

## The Performance Review Episode Eleven

### Audio

Welcome to the Performance Review, Greenburg Traurig's California labor and employment Law podcast, where we discuss and review important trends and topics for California employers, with hosts Ryan Bykerk and Philip Person.

### Ryan Bykerk

All right. Well, welcome back. Today, we are **going** to be turning back the clock. We're going to be putting on our FDR hats. We're going to be crossing the picket lines, doing all those good things, because today we're going to be talking about one of the oldest American labor and employment law topics out there, and that is unions. It's the labor of labor and employment. So that's our topic today. And Philip, it's not just for companies that are already unionized, right?

### Philip Person

Exactly. This applies to all employers, both those who have a unionized workforce and those who do not. But luckily, I'm not going to be the expert or the guest talking about it today. Today we have an absolute pro who's coming in who talks about everything dealing with unions, traditional labor, and I can go through his credentials, but Jonathan Sack is our guests. He's counsel at GT San Francisco office. And rather than me introduce myself, Jonathan, tell us about your practice.

### Jonathan Sack

Well, thanks for having me guys. It's really great to be here. I think our practice has probably all grown a bit more robust in the COVID era, but I've been a labor and employment attorney since I started practicing in 2010 and the bulk of my practice has been traditional labor. What that means is that I represent employers in all aspects of labor relations, starting with before a union is elected, so through the union campaign, through the election, and then if the union wins in collective bargaining negotiations.

### Jonathan Sack

And then there's also a pretty big litigation component through arbitrations and unfair labor practice charges and, and hearings as Philip just mentioned, a lot of what I do for unionized employers applies to non-unionized companies too.

### Ryan Bykerk

I think that's such a good point, Jonathan. I mean, I was teasing about FDR and picket lines, but that is sort of what people think of sometimes. Why don't we start with just that, start with the why. Why are we talking about unions today? Why should employers, maybe in particular those who don't currently have unions care about this subject?

### Jonathan Sack

Well, yeah, that's a fair question. The number of union represented employees in the US is down about 50% since the government started keeping statistics in 1983. But people tend to forget that the National Labor Relations Act , which is the federal statute that governs unionization throughout most of the private sector, many provisions of that statute apply equally to non-unionized employers. The NLRA, for instance, the cornerstone provision protects employees rights to engage in protected concerted activity for mutual aid and protection.

[Jonathan Sack](#)

I know that's a mouthful, and I'm sure we'll probably get into that later, but that provision has ramifications for employer handbooks, for discipline and termination decisions, for arbitration agreements, just to name a few of the aspects of the employment relationship that the NLRA applies to for non-union and unionized employers. Union activity has been back on the rise lately. We're seeing this a lot from frontline workers in some industries throughout COVID. They feel they've really carried the burden during the pandemic.

[Jonathan Sack](#)

They're exhausted. And in a lot of instances, they feel that they're not being recognized. Their concerns are going unheard. If the employer is not listening to them, who do they go to? They go to unions to try to advocate for them in the workplace. We've got COVID going on. And then on top of that, we have a new president. President Biden has stated that he plans to be the most pro-union president since FDR.

[Jonathan Sack](#)

He's already commented publicly weighed in on at least two union elections before the employees have even gone to vote at specific companies, which is very, very uncommon, even under previous Democratic administrations. We've already seen him take concrete steps in that direction by filling federal employment agencies, both at the National Labor Relations Board, which is the federal agency that oversees the NLRA, and at other federal agencies with nominees who have strong union backgrounds.

[Jonathan Sack](#)

There's also the federal statute or federal legislation called the Protecting the Right to Organize Act or the PRO Act, which would significantly overhaul the NLRA, and Biden's a strong supporter of that too. There's a lot going on in the traditional labor space right now, which is a big change from under the previous administration.

