

## LABOR LAW

## Google workers of the world, unite!

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*Until recently, Google's unofficial motto was "Don't be evil." When it restructured to become a subsidiary of Alphabet in 2015, the motto was changed to "Do the right thing" – apparently a response to accusations that some of its actions were in fact "evil." Indeed, despite the progressive image Google/Alphabet has endeavored to present, it has in recent years faced numerous high-profile allegations of sexism, ageism, racism, political bias, and unethical business choices.*

*On January 4, 2021, 226 of Alphabet's 230,000 employees and contractors surprised the world by announcing they had secretly organized as the Alphabet Workers Union (AWU), a nonexclusive "solidarity" union open to all Alphabet workers throughout North America, including not only rank-and-file temporary and full-time employees but also managers, contractors, interns, and vendors.*

### Formation of AWU

Disclaiming any immediate intent to seek recognition as an exclusive bargaining representative under the National Labor Relations Act (NLRA), the AWU's stated long-term goal is to increase its mass to a "unified worker voice" that it can use to pressure Alphabet into living up to its original values. AWU's mission statement proclaims the breadth of its ambitions: "To protect Alphabet workers, our global society, and our world."

By the end of its first day, the AWU's announced membership had more than doubled, and by January 25, it had quadrupled to more than 800 members. That same day, the union also announced the formation of Alpha Global, a "global alliance" with unions in nine other

countries.

While the AWU still represents only a miniscule percentage (0.03 percent) of Alphabet's overall workforce, its rapid growth has been impressive, enabling a small minority of activist workers to cause the company adverse publicity on an international scale. That's an impressive beginning for the upstart union and a great PR and membership move for Communications Workers of America (CWA) Local 1400, which is backing the AWU's efforts.

### Creation narrative, recent controversies

The AWU's creation narrative references a long history of unofficial organizing by Google workers, including a 2014 campaign against the Google+ "real names" policy, a 2018 walkout objecting to the handling of sexual harassment claims, efforts to pressure Alphabet to disclaim controversial contracts such as Projects Maven (artificial intelligence, or AI, for military drones) and Dragonfly (a censored search engine for China), and 2019 attempts to convince Google to cancel contracts to sell technology to police departments.

The AWU's most recent efforts spring from Google's allegedly discriminatory termination of well-known AI ethics researcher Timnit Gebru in December 2020. Google asked Gebru to withdraw a paper she coauthored on the risks of using very large language models because it was critical of Google and "ignored" its efforts to mitigate the identified problems. After she didn't agree, the company ended her employment. Google says she resigned, but Gebru claims she was fired.

The AWU's PR work has generated widespread critical coverage of Gebru's case. Nearly 2,700 Google employees and more than 4,300 academics signed a letter condemning the company's actions, and nine members of Congress have demanded clarification.

More recently, Google also suspended Margaret Mitchell (a member of its Ethical AI Team and one of the AWU's founding members), locking her e-mail accounts for allegedly using automated scripts to gather, download, and publicly share evidence of illegal discrimination and retaliation. The AWU hasn't been shy about pointing to the ongoing saga as evidence of antiunion bias and a key justification for the new union's creation.

### **Recently issued NLRA Complaint**

In November 2019, Google fired four employees (the "Thanksgiving Four") who had been active in organizing coworkers and protesting the company's perceived failure to live up to its ideals. The company based the terminations on alleged security breaches, including sharing confidential documents and improperly accessing internal calendaring and communications tools.

In response, the CWA and the employees filed six unfair labor practice (ULP) charges alleging unlawful surveillance, interrogation, discrimination, and retaliation. Notably, the NLRA protects "concerted activity" by individual employees or groups of employees even when, as here, no union has been recognized as the exclusive bargaining representative.

The Thanksgiving Four terminations appear to have directly triggered the secret campaign that ultimately led to the AWU's creation. It's likely not a coincidence the National Labor Relations Board (NLRB) issued a complaint based on the six consolidated ULP charges just one month before the AWU went public.

