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SPOTLIGHT ON

Employee Voice, Unionization, and the Contours of the Employment Relationship

Channeling employee voice for productive and positive workplaces drives successful employee relations. As employee voice grows louder and external pressures for worker collective action increase, CHROs will have a larger role to play in employee relations.

By Gregory Hoff

About this Series

HR Policy Association (HRPA) represents nearly 400 of the largest companies worldwide. Members employ more than 10 million individuals in the U.S. This report articulates the perspectives of our members regarding the trajectory of work in the U.S. and the need for specific changes in both corporate and public policies to effectively advance the future of the American workforce.

HR Policy Association's "Advancing the American Workforce" series equips policymakers and business leaders with insights from Chief Human Resource Officers (CHROs) of major companies. The profound changes employers and society have experienced over the past five years have transformed the way large employers and their employees think about work, the workforce, and the workplace and how each needs to be structured for long-term success. HR Policy provides the perspective, not only from employers, but from CHROs who bridge the goals of their companies with the talents and needs of its greatest asset: employees.

New technologies, evolving demographics, and shifting political winds demand a strategic approach to HR. Chief Human Resource Officers are at the forefront of navigating these changes, and their perspective provides invaluable insights for policymakers. This multi-part series offers practical experiences and perspectives on the critical trends shaping the future of work, and suggests policy approaches to ensure the American workforce remains at the vanguard of global excellence in the years to come.

Executive Editor: Timothy J. Bartl

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EXECUTIVE SUMMARY

Employee Voice, Unionization, and the Contours of the Employment Relationship

Spurred by cataclysmic changes to the workplace during the COVID-19 pandemic, employee voice rose to a fever pitch in the early 2020s, with no signs of abating. Organized labor, with the strong backing of the Biden administration, has moved to capitalize on this trend and increase union membership in the United States, which has dropped to historical lows. So far, despite high-profile organizing and strike activity, tangible results remain elusive.

Meanwhile, the National Labor Relations Board (NLRB), the agency responsible for interpreting and enforcing the National Labor Relations Act, continues to seesaw back and forth on major federal labor law and policy changes, with the current Board going further than ever before to tilt the playing field in favor of unions. Legal changes to the contours of the employment relationship – including worker classification and joint employer liability – continue to occur at both the state and federal level, leaving employers on uncertain and shifting ground, all while the gig economy grows larger and larger.

Chief Human Resource Officers (CHROs) are the main architects of successful and sustainable company culture within executive leadership and, as such, strive to precisely capture and respond to employee voice. In turn, channeling employee voice for productive and positive workplaces drives successful employee relations. As employee voice grows louder and external pressures for worker collective action increase, CHROs will have a larger role to play in employee relations.

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Employee voice on the rise. **The combination of the shift towards remote and flexible work arrangements and a sudden talent crunch – both caused in large part by the COVID-19 pandemic – has ushered in an unprecedented era of employee voice and activism.**

Over **90% of large companies** indicated that finding and hiring talent is more challenging since 2020 than before it.

As the democratization of work continues over the next decade – a product of increasing flexibility in how, when, and where work can be done – worker leverage, and the uptick in employee voice that comes with it, will only grow. In addition, Gen Z workers, and Millennials to a lesser extent, expect their employer and workplace to align with their values and provide them a say in the overall direction of the company. If they feel they are not being heard, or that their employer does not share their socio-political values, they will take their talents elsewhere.

More than ever, therefore, it is essential that CHROs ensure that employees are heard and that employee voice is channeled into a productive workplace and culture that benefits both the employer and the people who work there.

In a recent survey, nearly **90% of Gen Z respondents said that they want purpose-driven work**, while nearly half said that they have turned down an employer based on personal **ethics or beliefs**.[1] Seventy-five percent said that an organization's **community engagement and societal impact** is an important factor when considering an employer.