[Philip Person](#)

And like you said, there's a lot going on on the labor front. You've taken notice. I've taken notice. Ryan's taking notice. But more importantly, the workers have taken notice too. Just this year, some of the world's largest

companies, a lot of these tech companies found themselves in the news for high profile pushes for workforce unionization. And that's even in the midst of the pandemic.

[Jonathan Sack](#)

Yeah, yeah, that's... Do you want to go ahead?

[Ryan Bykerk](#)

That's certainly right. We have all noticed that. I mean, everyone. There have been people weighing in on this left, right, and center. I mean, basically you've sold me. Like I said, I was just teasing about the FDR thing in the first place, but unions are worth talking about. They're worth talking about today. Why don't we start just with what are unions, how do they form. Give us maybe some backstory on that.

[Jonathan Sack](#)

Sure. I mean, unions really have their roots in the guilds of Medieval Europe, but modern labor law in the US started back around 1935, which is when Congress passed the National Labor Relations Act. That really changed the landscape for unions. Before that law was passed, there had been decisions holding unionization to be illegal. So that law really changed it in the US. To get to your question as to how unions form, a union...

[Jonathan Sack](#)

It's a long process laid out in the NLRA, but essentially a union first has to show that 30% of the employees whom the union is trying to represent at a particular employer are interested in having the union. Once the union gets that 30% showing, the union can then file a petition to hold an election. And then the NLRB will conduct the election. And then if the majority of the employees who vote, vote in favor of the union, then those employees are unionized. What's interesting about that is in union elections, turnout is really key.

[Jonathan Sack](#)

Because say you've got a thousand employees whom the union is trying to represent, but only 50 of them show up and say 26 vote in favor of the union, all thousand of them, including those 900 employees who didn't vote at all, would be union represented. That's something that employees tend to not fully realize when there's a union election scheduled at their workplace.

[Philip Person](#)

And this is all great information. I'm still stuck on you saying guilds of medieval times or Medieval Europe. We'd like to make fun of our guests here, but that one there, you brought it upon yourself.

[Ryan Bykerk](#)

Are you making a reference to The Lollipop Guild, Philip?

[Philip Person](#)

I didn't say it. He said guilds of medieval time. That's a new one. I haven't used that.

[Jonathan Sack](#)

Just now there's... The carpenters union is a very large and powerful union. Employees from starting in the medieval times would perform together who are in the same industry and would try to achieve better earnings for their work through the guilds. The same spirit of collective action began long ago, and it's still codified in law today. It's what I handle on a daily basis. Thank you to the medieval guilds for keeping me employed.

[Ryan Bykerk](#)

Yeah. Hey, there we go. See, history is important. And look, you just got some here on the performance review, from medieval times to current day. Let's switch gears a little bit. Jonathan, thank you. That's useful to kind of understand how the formation process works. But with that understanding, let's talk about maybe some telltale signs for an employer who does not currently have a unionized workforce to look out for and just to be aware of if a workforce is considering union representation. Are there some things to look out for?

[Jonathan Sack](#)

Yeah, absolutely. When we talk about signs of union organizing, we break it into two categories, the overt and the covert. The overt signs are the obvious ones. If your employees are picketing outside and they're calling for a union, at that point, the employer should have a pretty good idea what's going on, or if you see union flyers left in the break room or employees start wearing vote union pins on their uniforms, things like that. If there's open and obvious signs, which we call the overt signs of unionization, then yeah, those are some signs.

[Jonathan Sack](#)

But what's harder to detect and what is more common particularly in the early stage of a union campaign are the covert signs. When we talk about the covert signs, we're looking for any shifts in employee behavior or attitude that indicates that something is going on under the surface. It's hard to spot. It could be employee starting to become more adversarial or aggressive towards management. So say you have monthly staff meetings.

[Jonathan Sack](#)

They're usually pretty tame affairs, but then all of a sudden, you've got groups of employees protesting certain management decisions in those meetings. Those employees may not be directly calling for a unionization, but if that's a change from what was happening before, it may indicate that those employees are being fed information by a third party. The converse of that is also a sign though.

