

Unions in the Spotlight

Recent Developments at the NLRB Every
Employer Should Know



Agenda

- The National Labor Relations Board
 - Driving increases in union elections, ULP charges, and strikes, and enabling and supporting new organizing targets
- Unions Without Elections
 - The NLRB's recent *Cemex* decision; what it means and response strategies
- Other Union Organizing Law Developments
 - New election rules, micro bargaining units, trends in "salting"
- Expanding Employee Rights
 - How new rules affect policies, employee group activities, disruptive or offensive misconduct by employees, non-competes, non-disclosures, and other areas
- Other Developments for Union and Non-Union Employers
- New Bargaining Standards
- Future Areas to Watch
 - Rules for mandatory group meetings with employees
 - Further expansions to remedies

Current Landscape of the NLRB and Unions



The National Labor Relations Board

- Composition
 - Majority: Chair Lauren McFerran; Members Gwynne Wilcox and David Prouty
 - All represented labor unions in private practice
 - Minority: Member Marvin Kapan; Vacant
- General Counsel Jennifer Abruzzo
 - Previously served as inside counsel to Communications Workers of America
- NLRB Fiscal Status
 - Received 9% budget increase for FY2023
 - Hired additional judges, enabling processing of more complaints on ULP charges



Increases in Union Support and Activities

- Major Increase in Union Support
 - Per Gallup, union approval has increased from 48% to 67%, but...
 - 75% of general public supported the UAW over auto makers in current dispute
- (Nominal) Increase in Union Membership
- Major Uptick in Union Elections
 - Election petitions increased 53% from FY2021 to FY2022 (largest increase since 1979)
 - Petitions increased further from FY2022 to FY2023
 - NLRB on pace to conduct most elections in years
 - *Cemex* – unions without elections – could impact this
- Substantial Increase in Union Election Win Rate
 - Unions prevailed in 68% of elections in 2023, compared to 59% in 2019

Other Signs of a New Landscape

- Large Increase in Unfair Labor Practice Charges
 - ULP charges increased dramatically from FY2021 to FY2022 (19%), and from FY2022 to FY2023 (10%)
 - NLRB has found violations against many prominent and sophisticated employers
- Breakthroughs with New Organizing Targets
 - Retail (Starbucks, Apple, Barnes & Noble, Chipotle)
 - Pharmacies
 - Technology Industry (video game developers)
 - Banks
 - Doctors and medical residents
 - Student Athletes
 - Other developing industries (digital currency, cannabis dispensaries)
- Strike Activities
 - Major impact against many high profile companies (UPS; Big 3; Kaiser Permanente)
 - Effective new strike tactics

The Impact of *Cemex*

Groundbreaking decision creates two new and easier paths for unions to organize new workers

- Employer now must affirmatively petition for an election
 - *Cemex* shifts the burden to the employer to file petitions upon a demand for recognition
 - Creates an obligation at odds with Supreme Court precedent
 - Failure to time respond: union without election
 - Mistakes by front-line supervisors and other agents can create major consequences
 - Recognition of union that never won an election
 - Liability for failing to bargain with that union
- Bargaining orders will become far more common
 - A bargaining order requires an employer to bargain with a union without any election
 - Bargaining orders will become the default remedy for cases where the Board previously ordered rerun elections
 - Even a single NLRA violation during the “critical period” can trigger a bargaining order

Mitigating the Effects of *Cemex*

- Train front-line supervisors now
 - Approved procedure for escalating any request for union recognition
 - Responding to union activities while maintaining NLRA compliance
- Review policies and procedures, especially in key areas
 - Non-compliant policies may result in ULPs that result in *Cemex* bargaining order
 - Solicitation and distribution
 - Trespassing
 - Attendance and tardiness
 - Uniforms and Appearance
 - Confidentiality
- Consult with counsel about employment decisions that could affect bargaining units and vulnerability

Further Union Organizing Developments



New “Quickie” Election Rules

- Effective December 26, 2023
- Largely reimplement 2014 election rules
- Experience under 2014 rules shows that “quickie” elections improve unions’ success
- Key Changes:
 - Require employers to notify employees earlier
 - Entitle unions to information about the bargaining unit sooner
 - Narrow employers’ ability to contest voter eligibility, scope of unit, and other matters before an election
 - Cause elections to occur faster (and eliminate prior rule requiring at least 20 business days after Regional Director’s Direction of Election)