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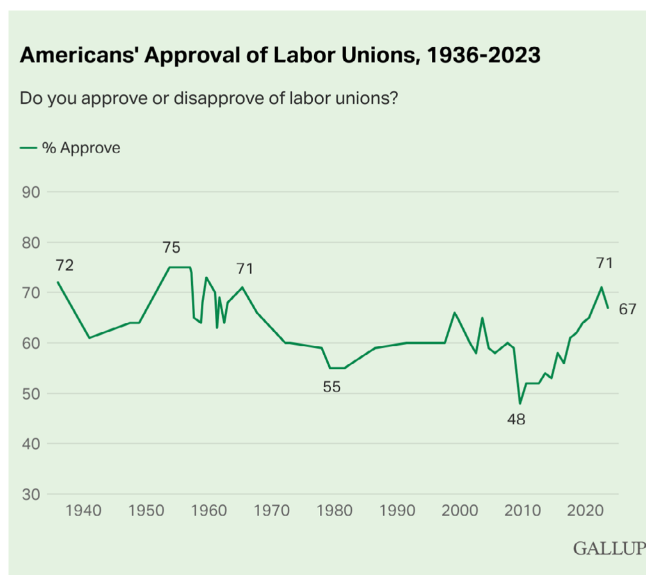
The Role of Unions. **Employee voice shows no signs of abating in the coming years. Meanwhile, the Biden administration and its NLRB have used all available levers of power to drive increased union density in the United States. In 2022, public support for unions reached a near 40-year high at 71%.[2]**



Over the last couple of years, several high-profile strikes, collective bargaining negotiations, and union organizing campaigns have generated countless headlines. And yet, in 2023, American union membership declined to just under 10% (6% for the private sector), an all-time low that represents less than half of membership rates in 1983 (the most recent year that the Bureau of Labor Statistics had comparable data).[3]

While many proponents of organized labor will point to weak federal labor law, weak enforcement, and company interference as the primary culprits of this disparity, union organizing statistics do not quite bear that out. On average, unions win 70% of representation elections – that number has remained relatively constant over the last decade.[4] The number of election petitions filed by unions has also remained relatively stable over a similar period. Simply put, when unions seek to organize new workers and run for election, they win much more often than not. However, traditional unions have failed to increase the rate of organizing to keep pace with the growing American workforce. In fact, in many recent years, their organizing rates actually declined.

In all, unions have attempted to organize less than 0.1% of the eligible private sector workforce, a reality that is increasingly recognized by those within the union movement. The problem is less "bad actor employers" or "weak law," and more a failure to "get out and organize."[5]

Nevertheless, labor law reform (such as the PRO Act[6]) is still primarily focused on tilting the playing field against employers and towards traditional unions, rather than updating the laws to reflect the modern workplace and the modern relationship between employers and employees. As outlined above, to be a competitive and profitable company in today's economy, employers must provide a place to work where employees feel included and where their voice is heard, in addition to traditional financial incentives. Simply put, good employee relations is one of the cornerstones of a profitable enterprise. Law and policy should focus on improving employee relations, period – whether that involves a union or not.

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Independent contractors and the gig economy will continue to grow.

Other than significant demographic shifts, perhaps the single most transformative workforce trend is the exponential growth of the gig economy and contingent workers. While this growth is largely attributable to the explosion of app-based services (e.g., Uber, Doordash), the rise of the gig economy and the contractor workforce has also been accelerated by the shift towards – and desirability of – remote and flexible work arrangements.

Nearly 40% of the U.S. workforce did freelance work in 2022 (i.e., work in which they were not characterized as employees), and 66% of hiring managers planned to increase utilization of contractors. In 2021, only 16% of surveyed workers had earned money through platform work. **Freelancers contributed nearly $1.4 trillion to the U.S. economy in 2022**, an exponential increase from $50 billion in 2021.[7]

Independent contractors are an increasingly essential segment of the American economy and, as such, have drawn the eye of policymakers. Unfortunately, the nature of independent contractors and their utilization is often misunderstood or mischaracterized. Policymakers often conflate the gig economy and app-based services with all independent contractors or freelancers. Not only are app-based services and the gig economy a small subset of the overall independent contractor population, the issues associated with each type of contractor are distinct from each other.

Independent Contractors

All individuals who perform work but who, by the nature of their work and their relationship with the entity for whom they provide work, are not employees under federal or state employment laws. This includes highly compensated individuals performing the same type of work over longer periods of time (even for the same, single entity), who may not desire to have an official employment relationship (or otherwise do not qualify as an "employee" under federal and state employment laws).

Gig Workers

The term "gig worker" – a subset of "independent contractors" – is popularly used to refer to app-based or platform workers, but also covers any individual who performs work on a short-term basis often for a variety of different entities – the type of work is generally common among all "gigs" (in other words, the expertise used is the same, and is the reason for being contracted – freelance writers, for example).

Platform/App-Based Workers

A subset of "gig workers" and "independent contractors," are those who perform work for app-based services such as Uber, Lyft, DoorDash, or Task Rabbit. These individuals often work simultaneously for multiple different platforms performing different types of work.