[Jonathan Sack](#)

If you have a normally talkative or even argumentative workforce, and then all of a sudden in that same staff meeting those folks are now growing more quiet, that means that employees may be voicing their concerns to a third party as in a union. It really just comes down to being attentive and paying attention to your workforce, which is really a good management and HR practice irrespective of union issues.

[Philip Person](#)

You mentioned the obvious signs and also the subtle cues. The employee workforce may be less talkative or even more talkative, just changing their stripes. But the other thing you talked about was flyers being left out and union paraphernalia. But nowadays, isn't there a lot of activity that goes on online, like union organizing online?

[Jonathan Sack](#)

Yeah, that's a great point. Before COVID, unions were really taking advantage of social media to try to organize employees. That carries a number of benefits for the union. One, it's cheaper. If you have a union headquartered in say Washington DC and you're trying to organize an employer in Texas, the union doesn't have to send folks down to try to see if the employees are even interested. A union can find one or two employees, join with that small cohort, start a private Facebook and take it from there. It's cheaper. It also carries the benefit is that it's secret.

[Jonathan Sack](#)

It makes it much harder for employers to spot. When an employer finds out about a union campaign, they typically try to put their message out there and say that to explain why the employer does not think that the union is in the employee's best interest. And employers, by the way, have the right to do that, as long as you don't threaten employees in the process. But if employers don't know that there's union activity going on, they don't respond. There's nothing that they know to respond to. So it carries that benefit for the union as well.

[Jonathan Sack](#)

That was true before COVID, and it's even more true now where it's not only more expensive to conduct a traditional boots on the ground campaign, but also unsafe. Like Zoom meetings, online union organizing is something that I think is going to continue post-pandemic.

[Ryan Bykerk](#)

Yeah. Well, so what if these signs aren't even present, right? I mean, we promised at the outset of this that this is still a relevant podcast episode for any employer, because actually these laws do affect them even if there is no current union they haven't seen the subtle or not so subtle signs that union organizing is happening. So what if none of that's going on, what should

employers in those situations... Why should they even really care about the NLRA or this whole area of law?

[Jonathan Sack](#)

Well, there's a lot of provisions of the NLRA that are not limited to unionized workforces. Some of the protections apply to also non-supervisory employees, regardless of whether they're represented by a union or not.

[Philip Person](#)

Is that where we would be talking about protected concerted activity, something to that effect, right?

[Jonathan Sack](#)

Yeah, that's exactly where I was headed. Protected concerted activity is something that any non-supervisory employee has the right to engage in. And when they do, it's similar in a way to protected activity under other state and federal anti-discrimination statutes. Employers really can't prohibit it and the employers are prohibited from retaliating against employees who do do it. But in the NLRA world, protected concerted activity activity generally means two or more employees joining together for their mutual aid or protection.

[Jonathan Sack](#)

What that means is essentially to improve wages, benefits, schedules, or other working conditions. To break that down a little bit, there's really two components, there's a subject matter component and a group action component. In terms of subject matter, the issue that the employees are discussing or engaging in some activity over must relate to terms and conditions of employment, meaning wages, schedules, benefits, workplace safety issues. That means that not all activity will be protected, right?

[Jonathan Sack](#)

Because if you have an employee who is protesting or complaining about the employer's product or how the employer treats customers, those complaints are less likely to be protected than a complaint say about wages. But the way the NLRB has defined terms of conditions of employment is pretty broad. In today's age, where employees are increasingly voicing their social justice concerns, employee activity and protests around those topics, they can be protected.

[Jonathan Sack](#)

The employees can be protected if there's a sufficient connection to the employee's wages or working conditions. That's the subject matter component. There's also the group action component. The idea of concerted activity generally means that you're preparing or you're gearing up to do something related to a union. But no union has to be present or really even contemplated for the group action requirement to be met. All it usually

requires the involvement of two or more employees banding together in an effort to improve things at the workplace.

