

National Labor Relations Board Updates

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Agenda

- 2023 Labor trends
- Relevance to non-union employers
- Major 2023 NLRB decisions

2023: Sustained Support For Unions, Increased Labor Action

Gallup's Annual Work & Education survey reports:

- 2023: 67% of Americans approve of labor unions
- 2022: 71% of Americans approve of labor unions

# elections	% union success
1,316 (2023)	76% (2023)
1,249 (2022)	72% (2022)

Cornell-ILR Labor Action Tracker reports 450 worker strikes started in 2023, 374 strikes were reported in 2022.

What If My Organization Doesn't Have A Union?

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C.A. § 157 (NLRA Section 7)

- Section 7 applies to employees in the private sector, regardless of union status
- Section 8 prohibits employers from interfering with protected and concerted activities

Cemex Construction Materials Pacific, LLC

Employer must respond to Union demand for recognition with either recognition of the union, or, if the union has not filed for election, a RM petition (Employer Petition for Election).

If the Employer commits an unfair labor practice (ULP) that requires setting aside the election, the NLRB will dismiss the employer's petition and issue a bargaining order.

- ULPs at issue in **Cemex**: threatening drivers with discipline for placing pro-union stickers on their hardhats, instructing employees not to talk to union organizers on company time, threatening closure or movement of a plant, and using fliers, documents and messages which contained misrepresentations regarding consequences of strikes and impacts of strikes.

Takeaway: If faced with a demand for recognition, quickly file an RM petition.

Final Rule To Restore Fair & Efficient Procedures For Union Elections

Stated goals of the new rule: (1) commence pre-election hearings sooner; (2) speed up the dissemination of election information to employees; (3) make pre- and post-election hearings more efficient; and (4) hold union representation elections more quickly.

Restores 2014 rules on election procedures. For example...

- **Pre-election hearing scheduling** – Pre-election hearings will now generally be scheduled for eight calendar days from the service of the notice of hearing (~10 days sooner)
- **Limited Regional Director discretion to postpone pre-election hearings** – Regional Director can postpone “upon request of a party showing special circumstances” or for more than two days if a party shows “extraordinary circumstances.” (2019 rule permitted Regional Directors to postpone for an unlimited amount of time for “good cause”.)

Takeaway: Employer needs to move quickly when it learns of an election.

Stericycle Inc.

Overtaken *Boeing* (2017). Boeing test evaluated facially neutral policies, rules or handbook provisions that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights. The Board would consider: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.

Now, under *Stericycle*, the General Counsel must prove that a challenged rule has a reasonable tendency to chill employees from exercising their rights. If the General Counsel does so, then the rule is presumptively unlawful.

- The employer may rebut the presumption by 1) proving that the rule advances a legitimate and substantial business interest and 2) that the employer is unable to advance that interest with a more narrowly tailored rule.

Takeaway: Evaluate handbook provisions and other work rules.

McLaren McComb

- Offering employees a severance agreement that requires them to broadly give up their rights under Section 7 of the Act violates Section 8(a)(1)
- The Board found the agreement's confidentiality provision to be too broad. The provision prohibited disclosure to "any third person", and the Board took that to mean the agreement would prohibit the employees from disclosing to anyone that the agreement contained unlawful provisions and would further prohibit them from discussing the terms of their agreement with other coworkers.
- Decision applies retroactively to agreements entered into before the case was decided (February 21, 2023)

**Takeaway: incorporate protective language into
severance & separation agreements**

QUESTIONS?