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Countless studies have demonstrated that most contractors – whether they are performing platform work or not – opt for non-employee arrangements for the increased flexibility in how they perform the work, scheduling or otherwise.[8] Despite some popular narratives, workers are generally not forced into these arrangements against their will – they prefer the flexibility and freedom associated with being an independent contractor, and have no wish to be tied to a formal employment agreement.

A majority of current or recent gig workers surveyed indicated that they were satisfied with pay and how their jobs are assigned. Nearly three-quarters of contractors surveyed said that flexibility is the main reason for doing contract work.[9]

While intentional misclassification does unfortunately exist and should be addressed, the vast majority of American companies are not hiring contractors to avoid employment law obligations. Employers utilize contractors for a variety of purposes, including to manage the ebb and flow of labor supply and demand, to quickly fill a need for specialized workers with specialized skills for short-term projects, or to fill service gaps outside of a company's core competencies (e.g., security services, cleaning services) – none of which involve attempting to avoid liability under the FLSA or other labor and employment laws, or to deprive individuals of rights or benefits.

Policy approaches to independent contractor regulation have generally involved mischaracterization of the misclassification problem (i.e., that employers use contractors to avoid employment law liability) to justify all-encompassing restrictions on the use of independent contractors. This approach, however, fails to meaningfully address the core issue related to contract workers and gig workers in particular – access to a similar safety net afforded to statutory employees.

While contractors may use contract work to supplement primary income, as a retirement gig, or for reasons that do not involve the need for traditional employment benefits, in many cases app-based workers perform such work as their primary employment and, therefore, may need such benefits. Current law neither allows these individuals access to such benefits and other traditional employment protections nor allows platform employers – or any employer – to provide such access without triggering a full employment relationship sought by neither party. As outlined further below, policy approaches should target solutions that provide such access without removing the flexibility of contract work sought by all stakeholders.[10]

Beyond the issues associated with the gig economy, there is a longstanding need for clarity and consistency in worker classification law in general. What it means to be an "employee" under federal and state law has, over the last two decades, ping-ponged back and forth. Each of the last four Presidential administrations have changed the definition of employee under multiple federal laws. Meanwhile, several states have put forth their own, often conflicting interpretations, resulting in requirements that change depending on the year and jurisdiction. The need for a uniform, clear, and concise interpretation of what it means to be an "employee," based on well-established common-law principles is clear.

"More than anything, we just want to know what the law is and that it will stay that way, and we will follow it."

HR POLICY ASSOCIATION MEMBER CHRO

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Policy Recommendations

As the how, when, where, and why of work becomes progressively flexible and employee voice becomes increasingly important to corporate governance, policymakers should ensure that their actions promote positive employee relations benefitting all stakeholders. HR Policy recommends the following approaches:

1. A private sector safety net for contingent workers

The current approach to regulating independent contractors and the gig economy generally involves expanding the definitions in decades-old employment laws to characterize contingent workers as statutory employees wherever possible. This approach not only misinterprets how and why contingent work is done but serves only as a temporary solution as the definition changes every four to eight years depending on the political party in control. Instead, policymakers should:

- Reestablish traditional, common-law understandings of what it means to be an employer and employee based on direct and clearly exercised control over the terms and conditions of employment, such as hours of work, how the work is performed, where the work is done, etc. This approach – backed up by decades of judicial interpretation – would provide much needed clarity to all stakeholders in what has become an exceedingly murky area of the law.
- Carve out safe harbors that enable employers to provide contingent workers access to benefits without creating a statutory employer-employee relationship not sought by either party. For example, contingent workers should be allowed to participate in employer health plans, defined contribution retirement plans, health and safety training, insurance, apprenticeships, career development, tuition reimbursement, and other benefits without losing independent contractor status. Minimum wage, sick leave, and family and medical leave protections could also be provided.

2. Promote positive employee relations – with or without a union

The NLRA unnecessarily inhibits – or outright prohibits – meaningful relationships and interactions between employers and employees without the presence of a union. This is largely because the NLRA – originally passed in 1935 – was enacted during a time of considerable industrial conflict and when the threat of artificial company unions or company-dominated unions was real. Nearly a century later, this adversarial model is outdated and out of step with contemporary workplace realities.