[Jonathan Sack](#)

For example, a single employee complaining about that employee's discipline is less likely to constitute a protected concerted activity. But in contrast, if you have two employees who approach management with the same complaint, that likely would constitute concerted activity. In one case, the employee is looking out for himself. But in the other case, he's looking out for himself and his peers. Of course, as always in our profession, there are exceptions to the rule.

[Jonathan Sack](#)

And in some cases, a single employee's actions can be protected. It's often difficult to know when activity is protected and not. It's been a consistent challenge for even the NLRB, and there's been case law going back and forth on that really since the NLRA was enacted.

[Ryan Bykerk](#)

Jonathan, aren't there instances in this space in particular where, again, an employer with no particular union presence or any concern of organizing can get in trouble with like handbook provisions that regulate what employees are allowed to be sort of doing and talking about? I mean, isn't that kind of a space where people sort of run into this totally unknowingly?

[Jonathan Sack](#)

The right to engage in protected activity has been applied to the right of employees to discuss their terms and conditions of employment. Where handbook employer handbooks typically run a foul of this is where... Many instance, but a common one is confidentiality provisions. If an employer restricts employees' ability to discuss their own wages, which many employers would like employees not to do, those provisions very frequently will be found to be over broad. Same with disciplinary decisions. Generally, it's difficult to restrict employees from discussing their discipline.

[Ryan Bykerk](#)

Got it. Okay.

[Philip Person](#)

At the top of the podcast, we mentioned President Biden and him repeatedly saying that he's going to be the most pro-union president since FDR. We're still early in the presidency, but let's try to read a little tea leaves here. Are there any predictions that you have on the pro-union actions he might implement down the road?

[Jonathan Sack](#)

Yeah, I mean, so currently the NLRB is a five member board. It's currently composed of three individuals, three board members who were appointed by

Trump and one Democratic appointee. There's one vacancy currently whom President Biden just this week nominated a prominent union side attorney to fill. The terms of those three Trump appointees will begin to expire in August. And when that happens, pretty much everyone expects him to fill those positions with nominees who have similarly strong union backgrounds.

[Jonathan Sack](#)

The NLRA, the law under it is really shaped by those NLRB decisions. Because of the way the statute is structured, whichever... The law tends to change significantly depending on whether we have a Democrat or Republican in the presidency. So under Trump, the Trump NLRB reversed more labor friendly Obama era decisions. We expect that Biden NLRB to reverse course in many of these areas. For example, the Trump NLRB held that employees do not have the right to use employer email for organizing purposes.

[Jonathan Sack](#)

The Trump NLRB revised the standard for joint employer and independent contractors and did so in a manner that the fewer workers are eligible to unionize and subject to the NLRB provisions that apply to non-unionized workforces. The Trump NLRB also found that many employer handbook rules that would not have passed muster under the Obama NLRB were lawful. Those are just a few of many areas where we expect the Biden NLRB to reverse course.

[Ryan Bykerk](#)

Another thing I think that's probably worth talking about is the PRO Act that you mentioned at the beginning of the podcast. I think maybe that's something. Could you unpack that just a little bit? What's that going to look like if that's passed?

[Jonathan Sack](#)

Well, if the PRO Act is passed, it would really be a sea change in the NLRA and the traditional labor space. Basically the act is styled as an overhaul of the total framework and touches on almost everything from joint employment, independent contractor status, arbitration agreements, penalties for violating the NLRA, really the works. One component that really applies to unionized and non-unionized workers are the joint employer and independent contractor issues.

[Jonathan Sack](#)

The PRO Act would expand those definitions and by extension the number of workers who can unionize and covered by the NLRA even without a union. In California, we're all very familiar with the ABC test for determining independent contractor status. The PRO Act actually codifies the ABC test into the federal labor statute.