Effect of New Election Rules

Event	Week Under New Rules	Week Under 2019 Rules
Post Notice of Petition and distribute electronically to employees (Now 2 business days after service of Notice of Hearing, previously 5 business days after service of Notice of Hearing.)	1	2
Non-petitioning party must file Statement of Position (Now noon of business day before start of Pre-Election Hearing, previously 10 calendar days after Notice of Hearing. Extensions far more limited.)	2	2
Petitioning party's response to Statement of Position (Now orally at start of Pre-Election Hearing, previously 3 business days before Pre-Election Hearing.)	2	3
Pre-Election Hearing (Now 8 calendar days from service of Notice of Hearing, previously 14 business days after service. Extensions far more limited.)	2	3
Any post-hearing briefs (Now only permitted with special permission from R.D. or Hearing Officer, previously filed up to 5 business days after close of hearing.)	2 (if allowed)	4
Decision and Direction of Election ("DDE")	2 or 3	4 or 5
Notice of Election (Now transmitted at same time as DDE, previously Regions may send later and specify election details in this document.)	2 or 3	4 or 5
Election (Now "earliest date practicable" after DDE, with average election 23 days after Petition under 2014 quickie election rules. Previously, held no sooner than 20 business days after DDE, with average of 35-40 days after Petition without "quickie" rules.)	3 or 4	5 or 6

Return of “Micro Units”

NLRB reinstates *Specialty Healthcare*, allowing for “cookie cutter” bargaining units

- *American Steel Construction, Inc.*, 372 NLRB No. 23 (Dec. 14, 2022)
- Overrules *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017) and reinstates *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011).
- Shifts burden to employer to show that union-proposed bargaining unit improperly omitted employees
- Employer bears the burden of showing the excluded employees share an “overwhelming community of interest” with the included employees by establishing there is no “legitimate basis” for excluding them

Effects of *American Steel Construction*

Further shifts the balance towards unions in organizing

- Examples of Micro Units
 - Maintenance employees but not production employees within a facility
 - Cosmetics and fragrances salespeople at a department store, but not other salespeople
- Practical Consequences
 - Allows for some quasi-gerrymandering by unions
 - Helps unions establish relationships at new locations
 - Helps unions gather information about new workforces
 - Create burdensome subgroups of employees that require disproportionately large H.R. and legal resources

Other Developments in Organizing

- Prominent Use of “Salts”
 - Key role in organizing campaigns at Starbucks, Chipotle, and other recent union breakthroughs
 - Unions are developing sophisticated techniques for training and utilizing salts
- New Rules for Voluntary Recognition
 - NLRB proposed rule likely to become effective by end of 2023
 - Would further “lock in” employers who voluntarily recognize a union (or become bound under *Cemex*)
 - Would rescind unique 2020 rules for construction industry employers
- Expanded “Persuader” Reporting
 - New LM-10 form requires disclosure of federal contracting and subcontracting
 - Important implications for employers when informing employees about consequences of unionization

Even More Developments in Organizing

- Expanding Employee Rights to Wear Union Apparel
 - Employers must show “special circumstances” to maintain any rule – even facially neutral rules – that would restrict employees from wearing any union apparel
- Increased NLRB Enforcement Against Facility Closures
 - Several high profile complaints and remedies in area where Board historically exercised a light touch
- Board-Proposed “Blocking Charge” Rule
 - Likely to become effective by end of 2023
 - Would impose even more hurdles to employee decertification petitions

Expanded Employee Rights



“Protected Concerted Activity”

- What is “protected concerted activity”?
 - When an employee attempts to improve working conditions for herself and coworkers (with limits).
- Classic Examples
 - Organizing or supporting a labor union
 - Striking and picketing
- Modern Examples
 - Complaining about job conditions on social media
 - Photographing/recording working conditions with mobile devices
 - Sick-outs
 - Calling out company leaders in public settings or large meetings
- NLRA prohibits interference, restraint, or coercion through:
 - Policies targeted at union activities or other PCA
 - Facially neutral policies that indirectly limit union activities and PCA
 - Discriminatorily creating or enforcing policies against PCA



New Standard for Rules and Policies

- *Stericycle, Inc.*, 372 NLRB No. 113 (Aug. 2, 2023)
 - Rescinds the prior approach under *Boeing Co.*, 365 NLRB No. 154 (2017)
 - Board no longer maintains different “categories” of facially neutral policies or presumes that certain types of policies are valid
 - If General Counsel shows that a facially neutral rule or policy has a “reasonable tendency to chill employees” from exercising their Section 7 rights and engaging in PCA, then the NLRB presumes the rule or policy is unlawful
 - Employer can “save” a facially neutral policy or rule by proving that (a) it advances a legitimate and substantial business interest and (b) the employer is unable to advance that interest with a more narrowly tailored rule
 - NLRB will assess all of these prongs from an employee and union-friendly perspective
 - Employer’s intent is irrelevant

