COUNTRY BASELINE UNDER THE ILO DECLARATION ANNUAL REVIEW

United States - 2023

FREEDOM OF ASSOCIATION AND THE EFFECTIVE RECOGNITION OF THE RIGHT TO COLLECTIVE BARGAINING

REPORTING

Fulfilment of Government's reporting obligations

OBSERVATIONS BY THE SOCIAL PARTNERS

Did employers and/or workers organizations comment on the report? [11a]	Yes

EFFORTS AND PROGRESS MADE IN REALIZING THE PRINCIPLE AND RIGHT

Ratification

Ratification intention

What are the prospects for ratification of Convention No. 87?	No indication
What are the prospects for ratification of Convention No. 98?	No indication
What, if any, are the impediments to the ratification of Convention No. 87 and/or Convention No. 98?	No change. In October 1985, the President's Committee on the International Labor Organization (PC/ILO) adopted three ground rules providing that no ILO convention will be sent to the Senate for its advice

	and consent to ratification unless or until U.S. law and practice, at both the federal and state levels, are in full conformity with its provisions. These ground rules were incorporated in a Senate declaration adopted in 1988, at the time the Senate gave its advice and consent to United States ratification of ILO Convention No. 144 on Tripartite Consultation. The ground rules provide that: - Each convention will be examined on its merits on a tripartite basis. - If there are any differences between the convention and federal law and practice, these differences will be dealt with in the normal legislative process. - There is no intention to change state law and practice by federal action through ratification of ILO conventions, and the examination will include possible conflicts between federal and state law that would be caused by such ratification. By necessity, the legal review process undertaken by Tripartite Advisory Panel on International Labor Standards (TAPILS) prior to ratification is complex, thorough, and in many instances very lengthy. Only when TAPILS has completed its review of a given convention, is it possible or appropriate to make precise judgments about the conformance of U.S. law and practice with that instrument.

Recognition of the principle and right (prospect(s), means of action, basic legal provisions)

Have there been changes in law and practice in your country as regards freedom of association and the effective recognition of the right to collective bargaining?	Yes
Policy initiatives	On July 19, 2022, the National Labor Relations Board (NLRB) and the Federal Trade Commission executed a memorandum of understanding (MOU) to increase inter-agency cooperation on protecting workers from anticompetitive and coercive labor practices. The agreement enables information sharing, cross-agency training, and outreach on issues such as the gig economy, noncompete and nondisclosure provisions, market concentration, and collective bargaining. On July 26, 2022, the NLRB and the Department of Justice (DOJ) Antitrust Division signed an MOU to strengthen the partnership between the two agencies. Through increased coordination in enforcement, training, and information exchange, the MOU will strengthen the agencies' ability to

	protect workers from collusive or anticompetitive practices and prevent encroachment on workers' rights protected by the National Labor Relations Act (NLRA). On March 7, 2023, the NLRB and the Consumer Financial Protection Bureau (CFPB) signed an MOU to better coordinate their efforts and address practices such as employer surveillance, monitoring, data collection, and employer-driven debt.
Legislative developments (extracts)	The Labor-Management Reporting and Disclosure Act (LMRDA) establishes reporting and recordkeeping requirements for employers and labor relations consultants. The transparency created by these requirements is designed to better inform workers in making determinations regarding the exercise of their rights to organize and bargain collectively. Under LMRDA section 203(a), an employer must report, on Form LM-10, subject to exemptions, certain expenditures and activities, including any expenditure where an object thereof, directly or indirectly, is to interfere with, restrain, or coerce employees in the exercise of their collective bargaining rights, or to obtain information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer.

Judicial decisions

Federal Court decisions (extracts)	In NTEU v. FLRA,11 decided by the D.C. Circuit Court of Appeals on August 2, 2022, the court invalidated 2020 FLRA guidance that allowed federal agencies to enforce regulations that conflicted with a collective bargaining agreement (CBA) if an expiring CBA was extended. Following the 2018 Supreme Court decision in Janus v. AFSCME, that held requiring non-union employees to pay union fees in the public sector violated the First Amendment to the Constitution, the Supreme Court declined to extend this holding to workers who wish to withdraw from private dues agreements. The plaintiff in Kurk v. Los Rios Classified Emp. Assoc. unsuccessfully sought to undo a voluntary membership agreement by claiming she had a First Amendment right to renounce union membership. On May 1, 2023, the Supreme Court declined to hear the plaintiff's appeal. On June 1, 2023, in Glacier Northwest v. International Brotherhood of Teamsters Local Union No. 174, the Supreme Court held that striking union members can be sued under state tort law if they do not take "reasonable precautions" to protect employer property. To be protected by the NLRA, the court reasoned that a union must prevent "foreseeable, aggravated, and imminent danger" to employer property resulting from the union's cessation of work.
NLRB decisions (extracts)	In Tesla, Inc., decided on August 29, 2022, the NLRB held that any restrictions on the display of union insignia are presumptively unlawful, with an exception for special

