

FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING

FREQUENTLY ASKED QUESTIONS

Shareholder Association for Research and Education on behalf of the Catherine Donnelly Foundation, SOC Investment Group, British Columbia Investment Management Corporation, AP3 Third Swedish National Pension Fund, CCLA Investment Management, and Actiam.

This document was prepared by the proponents of Item 16 - Shareholder Proposal Requesting Additional Reporting on Freedom of Association, on the Amazon.com, Inc. Proxy Statement for the company's 2023 annual general meeting on May 24, 2023. It offers answers to frequently asked questions about freedom of association and collective bargaining. While it uses Amazon as an example, the answers apply to all companies that abide by the international labor standards discussed. The answers have been developed in collaboration with Lance Compa, Senior Lecturer Emeritus, Cornell University School of Industrial and Labor Relations.

What is the difference between the International Labor Organization (ILO) core labor standards Declaration and the ILO core Conventions?

In 1998 the ILO adopted its “Declaration on Fundamental Principles and Rights at Work” covering four subjects as deserving of special status and treatment: freedom of association and collective bargaining, forced labor, child labor, and discrimination.¹ The Declaration obligated ILO member countries to “respect, promote and realize” (i.e., make real) these principles “even if they have not ratified the Conventions in question.” The Declaration identified two fundamental Conventions connected to each of the four principles.

For freedom of association and collective bargaining, these are Conventions 87 and 98. These Conventions set out fundamental standards and obligations for compliance.² More detailed requirements of the Conventions have been elaborated by the ILO Committee on Freedom of Association (the “Committee”), the oversight body for these two Conventions only, in thousands of cases that have come before the Committee since its establishment in 1951.

¹ In 2022, the ILO added occupational safety and health as a fifth core standard, along with two related Conventions.

² Convention 87's key clause is “Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization.” at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312232. Convention 98's key clause is “Workers' and employers' organizations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.” at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C098).

The only way to test compliance with the principles of the Declaration, whether by governments or by companies such as Amazon, who says “our policies and practices align with international labor standards,” is by reference to the requirements of the Conventions and decisions of the Committee.³

What is the difference between freedom of association (FOA) and collective bargaining (CB)?

Freedom of association is workers’ right to form and join trade unions to defend their interests without interference by government or employers, choosing their own representatives, and defining their own priorities and goals. The right to collective bargaining is one component of freedom of association, along with the right to organize and the right to strike. It means that workers have the right to bargain collectively with their employer on terms and conditions of employment.

What does “neutrality” mean and why?

Neutrality does not mean employers cannot communicate with employees, but rather that such communication does not interfere with freedom of association by containing threats of negative consequences if workers choose union representation. For example, telling employees that “things could get worse if you bring in a union” is a powerful threat that interferes with workers’ organizing rights. Published press articles indicate that Amazon routinely makes such threats in mandatory captive audience meetings.⁴ In a neutrality agreement, employers agree not make such threats.

Employers who are open to neutrality agreements normally negotiate with unions on the parameters of communication by both parties. Some agreements require “positive campaigning,” or refraining from negative attacks by either party against the other. Neutrality agreements usually contain a rapid procedural mechanism for resolving disputes – often by jointly selecting an arbitrator who stands by to decide them quickly.

Why do mandatory captive audience meetings violate international standards when they are not illegal under U.S. labor law?

Published media articles indicate that Amazon holds anti-union mandatory captive audience meetings on a large scale.⁵ Such meetings take place inside the workplace

³ The Committee’s decisions are summarized in its *Compilation of Decisions* (2018), at https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/freedom-of-association/WCMS_632659/lang--en/index.htm.

⁴ See, for example, Jason Koebler and Lauren Kaori Gurley, “LEAKED AUDIO: Amazon Union Buster Warns Workers ‘Things Could Become Worse’,” *MotherboardTech by Vice*, February 16, 2022, at <https://www.vice.com/en/article/jgmbvg/leaked-audio-amazon-union-buster-warns-workers-things-could-become-worse>.

⁵ See Noam Scheiber, “Mandatory Meetings Reveal Amazon’s Approach to Resisting Unions: The company has held hundreds of meetings with workers to discourage them from supporting a union in two upcoming elections,” *The New York Times*, March 24, 2022, at <https://www.nytimes.com/2022/03/24/business/amazon-meetings-union-elections.html>.

during work time, usually in small groups of 15-25 employees, who hear anti-union speeches and watch anti-union PowerPoint presentations, films, and videos. They are mandatory because management requires workers to attend the meetings. They are “captive” because workers cannot leave or otherwise avoid the anti-union communication.

U.S. law allows employers to hold captive audience meetings and to “predict” negative consequences if workers choose union representation, as long as they do not directly “threaten” such negative consequences.⁶ But the distinction between “predictions” and “threats” is rarely apparent to workers, who will likely perceive a threat either way.