Impact of *Stericycle*

- Combined with *Cemex*, This New Standard Creates Major Potential Liability for Overbroad Policies
 - Board has held on prior occasions that simply *maintaining* an overbroad policy during an election period – without enforcing it – can require a new election (and thus a bargaining order under *Cemex*)
- Vulnerable Policies Include Those Addressing:
 - Trespassing on Employer Property
 - Photographing/Recording on Employer Property
 - Civility, Insubordination, and Disruptive Behavior
 - Use of Employer Name and Logo
 - Conflicts of Interest or Moonlighting
 - Statements to Media



Other Developments in Section 7 Rights

- Standard for When Individual Employee Action Constitutes PCA
 - NLRB now considers the “totality of the circumstances” when assessing whether an individual’s solo activities fall within Section 7
 - NLRB previously was averse to protecting individual actions except in certain specific situations
- Employees Advocating for Non-Employees
 - Effectively lowers the bar for the level of tangible “benefit” employees must be seeking, in order to establish they are engaging in PCA
- Offensive, Derogatory, Profane, or Similar Misconduct During PCA
 - Overturns existing standard that applied to multiple types of PCA
 - Reinstates prior standards, which applied differently based on the type of PCA (*e.g.*, picketing, social media, or outbursts to management)
 - These standards leave more room for interpretation, and create more uncertainty for employers seeking to address problematic behavior
- Promoting Diversity, Equity, and Improvement
 - Almost always will constitute PCA when done by non-supervisory employees

New Limits on Restrictive Covenants

- Confidentiality and Non-Disparagement Provisions
 - Now generally unlawful for employers to enter into with, or even present to, non-supervisory employees
 - Limited exceptions may exist when an employer requests a narrowly tailored (not comprehensive) non-disclosure from an employee who has unique access to important trade secrets or similar proprietary information
- Non-Competition and Non-Solicitation Provisions
 - G.C. takes the position that most non-competes and non-solicits with non-supervisory employees violate the NLRA
 - Limited exceptions may exist, similar to the possible exceptions for confidentiality agreements
- Other Recent Developments Create Other Hurdles
 - FTC's proposed rule that would prohibit most non-competes
 - New state laws further restricting non-competes
 - Increased agency enforcement against no-poach and traditional non-compete agreements

Other Developments For Union and Non-Union Employers



Independent Contractor Risks

- Employee vs. Independent Contractor Classification
 - NLRB implements broader test for when contractor constitutes an employee
 - Overrules *SuperShuttle DFW, Inc.*
 - New test places no unique emphasis on entrepreneurial opportunity for economic gain
 - Evidence shows lower standards for employee status greatly increases ULP charges
- Worker Misclassification as a *per se* Unfair Labor Practice
 - General Counsel seeks to revisit whether this automatically violates NLRA
- New Rules Compound New Risks
 - *Cemex* magnifies the consequences for employee misclassification
 - New joint employer test further expands risks for misclassification

Key Concepts Under *Cemex*

- Union-Related Comments as Evidence in Discrimination Cases
 - General Counsel can cite certain general comments about unions by employer to establish discriminatory animus
- New Standard for Prohibiting Contractors from Protesting on Property
 - NLRB narrows situations where property owner can bar contractors from leafletting and protesting on property
 - Property owner must show that (a) contractors would significantly interfere with the owner’s use of its property or (b) it has some other “legitimate” and non-discriminatory business reason for the rule
- Employer Questioning of Employees
 - Union and non-union employers still must give *Johnnie’s Poultry* safeguards (despite many federal courts rejecting it)
 - Other warnings and safeguards may be required (*e.g.*, *Weingarten*, *Upjohn*, other rules against “coercive” conduct)

New Standards for Collective Bargaining



Narrower Options for Unilateral Changes

- No More Reliance on Past Practice . . .
 - Before the first collective bargaining agreement (*Wendt Corp.*)
 - Where changes are “informed by a large measure of discretion” (*Wendt Corp.*)
 - That occurred under a since-expired CBA (*Tecnocap*)
- Limited Flexibility to Respond During Exigent Circumstances
 - Employers must overcome a high bar to avoid bargaining over pandemic-related changes
- Greater Risk When Interpreting CBA Language in New Ways
 - G.C. seeking to revisit *Bath Iron Works* and its important exception for interpreting existing CBA language
- Last Hurrah For The Contract Coverage Standard?
 - G.C. seeking to revisit *MV Transportation*
 - Board clarifies limits of “contract coverage” standard

Other Bargaining Considerations

- Stricter Scrutiny of “Bad Faith Bargaining”
 - New limits on “table talk” constituting unilateral action
 - New risks for prematurely declaring impasse
- Enhanced Enforcement Over Core Business Decisions
- General Counsel Seeking to Overturn Other Key Authority
 - Rules for ceasing “dues checkoff” when CBA expires
 - Deferral to arbitrator decisions that resolve ULP allegations