	circumstances that justify the restriction. The decision overrules Wal-Mart Stores, Inc. ,a 2019 decision that held that only complete bans on union insignia were presumptively unlawful, creating a weaker standard for when employers impose size-and-appearance restrictions. On December 13, 2022, in a decision in Thryv, Inc., the Board clarified its make-whole remedy to expressly ensure that workers who are victims of labor law violations are compensated for all “direct or foreseeable pecuniary harm” suffered as a result of those unfair labor practices. The decision explains that, in addition to the loss of earnings and benefits, victims of unfair labor practices may incur significant financial costs, such as out-of-pocket medical expenses, credit card debt, or other costs that are a direct or foreseeable result of the unfair labor practices. The Board determined that compensation for those losses should be part of the standard, make-whole remedy for labor law violations.

Exercise of the principle and right

Special attention to particular situations

Has particular attention been paid to specific groups of population, workers or sectors of activity in the efforts to promote freedom of association and the effective recognition of the right to collective bargaining?	Yes. Following guidance from the NLRB in 2021 outlining how the NLRB can help immigrant workers petition for deferring deportation, the Department of Homeland Security (DHS) announced an expedited process for labor agencies to request deferred action on behalf of workers in January 2023. Deferred action may be necessary for workers or their advocates to participate in NLRB processes or exercise their rights under the NLRA.

Promotional activities

Training	On September 12, 2022, the Federal Labor Relations Authority (FLRA) released a training video on Labor-Management Forums (LMFs), which can improve labor-management relations by involving unions in agency decision making. The training covers the basics of LMFs and how to integrate them into the collective bargaining process.
Awareness-raising	On September 7, 2022, the U.S Department of Labor partnered with the NLRB, the Small Business Administration, and the Federal Mediation and Conciliation Services to create a digital toolkit with information for employers who want to support and work with their employees who are considering unionizing. The toolkit details the rights and obligations of employers, provides links to free mediation services, and offers free training on

establishing collective bargaining agreements and labor-management partnerships.

On March 28, 2023, the NLRB launched a “Know Your Rights” card series in English and Spanish to better inform workers of their benefits and protections under the NLRA. The cards are designed to be used by workers at their workplace.

Special initiatives/Progress

The NLRB remains active in running union elections as well as investigating and resolving unfair labor practice (ULP) charges. Union representation petitions were up 53% in FY 2022 compared to FY 2021.

Section 10(j) of the NLRA authorizes the Board to seek temporary injunctions against employers and unions in federal district courts to stop unfair labor practices while the case is being litigated before administrative law judges and the Board. From July 1, 2022, through June 30, 2023, the Board sought 13 10(j) injunctions. Of these, three were settled, one granted, none denied, and as of July 6, 2023, the Board is still seeking nine of them.

In FY 2022, the National Mediation Board (NMB) entered its 88th year of assisting in the resolution of representation, collective bargaining, and grievance disputes in the airline and railroad industries. During this time, the NMB’s Office of Mediation Services was responsible for managing more than 93 mediations, 46 of which came to a successful conclusion without any interruption in service. The NMB also worked successfully on 49 cases using non-traditional and low-cost alternative dispute resolution techniques. The Office of Legal Affairs successfully completed 31 representation cases and held 20 representation elections, the most since 2017. The NMB’s Office of Arbitration Services decided and closed 3,803 arbitration cases.

CHALLENGES IN REALIZING THE PRINCIPLE AND RIGHT

The Government of the United States pointed out that challenges with respect to freedom of association and the effective recognition of collective bargaining include new technology and changes in the types of employment available. Technological innovations have made it easier for employers to monitor employees and interfere with union formation. For example, employers can use predictive models to assess likelihood of unionization at specific locations and target anti-union efforts at these locations and can track when large groups of employees come together and monitor those meetings. The labour market is expanding in the gig economy, and gig work employers often treat their workers as independent contractors, a category of workers that is not covered by the NLRA. For its part, the United States

	Council for International Business (USCIB) considers that there is no evidence or data that technologies are being used in the manner described above and that lawful use of the classification "independent contractor" should not be listed as a challenge to freedom of association and effective recognition of the right to collective bargaining.