[Philip Person](#)

Got it. One of the things here that I've always said about labor laws, it's like the wild, wild west. You get a new administration and it's going to be a new set of laws changing. With the PRO Act coming up, I'm interested to hear how that's going to affect arbitration agreements. You kind of referenced that earlier. Do you have a little bit more insight on that?

[Jonathan Sack](#)

Yeah, well, there was a lot of litigation as to whether the class and collective arbitration agreements... Sorry, class and collective arbitration agreements violated the NLRA's protection of employees' ability to engage in protected concerted activity. The PRO Act would render those provisions illegal both to enter and to enforce. The change would essentially circumvent the Supreme Court decision in the Epic Systems case.

[Philip Person](#)

It sounds like the PRO Act would be a game changer. With so much in the air, it looks like the employers should definitely keep their ears to the street and just keep their eye on the progress of the PRO Act.

[Jonathan Sack](#)

You raised a good point when you said if it becomes law. Its fate is very much uncertain. It passed the House in March with a lot of fanfare, but it still has to pass the Senate. And with the current 50-50 split, it's unlikely that the PRO Act would get past the Senate filibuster. There's currently some rumblings about trying to get it through as part of President Biden's infrastructure bill. But even then, it's looking more likely that that bill may have to be enacted through the budget reconciliation process.

[Jonathan Sack](#)

It's unlikely that the entire PRO Act could get passed as part of the infrastructure legislation if it goes to the budget reconciliation route, but arguably some portions of it will. PRO Act is so expansive that even if only a small fraction of those provisions get passed, that will still be a major change under to federal labor law.

[Philip Person](#)

Well, we've kind of scratched the surface on this topic of just everything that happens with traditional labor. And like I said, it's a wild, wild west. We're coming towards the end of the show here, the end of the podcast, and we typically ask for a crazy labor employment story. Labor stories are always crazy anytime you bring in a union, so we're counting on you to give us a great story. What do you have for us?

[Jonathan Sack](#)

Okay, yeah. I mean, I was driving. I had this client that did not want to conduct the negotiations during the work day because they couldn't release enough

employees to attend the sessions during work time, so that all the sessions were late at night in a pretty rural area. I was staffed to handle them as a second year associate literally by myself, which was good in a lot of ways because I think I probably took a few more risks than I would have otherwise.

[Jonathan Sack](#)

But I'm pretty sure I did not violate the law because almost everything I did was challenged by this union. But in one instance, we had a very contentious session as these as negotiations can be. During negotiations, employers do not have to agree to any of the union's demands. You just have to bargain in good faith. They can get pretty contentious. This one session, the union stormed out and banged their fists on the table. I was kind of scared, but tried to hold it together. When I went home that night, someone was following me.

[Jonathan Sack](#)

I got back to my hotel. It was like a Holiday Inn Express or something and had a large parking lot. I drove around the parking lot because I didn't want to park and then be followed, and this guy followed me around the parking lot. I parked right by the lobby, ran in, and told him to call the police. Ran up to my room and lived to tell about it and did not deter me from this field, which I love. That is a very rare instance and it's only happened once in my 10 years of practice.

[Philip Person](#)

You said you had to run in. How big was this guy?

[Jonathan Sack](#)

If he got out of his car, I was running too fast for him to know. It might not have been a guy. I can only see the headlights, but I mean, it's definitely following me around because he showed me around the parking lot.

[Ryan Bykerk](#)

Wow! All right, I don't think I've ever had that happen, Jonathan. I'm glad you did not give up. I'm glad you persevered because we need to call you and get your help with stuff all the time. We're glad to have you. Well, really thank you, Jonathan, for being on the podcast today. This was great help I'm sure for our listeners. The kids, of course, have missed this entire part. Hopefully someone can fill them in on the G rated version. But again, thank you, Jonathan. This was really helpful.

[Ryan Bykerk](#)

Thanks everybody for listening. We appreciate it. Please tune in next time. Email us with any of your crazy employment stories or thoughts. And again, thank you for joining us here on the Performance Review.

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