Key Considerations for Corporate Deals

- Obligations When Buying Unionized Businesses or Their Assets
 - New risks when declining to hire a seller's union-represented employees
- Union requests for documents concerning mergers and acquisitions
 - Purchase Agreements
 - Communications between parties to the deal
 - Documents from prior deals
 - G.C. seeking to lower bar for unions to get financial information
- Laws Requiring Purchaser to Retain Predecessor's Employees
- Vulnerability Arising from Demands for Recognition Under *Cemex*

New Joint Employer Rule and Other Areas to Watch



New Joint Employer Rule

Expands liability and obligations in franchise, contracting, and other relationships

- Final rule will become effective December 26
- Expands the paths to joint employer status
 - Increases focus on whether putative joint employer has “indirect” control over workers, even if it is not exercised
 - Creates additional risks for a party that contracts for more control over workers than it actually uses or needs
- May further bolster union organizing, and create new paths for liability
 - Creates new implications if NLRB accepts G.C.’s position that worker misclassification constitutes a *per se* ULP

Employee Group Meetings

NLRB seeks to prohibit this key employer technique

- NLRB General Counsel Position
 - Mandatory employee group meetings (a/k/a “captive audience” meetings) automatically violate the NLRA
 - Directs Regional Offices to search for cases to issue complaints
 - Ultimately will request NLRB to accept this position
- New State Laws
 - Recently enacted in Connecticut, Maine, Minnesota, New York, and Oregon
 - Generally prohibit employers from disciplining employees who decline to attend these mandatory meetings about unions or other covered matters
 - Some require unique employee notices
- All May Violate Established Supreme Court Precedent

Other Upcoming Employer Obligations

- Expansion of *Weingarten* Rights
 - Entitle union-represented employees to representatives during disciplinary investigations when requested
 - G.C. is seeking to extend *Weingarten* to non-union workplaces
 - NLRB already has expanded to strike replacements
- Employer Email and Electronic Communication Systems
 - G.C. seeking to overturn *Caesars Entertainment* and reinstate *Purple Communications*
 - Would bar employers from prohibiting employees – directly or indirectly – from using employer email, intranets, and other communication systems from discussing unions
- Employee Monitoring Practices
 - G.C. proposed that NLRB specifically regulate wearable devices, badge records, keystroke loggers, GPS, and other systems that monitor employees
 - Would place the burden on the employer to convince the NLRB that its business needs outweigh the potential impact on employees seeking to covertly support unions

Impact of *Janus v. AFSCME*

Impact of groundbreaking Supreme Court decision is still TBD

- 2018 Decision
 - Held that First Amendment prohibits unions from requiring public sector employees to pay dues (even just agency fees)
 - Many predicted it would hamstring public sector unions
- *Janus* has materially reduced public sector unions' dues and resources
- Public sector union membership has not materially dropped
 - May have simply reduced costs for employees who already had opted out of union membership
 - May be offset by other developments that have bolstered unions

Other Areas to Watch

- OSHA-Proposed Rule Permitting Outside Employee Representatives During Safety Inspections
- Right to Work Laws
- Status of PRO Act
- New Requirements for Arbitration Agreements
- Supreme Court Review for NLRB Changes to Precedent
- Standard for 10(j) Injunctions to Remedy ULPs
- Expanded Remedies for ULPs
 - NLRB-ordered “captive audience” meetings by unions
 - Reimbursing unions for organizing costs
 - Requiring employers to provide NLRB-approved training to employees and supervisors
 - Expanded notice posting, reading, and distribution obligations



Employment Law Worldview

EMPLOYMENT LAW WORLDVIEW

NLRB Issues New Joint Employer Standard (Yet Again) (US)

The NLRB and Employers' Terrible, Horrible, No Good, Very Bad Week: A Deep-Dive Analysis of Recent Activist NLRB Decisions

NLRB Proves Everything Old (And Clunky and Unworkable) Is New Again (US)

NLRB Issues Flurry of Blockbuster End-of-Year Decisions (With More to Come?) (US)

For those of you who require CLE credits please note the following states are approved or pending CLE for 1.50 general hour in AZ, CA, CT, KY, NJ, NY, OH, PA and TX.

After today's session you will receive a Uniform Certificate of Attendance to complete and email to our colleague Robin Hallagan at robin.hallagan@squirepb.com. Please make sure to add code **Union111**.

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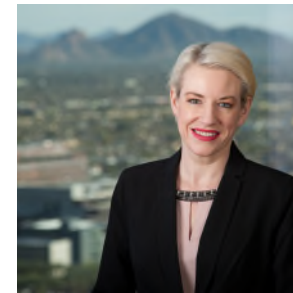
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