A useful distinction is between the content of employer statements as a form of expression, which is legitimate when it does not convey threats of negative consequences if workers choose union representation, and the mandatory, captive setting for such meetings created by the employer, which can be seen as a form of conduct which might also interfere with workers’ freedom of association.

The current General Counsel of the National Labor Relations Board (NLRB) is seeking to prohibit the mandatory aspect of captive audience meetings. In an April 2022 memorandum to NLRB regional directors, she stated:

In workplaces across America, employers routinely hold mandatory meetings in which employees are forced to listen to employer speech concerning the exercise of their statutory labor rights, especially during organizing campaigns... [T]hose meetings inherently involve an unlawful threat that employees will be disciplined or suffer other reprisals if they exercise their protected right not to listen to such speech... [E]mployers commonly use express or implicit threats to force employees into meetings concerning unionization or other statutorily protected activity... Finding such mandatory meetings, including those termed as “captive audience meetings” to be unlawful is therefore necessary to ensure full protection of employees’ statutory labor rights.⁷

The General Counsel is currently pursuing a test case before the NLRB to prohibit mandatory captive audience meetings.⁸ The case is not yet decided, so prior law allowing mandatory captive audience meetings remains in effect.

⁶ The distinction between lawful “predictions” and unlawful “threats” is not found in the National Labor Relations Act. It was created by the Supreme Court in *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969).

⁷ NLRB General Counsel, “The Right to Refrain from Captive Audience and other Mandatory Meetings,” Memorandum GC 22-04, April 7, 2022, at <https://www.nlr.gov/news-outreach/news-story/nlr-general-counsel-jennifer-abruzzo-issues-memo-on-captive-audience-and>.

⁸ See *Cemex Construction Materials Pacific, LLC.*, Cases Nos. 28-CA-230115 et. al., at <https://www.nlr.gov/case/28-CA-230115>.

As the ILO Committee on Freedom of Association has put it: “[T]he Committee considers that the active participation by an employer in a way that interferes in any way with an employee exercising his or her free choice would be a violation of freedom of association and disrespect for workers’ fundamental right to organise...”⁹ Forcing workers into meetings to hear attacks on unions and predictions of dire consequences if they choose union representation amounts to interference with their organizing rights.

Why is direct employee engagement not a substitute for a labor union?

When workers exercise their right to freedom of association, “direct employee engagement” is most often a euphemism for employers maintaining unilateral control of working conditions. With “direct employee engagement,” the employer is in a position of power and authority; the individual employee is in a position of vulnerability and subordination. Trade union organizing and collective bargaining are designed to redress this imbalance.

Amazon maintains several of what it calls “direct engagement” systems, such as “Associate Forums,” “Associate Roundtable Meetings,” “Voice of the Associate Boards” and more. None of these mechanisms fulfill international standards on freedom of association, because they do not contemplate any form of good faith bargaining with employees through representatives of their own choosing.

Collective bargaining between management and unions can and usually does coexist with employee engagement initiatives by management and employees. Employees are very knowledgeable about their jobs and how they might be made safer and more efficient. Supervisors can always engage employees on ways to find better ways to accomplish their jobs or enhance the workplace experience. Unions accept – and often embrace – this type of engagement, as long as management does not engage in individual bargaining with employees over terms and conditions of employment that bypass or undermine the union’s representational role.¹⁰

When does the employer’s freedom of expression constitute an interference against FOA according to the ILO Core Conventions?

Trade unions and employers have a right to freedom of expression as well as association. However, employers’ right to freedom of expression cannot interfere with workers’ right to freedom of association under Conventions 87 and 98.

⁹ See ILO Committee on Freedom of Association, Complaint against the United States, Case No 2683, Report No. 357(June 2010).

¹⁰ For a discussion, see Tammy Lytle, “How Companies Benefit from Partnering with Unions,” Society for Human Resources Management *HR Magazine*, Fall 2022, at <https://www.shrm.org/hr-today/news/hr-magazine/fall2022/pages/companies-partner-with-unions.aspx>.

As the Committee on Freedom of Association has put it: “While having stressed the importance which it attaches to freedom of expression as a fundamental corollary to freedom of association and the exercise of trade union rights on numerous occasions, the Committee also considers that they must not become competing rights, one aimed at eliminating the other...”¹¹

The ILO has further stated that under the core FOA Conventions, workers must be able to exercise freedom of association in “a climate free of pressure, fear and threats of any kind.”¹² Employer statements containing threats of negative consequence if workers choose union representation cross the line from expression to interference.¹³ An approach initiated in the U.S., and one which Amazon has exploited, is the use of anti-union consultants to formulate and implement management’s anti-union tactics, including communications in captive audience meetings.¹⁴ This is another form of interference with workers’ freedom of association: bringing outside consultants into the workplace not only to script captive audience meetings, but also to “roam the floor” in the workplace and compel workers to hear predictions of negative consequences if they vote in favor or union representation.¹⁵ At the Bessemer, Alabama Amazon warehouse, for example, the NLRB found that:

The captive audience meetings were conducted by employee relations managers, who were given the moniker “mini campaign owners” by the Employer. In addition to these “mini campaign owners” (MCO) the Employer hired a cadre of private paid consultants who assisted the MCO’s in the Employer’s anti-union campaign. While the MCO’s presented the Employer’s message at its captive audience speeches, the

¹¹ ILO Committee on Freedom of Association, Complaint against the United States, Case No 2683, Report No. 357, June 2010, para. 584, at https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2911727.