Clearly, the AWU's rejection of traditional recognition under the NLRA has not impeded it from creatively using the conservative NLRB both to defend workers and lay the groundwork for organizing more members in the future.

### **AWU's novel 'solidarity union' model**

The AWU has spun its approach as a return to how unions "used to work" in the 1930s, before NLRA exclusive recognition became the norm. The union also has claimed inspiration from the Committee for Better Banks, a nonunion coalition of Wells Fargo workers that was created to advocate for ethical business practices.

The nonexclusive "solidarity union" model the AWU has adopted certainly has better potential in big tech than a traditional approach. The minority union model allows it to eschew exclusive representation under the NLRA and avoid the need to prove majority support while still leveraging the Act's protections for individual employees.

Notably, the AWU pursues its goals in "partnership" with the CWA, which has some experience representing other "noncontract" unions such as the Texas State Employees Union. Equally notable is that the AWU has refused to reject the possibility of seeking more traditional exclusive representative status in the future, in the unlikely event it achieves majority support in an appropriate bargaining unit.

### **AWU's novel 'solidarity union' model**

The AWU and the NLRA are strange bedfellows. The union's decision to act (at least for now) as only a minority "noncontract" union raises a variety of potential issues, especially given the breadth of whom it has claimed as potential members.

NLRA protections don't extend to supervisors, managers, and contractors. Indeed, managers and supervisors who are visibly supportive of the AWU or who speak out against Alphabet risk termination because (1) they owe a duty of loyalty to the company and (2) the First Amendment doesn't apply to private-sector workers. On the other hand, whistleblower protections may provide an alternative avenue for employees like Mitchell, who was purportedly searching for

evidence of illegal discrimination. We also can expect other theories to emerge from Google workers' creative minds.

During union organizing campaigns, employers have a right to speak their minds with noncoercive speech, but they must be careful to refrain from threats, intimidation, promises, or surveillance (TIPS). The AWU's decision to aggressively seek new members while deferring any attempt to obtain exclusivity forces an ongoing state of heightened vigilance by Google/Alphabet.

When a union seeks exclusivity, inclusion of managers and supervisors within its ranks can easily result in violations of NLRA Section 8(a)(2)'s prohibition against employers "dominating" or lending support to unions. Conventionally, the employer, not the union, is on the hook legally in this situation—a real oddity as applied to the present situation.

### **Bottom Line**

For years, Google/Alphabet has traded on its image as being a "good" employer that not only allowed but encouraged workers to speak their mind. That image is dead for now, and it will take creativity and an unlikely change in business practices for the company to resurrect it.

Paradoxically, the very features that enabled Google to be so successful in the first place—employing very smart, progressive people who think outside the box—have contributed to the new movement throughout the companies' operations. Some might say this is karma in action.

Final thought: As was reported in previous issues of *California Employment Law Letter*, Peter Robb—the NLRB General Counsel (GC) under former President Donald Trump—led a battle to retrench against prounion gains under the Obama Board. One of President Joe Biden's first acts was the unceremonious discharge of Robb, despite the

fact the Board's GCs are appointed for a certain term rather than serving at the will of the president.

With the certain appointment of a union-friendly GC (and, over time, a prounion majority on the NLRB), we can expect the Board to become an even friendlier forum for efforts by unions like the CWA and the AWU to continue expanding their influence in novel directions.

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Counsel's approach with First Amendment guarantees as they relate to union conduct on public land. If the NLRB follows through with its evident agenda, extensive litigation over the next few years is almost certain.

This is the second time in the past three months the Trump NLRB has sought to clamp down on union options for organizing new employees. As we have reported, the General Counsel advised all NLRB regional offices to scrutinize allegations that a union sought or received more than ministerial assistance to its organizing efforts from the employer (see "NLRB General Counsel clamps down on union organizing strategies" in our September 21, 2020, issue). Couched as efforts to protect employees' rights to freely choose collective bargaining representatives, that effort and the current invitation stem from the same design: keeping nonunion employers union-free.

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