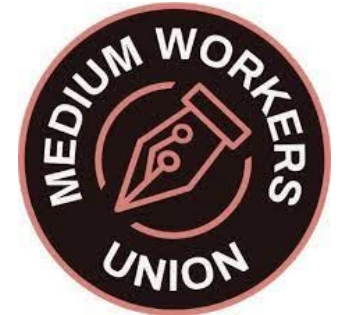
*E.g.,*

- Alphabet
- Kickstarter
- Medium
- Lanetix
- Glitch
- New York Times Tech Staff
- Change.org

### Groups

*E.g.,*

- CODE-CWA
- Tech Workers Coalition
- OPEIU
- Digital Media United
- NewsGuild



## POLLING QUESTION

**Has your company faced growing pressure to be more vocal about societal concerns?**

- A. Yes
- B. No
- C. About the same as before



# WORKPLACE ACTIVISM AND PROTECTED CONCERTED ACTIVITY

Increased Employee Activism More Broadly

## Addressing Societal Issues

- Half of U.S. employees believe their company faces growing pressure to be more vocal on societal issues
- 44% believe corporate America's role in addressing societal issues will increase

## Welcome to the New Age of Employee Activism

Aug. 18, 2021, 1:01 AM

 Listen  

**Strikes are sweeping the labor market as workers wield new leverage**

[washingtonpost.com/business/2021/10/17/strikes-great-resignation](https://www.washingtonpost.com/business/2021/10/17/strikes-great-resignation)

October 17, 2021

Q

QUARTZ *at* WORK

⌵

STATE OF PLAY

**How a new generation of workers has revitalized employee activism**

# THANK YOU!



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## Navigating Change in the US Administration

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additional resources, visit the  
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Resource Center:

[usadministration.mwe.com](https://usadministration.mwe.com)

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