Policymakers should ensure employers are

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free to engage with employee voice in all its forms, not just through unions, and empower employers and employees to tackle workplace issues together in whatever manner best suits the context:

The NLRA should be amended to only prohibit circumstances in which the employer has the clear intent to unlawfully avoid unionization, rather than prohibiting meaningful dialogue between employers and employees regarding workplace conditions without the presence of a union. Coming together with employees – either formally or informally – to improve workplace conditions should not be prohibited per se.

3. Enshrine the right to a secret ballot union election

Secret ballot elections are one of the cornerstones of any democratic process. There is no meaningful substitute for a secret ballot election for exercising free choice and speech –guaranteed under both the NLRA and the U.S. Constitution. The right to a secret ballot election in all circumstances for union representation should therefore be codified in federal labor law.

4. Preserve employer voice

The current NLRB has taken several steps to significantly restrict – or eradicate – employer voice and perspective from the workplace during union election campaigns. Additionally, more and more states are passing laws banning so-called "captive audience" meetings. These policy changes not only contravene the text and purpose of the NLRA – through which employer voice is explicitly protected – but inhibit an employee's ability to freely decide on representation. If employees can only hear one side of the story, it is impossible to make a truly informed decision on whether to join a union.

5. Harmonize employer obligations under the NLRA and Title VII

Under federal anti-discrimination law, employers are tasked with ensuring their workplaces are free from harassment and discrimination. However, evolving interpretations of the NLRA under the current Board - and those in the past – penalize employers for taking steps to fulfill such anti-discrimination and harassment obligations.

- Specifically, the NLRA has been interpreted to protect offensive, harassing, and/ or discriminatory employee language or conduct (including racial epithets and death threats). Correspondingly, employers are penalized with unfair labor practices if they take steps to discipline employees for engaging in such conduct or language.
- Policymakers should clarify that employers cannot be charged with unfair labor practices for enforcing policies or disciplining employees to comply with Title VII obligations. Employers should not be forced to choose between compliance with one statute at the risk of becoming liable under another.

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Endnotes

[1] 2024 Gen Z and Millennial Survey, Deloitte (2024). https://www2.deloitte.com/us/en/insights/topics/talent/deloitte-gen-z-millennial-survey.html.

[2] Lydia Saad, More in U.S. See Unions Strengthening and Wat it That Way, Gallup (Aug. 30, 2023), https://news.gallup.com/poll/510281/unions-strengthening.aspx#:~:text=Union%20Approval%20Steady%20Near%20Recent,-term%20average%20of%2062%25 (Support has since fallen to 67%....).

[3] *Unions* – 2023, Bureau of Labor Statistics (2024).

[4] https://www.nlrb.gov/reports/nlrb-case-activity-reports/representation-cases/intake/representation-petitions-rc.

[5] *See, e.g.,* Hamilton Nolan, *The Hammer: Power, Inequality, and the Struggle for the Soul of Labor* (2024) https://www.hachettebookgroup.com/titles/hamilton-nolan/the-hammer/9780306830921/?lens=hachette-books.

[6] See, e.g., H.R. 2.0 The Protecting the Right to Organize Act.

[7] Beth Kempton, Gig Economy Statistics and Key Takeaways for 2024, Upwork (Oct 27, 2023), https://www.upwork.com/resources/gig-economy-statistics.

[8] *E.g., see Id*; Monica Anderson et al. *The State of Gig Work in 2021*, Pew Research Center (Dec. 8, 2021), https://www.pewresearch.org/internet/2021/12/08/the-state-of-gig-work-in-2021/.

[9] *Id.*

[10] This type of policymaking has already arrived at the state level and local level. California, Washington, Massachusetts, and New York City, for example, have all implemented laws and regulations allowing gig or platform workers access to benefits and protections such as minimum wage, sick leave, and insurance without creating a full employment relationship. In almost every case, these measures were the product of compromises between government, business, and labor who all sought to protect the most vulnerable of contractors while allowing the flexibility afforded by being a contractor to continue.

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ABOUT

HR Policy Association

For more than 50 years, HR Policy Association has been the lead organization representing Chief Human Resource Officers of major employers. HRPA consists of nearly 400 of the largest corporations doing business in the United States and globally. These companies are represented in the organization by their most senior human resource executives. Collectively, HRPA member companies employ more than 10 million employees in the United States, over nine percent of the private sector workforce, and 20 million employees worldwide. These senior corporate officers participate in the Association because of their unwavering commitment to improving the direction of human resources policy. To learn more, visit hrpolicy.org.