¹² See ILO Committee on Freedom of Association, Compilation of Decisions (2018), para. 73, at https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/freedom-of-association/WCMS_632659/lang--en/index.htm.

¹³ See, for example, Committee decisions in cases involving the UK (Case No. 1852, at https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2903672); New Zealand (Case No. 1698, at https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2902617); Malaysia (Case No. 2301, at https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2908253).

¹⁴ See Dave Jamieson, “Amazon Spent \$4.3 Million On Anti-Union Consultants Last Year: The online retailer held “captive audience” meetings to dissuade workers from unionizing, with consultants receiving \$3,200 a day for their work,” *HuffPost Business*, March 31, 2022, at https://www.huffpost.com/entry/amazon-anti-union-consultants_n_62449258e4b0742dfa5a74fb?c9h.

¹⁵ See John Logan, “How Amazon’s Anti-Union Consultants Are Trying to Crush the Labor Movement,” *Labor Online*, March 22, 2021, at <https://www.lawcha.org/2021/03/22/how-amazons-anti-union-consultants-are-trying-to-crush-the-labor-movement/>

paid consultants also attended meetings to field questions and issues that the MCO's were not equipped to respond to...¹⁶

In most of the rest of the world, anti-union captive audience meetings like those conducted by Amazon are unheard of. Forcing employees to attend meetings to hear employers' anti-union speeches is equivalent to requiring workers to listen to employers' diatribes on race or religion or politics.

The *Comparative Labor Law & Policy Journal*, a leading scholarly publication, devoted a special issue, titled "The Captive Audience," to an examination of law and practice around the world.¹⁷ The editors asked scholars how their countries' labor law systems would treat captive-audience meetings.

A Spanish scholar stated, "Employers may call on their workers to attend meetings to inform them of certain items but these must not allude to union issues. Meetings are tools that serve to exchange ideas and opinions but whose contents may not violate workers' fundamental rights to freedom of association and ideology."¹⁸ A German scholar explained, "The employer is not entitled ... to force speeches against unionization on his employees.... There is no room for American style captive audience meetings.... If the employer wants to address issues typically addressed in American captive audiences, there is virtually no chance of doing so legally."¹⁹

Summing up contributions to this volume on captive-audience meetings, journal editors noted the "line of analysis embedded in several of these essays ... that the law conceives of a captive audience as an affront to human dignity, of the right to be treated as an autonomous adult, not a child in tutelage to one's employer, subject to its instruction on political or social subjects including unionization."²⁰

Since the U.S. did not ratify the ILO Core Conventions why should we expect U.S. companies to respect them?

As noted above, the 1998 Declaration obligates countries to comply "even if they have not ratified the Conventions in question." But even before 1998, the U.S. was obligated to comply with Conventions 87 and 98 even though it had not ratified them, by virtue of membership in the ILO. These two conventions have long been considered constitutional in nature and thus binding all ILO member states, whether or not they ratify them. Under this obligation, many complaints against the U.S. have been brought to the Committee on

¹⁶ NLRB Region 10, "Hearing Officer's Report on Objections," Amazon.com Services LLC and Retail, Wholesale and Department Store Union, Case No. 10-RC-260250, August 2, 2021, at <https://www.alreporter.com/wp-content/uploads/2021/08/Hearing-Officers-Report-in-Amazon-Case-No.-10-RC-269250.pdf>.

¹⁷ *Comparative Labor Law & Policy Journal*, Vol. 29, Issue 2 (2008), at https://clpj.law.illinois.edu/archive/vol_29/.

¹⁸ Núria Pumar Beltrán, "Captive Audience Speech: Spanish Report," *id.*

¹⁹ Christopher Gyo, "Legitimacy of Captive Audiences in Germany," *id.*

²⁰ "Editors' Note," *id.*

Freedom of Association, and the Committee has often ruled that the U.S. is in violation of its obligations under these two conventions.

In any event, Amazon claims to adhere to international standards regardless of U.S. ratification. In addition to ILO standards, Amazon invokes the UN Guiding Principles on Business and Human Rights (UNGP) and says that the company's policies and practices align with the UNGP. Guiding Principle 12 is:

The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.²¹

²¹ Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, United Nations Human Rights Office of the High Commissioner, at https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf