

Labor Law for Employment Lawyers:

What Every Business Needs to Know

June 26, 2024

Today's Webinar Host:

Stephanie Zielinski

Marketing Director

ComplianceHR



Who We Are



- Technology Platform
- Infrastructure enterprise

- Subject matter expertise
- Knowledge management team
- Case databases

What we do:
Deliver expert guidance in a fraction of time and cost vs traditional methods

Simplify the complexity of employment law



PolicySmart™

Create and maintain an up-to-date and legally compliant employee handbook



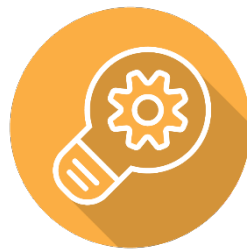
Navigator Independent Contractor

Remove risk in determining Independent Contractor status



Navigator Overtime

Determine if an employee is exempt or non-exempt



The Reference Center

A Comprehensive Solution for Employment Law and Common HR Compliance Questions



The Document Center

Efficiently generate state and federal compliant documents throughout the employee lifecycle

Compliance Essentials



Compliance HR
PolicySmart™
Changing the way companies create and maintain compliant handbooks

PolicySmart™ takes handbooks to the next level.
PolicySmart™ is an intuitive handbook compliance tool that provides employers with national and state-specific templates, a unique compliance timeline, and so much more.

Federal and State Compliant Templates:
A comprehensive library of federal and state-specific templates, as well as policy templates that are fully customizable, depending on your workforce and operational needs.

Innovative Compliance Timeline:
Provides an up-to-date timeline of important legal changes that will soon take effect in your selected jurisdictions, helping to ensure that policies are updated at the right time.

Handbook Policy Checklists:
Gain access to jurisdiction-specific checklists that tell employers which policies are required by law to appear in their handbook and who is covered by each policy.

Automated Monthly Emails:
Receive a summary and analysis of relevant legal developments that impact your workplace, with guidance on how to revise policy language.



Compliance HR
Reference Center
The Comprehensive Solution for Employment Law and Common Compliance Questions

Answer your compliance questions with the Reference Center

Local, State and Federal Information
A comprehensive library of state and federal information that bridges a variety of compliance topics to ensure you're able to access important data.

Wide Range of Compliance Topics
From COVID-19 to final pay, FMLA to rate changes, pay frequency to an call, organizations of any size and in any sector can benefit from this information.

Streamlined Workflow
The Reference Center is designed to help people across your organization quickly find answers to their questions, whether they're on a centralized legal team or an HR team distributed across the country.

PolicySmart provides you with:

- Federal and state-compliant templates
- Innovative compliance timeline
- Handbook policy checklists
- Automated twice monthly legal update emails

The ComplianceHR Reference Center provides you with:

- Local, state and federal information
- Streamlined workflows
- Wide range of compliance topics
 - COVID-19, final pay, FMLA, rate changes, and more

When coupled, these two solutions provide you with comprehensive compliance program support

Sign Up for a Demo

Three ways to sign up for a demo:

1. Reply “Yes” to the on-screen poll
2. Click the link in the Resources panel
3. Visit to www.compliancehr.com/demo/

Benefits of a custom demonstration:

- Discuss your organization’s requirements/challenges
- Review Navigator Suite Solutions
- Share compliance methodologies

ComplianceHR Demo & Free Trial:

<https://compliancehr.com/webinar-demo/>

Resources

[Compliance HR - Demo & Free Trial](#)

[State-by-State CLE Guide](#)

[BeaconLive - How to Access Certificates](#)

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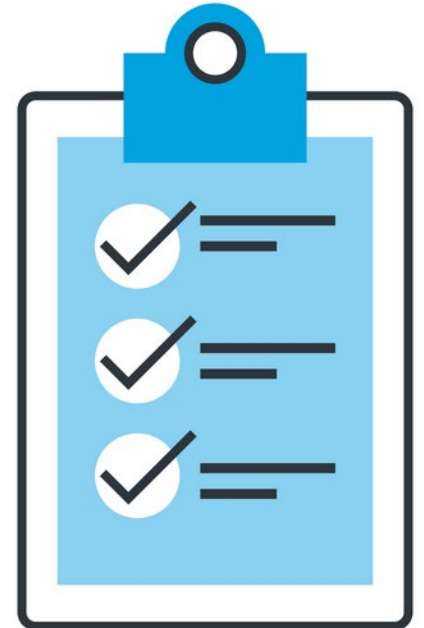
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Today's Goals

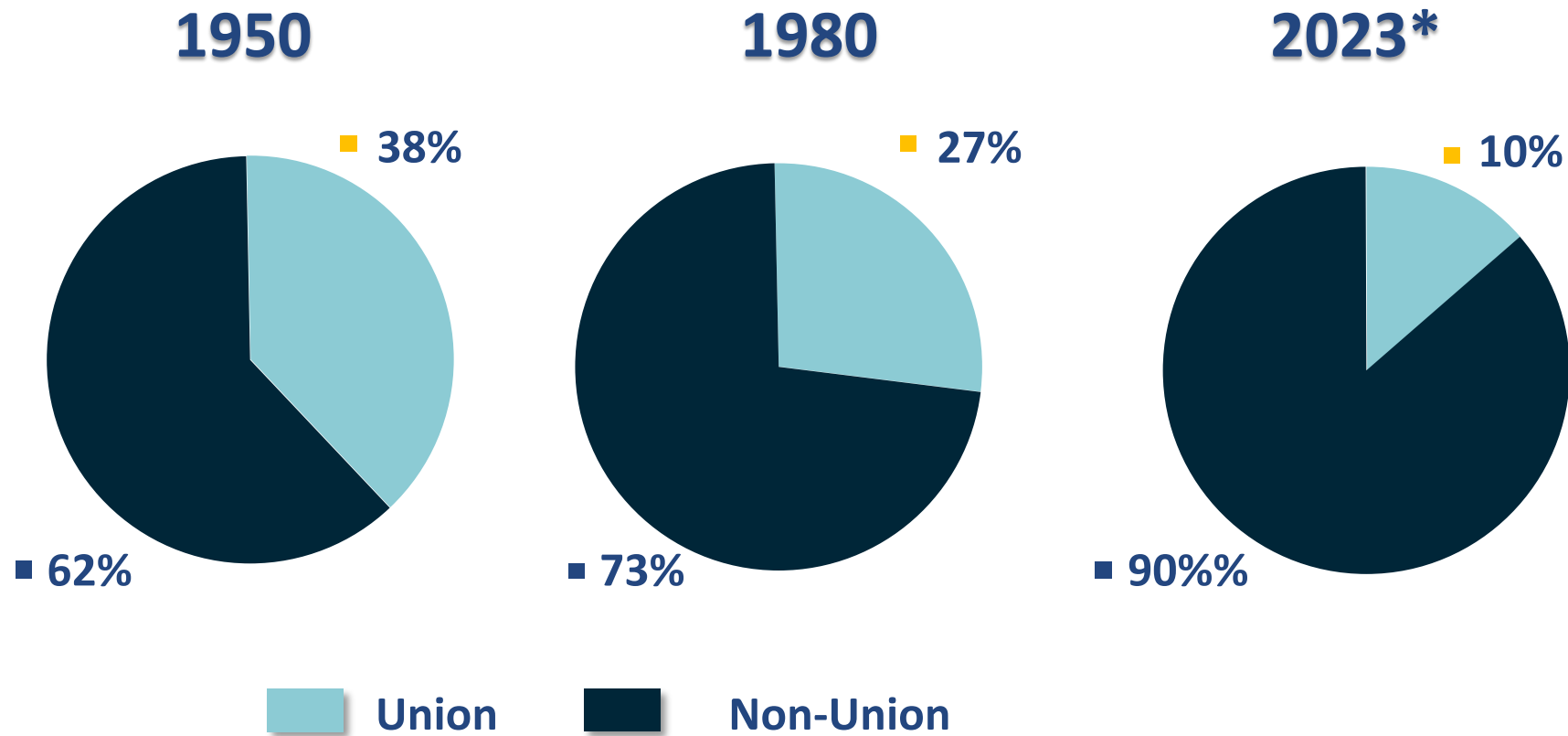
- Review the state of union organizing
- Review the current NLRB and lawsuits against it
- Understand the changed legal landscape
 - Expansion of PCA
 - Card check and consequences of committing unfair labor practices (ULPs) that interfere with union election
 - New standard for legality of workplace rules
 - Attacks on employment contracts
 - Changes to the joint employer and independent contractor standards
- Identify proactive steps your organization can take



Why Worry?

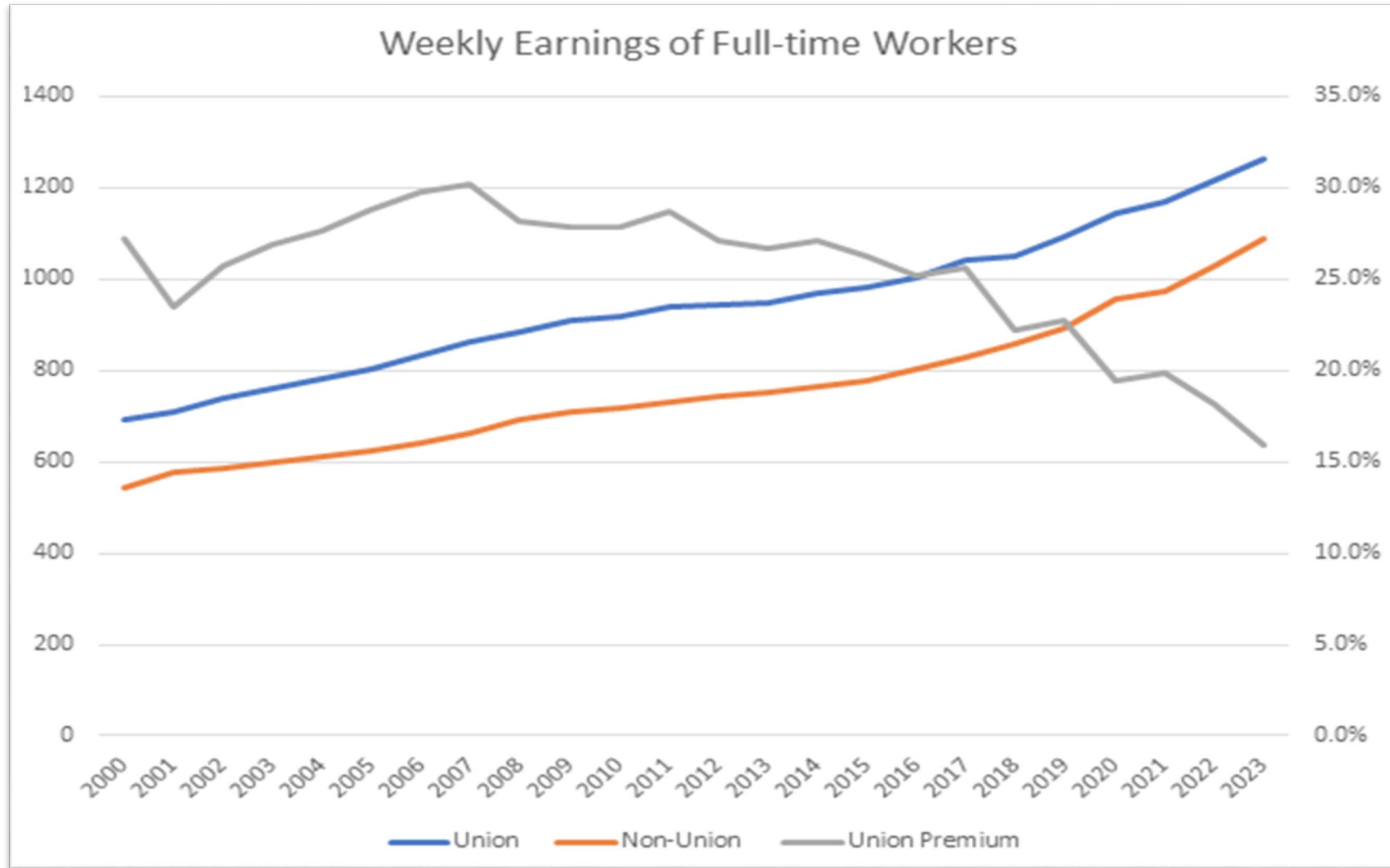


Rate of Unionization in the U.S.



*Private sector now at 6%

Union Earning Differential on the Decline



Source: American Action Forum, <https://www.americanactionforum.org/daily-dish/shameless-union-pandering-update/>

**Everything is fine, right?
Not so fast...**



Union Petitions Up 35%, Unfair Labor Practices Charge Filings Up 7% in the First Half of Fiscal Year 2024

Office of Public Affairs

202-273-1991

publicinfo@nrlb.gov

www.nrlb.gov

April 09, 2024

During the first six months of Fiscal Year 2024 (October 1–March 31), union election petitions filed at NLRB field offices rose 35% over the [same period in Fiscal Year 2023](#). Notably, this is driven by a spike in employer-filed RM-petitions, after the [Board's Cemex decision](#), accompanied by an uptick in employee-filed RC-petitions. In total, 1,618 petitions were filed during this time, compared with 1,199 in the first half of Fiscal Year 2023. Of the recent petitions, 1,137 were RC-petitions and 281 were RM-petitions.

At the same time, unfair labor practice (ULP) charges filed across the NLRB's field offices have increased 7%—from 9,612 to 10,278. Accounting for union petitions and unfair labor practice charges, the NLRB received 11,896 cases in the first half of Fiscal Year 2024, up 10% over the first half of Fiscal Year 2023 when the field offices received 10,811 cases.

Union Representation Petitions and Win Rates Have Increased

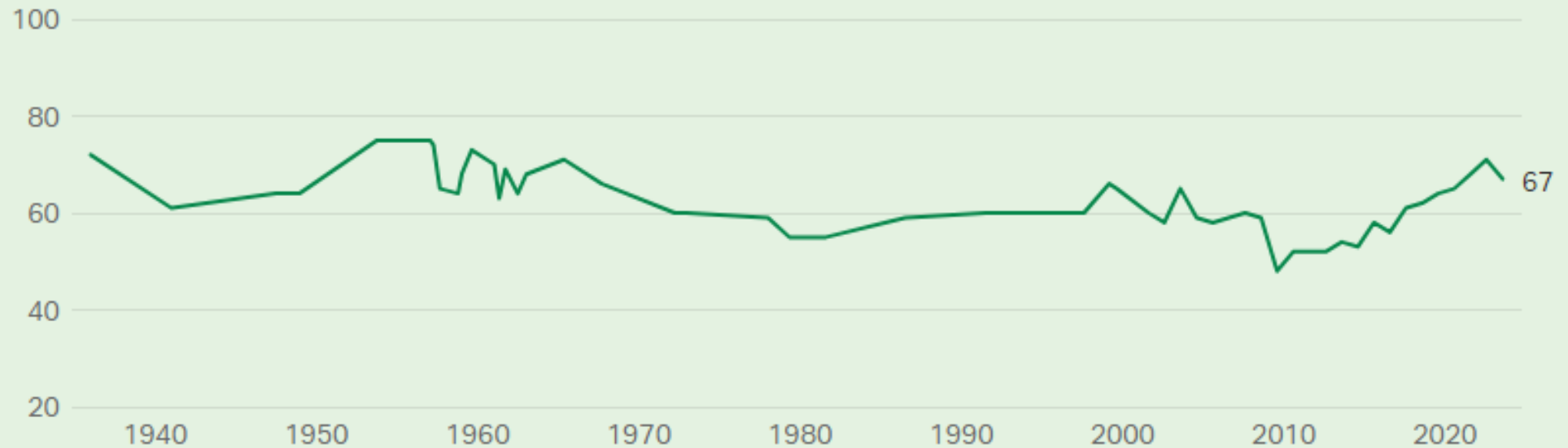
- Unions won 78.9% of elections in 2023, the third straight increase since 2020
- National corporate campaigns in food service and retail gained momentum in 2022
- Activity remains high in 2024



Support for Labor Unions is High

Do you approve or disapprove of labor unions?

— % Approve



[Get the data](#) • [Download image](#)

GALLUP

Fertile Environment for Organizing

- Bargaining success stories
- Union and younger worker alignment with social justice movements
- Inflation
- Biden Administration's pro-union stance



Lots of Media Hype

Los Angeles Times



AMERICAN BANKER.

BankThink Unions are coming for bank branches. Yours could be next on the list.

By Amber M. Rogers, Rachel Roney | March 20, 2024, 10:00 a.m. EDT | 4 Min Read



Unions are on the march and have banks in their sights, write Amber Rogers and Rachel Roney. WH_Pics - stock.adobe.com

Unions gained momentum in the banking industry over the past year, and they have not shown



GAMING

The game studios changing the industry by unionizing

Union interest continues to grow

By Nicole Carpenter | @sweetpotatoes | Updated Dec 12, 2023, 12:52pm EST

f t SHARE

Dartmouth Men's Basketball Players Vote to Unionize

Vote could contribute to undermining of amateur model in college athletics.

By Doug Lederman



Members of Dartmouth's men's basketball team after a 13-to-2 vote to join a local union.

The Daily Free Press

Workers demand wage increase at Arnold Arboretum

by Megan Amato



LABOR

UAW promises more pain for Big Three: 'We're not messing around'

The new strategy UAW President Shawn Fain announced Friday signaled the strike could start having broader implications for the economy.



UAW local 862 members strike outside of Ford's Kentucky Truck Plant in Louisville, Ky. on Thursday. | Michael Clevenger/Courier Journal via AP

The Current NLRB

Has made it easier for employees to organize & harder for employers to address employee concerns & communicate with employees.

Pending legal challenges

 **U.S. EEOC** 
@USEEOC Follow 

Sending a huge #GovLove shoutout to our partner in employment protections, @NLRB and @NLRBGC.



11:22 AM · 2/15/24 From Earth · 47 Views

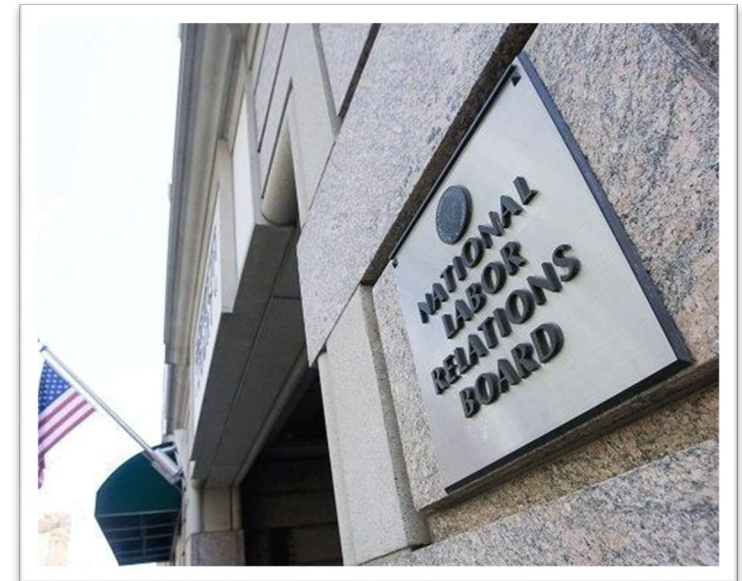
 Share this post with anyone, even if they aren't on X yet 

Expansion of Protected Concerted Activity



Section 7 of the NLRA: Employee Rights

- Section 7 is the “Employee’s Bill of Rights”
 - Right to form, join, or assist a union **or refrain** from any such activities
 - Right to engage in concerted activities for the purpose of collective bargaining or to refrain from any such activities
 - ***Right to engage in concerted activities for the purpose of mutual aid or protection*** or to refrain from any such activities
- Those protections apply to union **and non-union** employees



What is PCA?

- Involves the “terms and conditions” of employment;

AND

- Acting in concert with co-workers OR acting on behalf of co-workers OR to engage co-workers

Examples

- Discussing pay with co-workers
- Complaining about a manager
- Requesting new safety protocols
- Advocating for pay increases
- Demanding different shift schedules

Expansion of PCA

- Present administration takes very broad view
- NLRB held that big box employer violated the NLRA when it discharged an employee for refusing to remove “BLM” from their work apron
- *Lion Elastomers*, 372 NLRB No. 83 (2023) – overruled *General Motors*, requires employers to be more permissive in allowing cursing, vulgarity and potentially harassing conduct during otherwise protected concerted activity
- *Miller Plastics*, 372 NLRB No. 174 (2023) – broad view of when single employee’s action can be PCA
- *American Federation for Children*, 372 NLRB No. 137 (2023) – employees may be engaged in PCA when advocating for non-employees

Scenario: Social Media Posting

Katie is an employee in the company's warehouse. One day she posts a TikTok video about her manager, Janet, saying:

“Janet is the worst manager in the country. Not only is she lazy and rude, but now she's out to get me! She just told the day shift that we'd all have to do a six-month rotation on the evening shift. Are you kidding me!?”

Janet shows the TikTok to HR and demands that Katie be fired.

How should the company respond?

Scenario: Social Media Posting

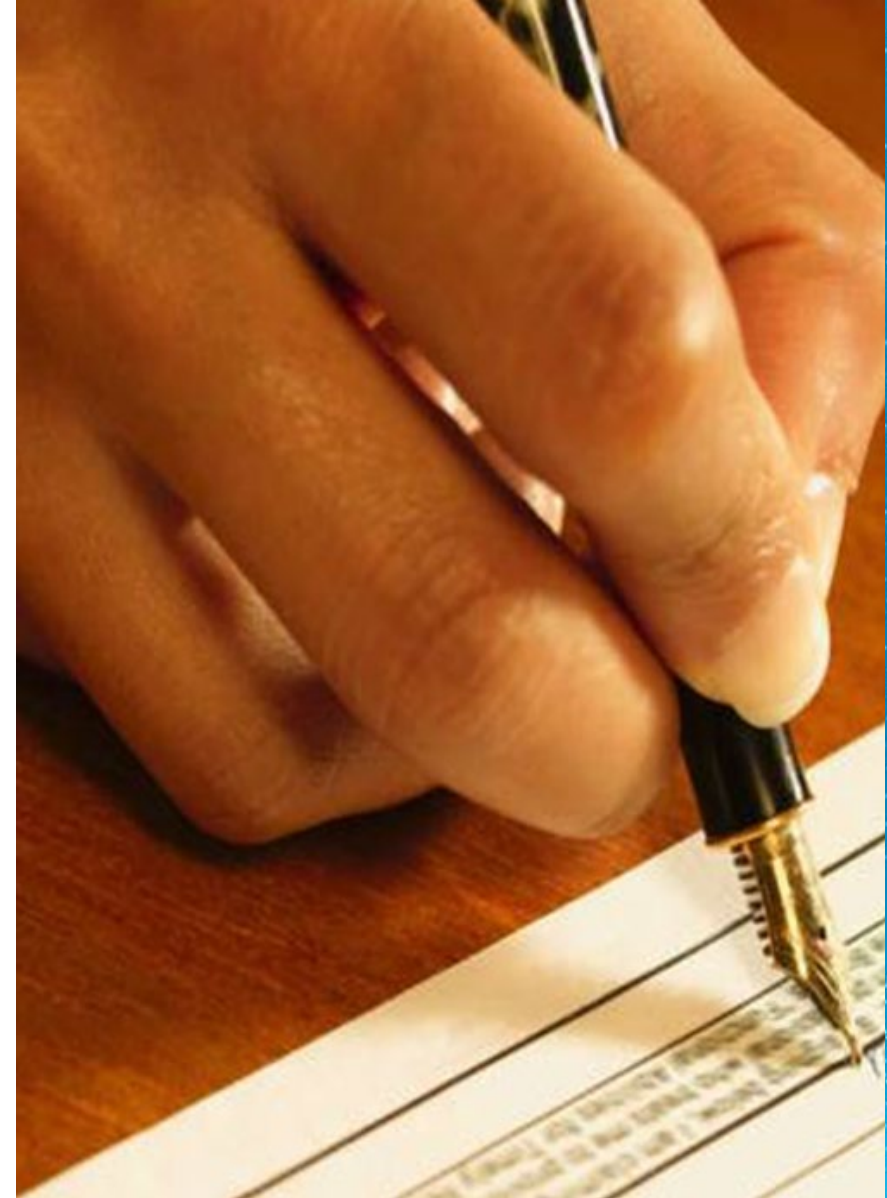
- What if Katie included profanity directed towards Janet in a video about the same issue? Still protected?
- What if the video did not reference others on a shift and Katie made it solely about herself?
- What if she complained about the shift change to Janet in person and was loud, aggressive, or profane?

A Union Without an Election: Understanding *Cemex*



Cemex - Overview

- When a union demands recognition as representative of a majority of employees in an appropriate unit, the Board says the employer must now either:
 - (i) recognize and bargain with the Union or
 - (ii) file an RM petition to "test" the employees support for the Union



Cemex: Game Changer

From: John Smith <john.smith@iusp.org>
Sent: Saturday, September 9, 2023 10:18 AM
To: Official Company Email No One Checks <info@company.com>
Subject: Request for Recognition

To whom it may concern:

Please be advised that Local 123 has been designated as the Section 9(a) representative of your employees at your Honolulu plant based on obtaining majority support via signed authorization cards. I hereby request that the Company immediately recognize Local 123 as the bargaining representative of these employees.

Regards,

John Smith

Business Manager

Local 123, International Union of Sneaky People (IUSP)

john.smith@iusp.org

+1 808 867 5309 direct

Cemex – Impact of Unfair Labor Practice Charges

- If the employer commits a single unfair labor practice during the critical period, the Board may dismiss the RM petition and issue a bargaining order;
- ULPs committed **before**, **during** and **after** the critical period will be considered

Cemex: What Is the Impact?

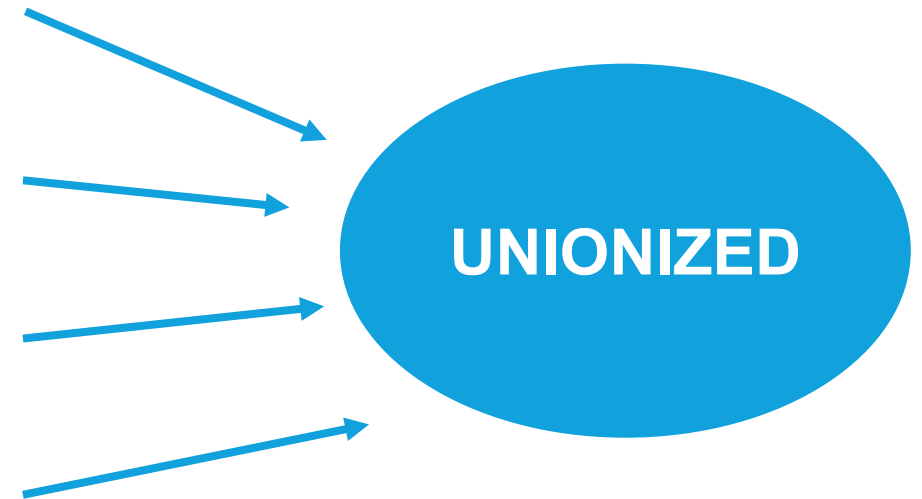
Result: More Unionized Workplaces

Union gets a card majority, and the employer fails to respond.

Union gets a card majority and the employer refuses to bargain but does not file an election petition.

Union gets a card majority and the employer files an election petition a month later.

Union gets a card majority and the employer files an election petition within two weeks, but employer commits an unfair labor practice.



Cemex – Here To Stay?

- *Cemex* may be applied retroactively
- *Cemex* contained a strongly worded dissent
- Appeal Pending in the Ninth Circuit
- *Cemex* bargaining orders have already been requested



Employer Policies and Work Rules



What is *Stericycle*?

- *Stericycle, Inc.*, 372 NLRB No. 113 (2023), held:
 - A facially neutral rule is “presumptively unlawful” if employees could interpret it to limit employee rights, regardless of whether there is a lawful alternative interpretation
 - No more “reasonable employee”; judged from perspective of someone “economically dependent” on employer considering PCA
 - Employer's intent is immaterial
 - Rule is lawful to maintain only if employer proves it “advances a legitimate and substantial business interest” and “the employer is unable to advance the interest with a more narrowly tailored rule”

Policies & Rules in the NLRB's Crosshairs

- Civility rules – “Employees must be respectful and courteous at all times...”
- Rules prohibiting harassing, disruptive, and insubordinate workplace conduct
- No recording or photography rules – “Employees may not record conversations, phone calls, images or company meetings with any recording device without prior approval”
- Rules regulating use of the employer's name, as opposed to rules to regulating “unfair use” of its logo/ trademark

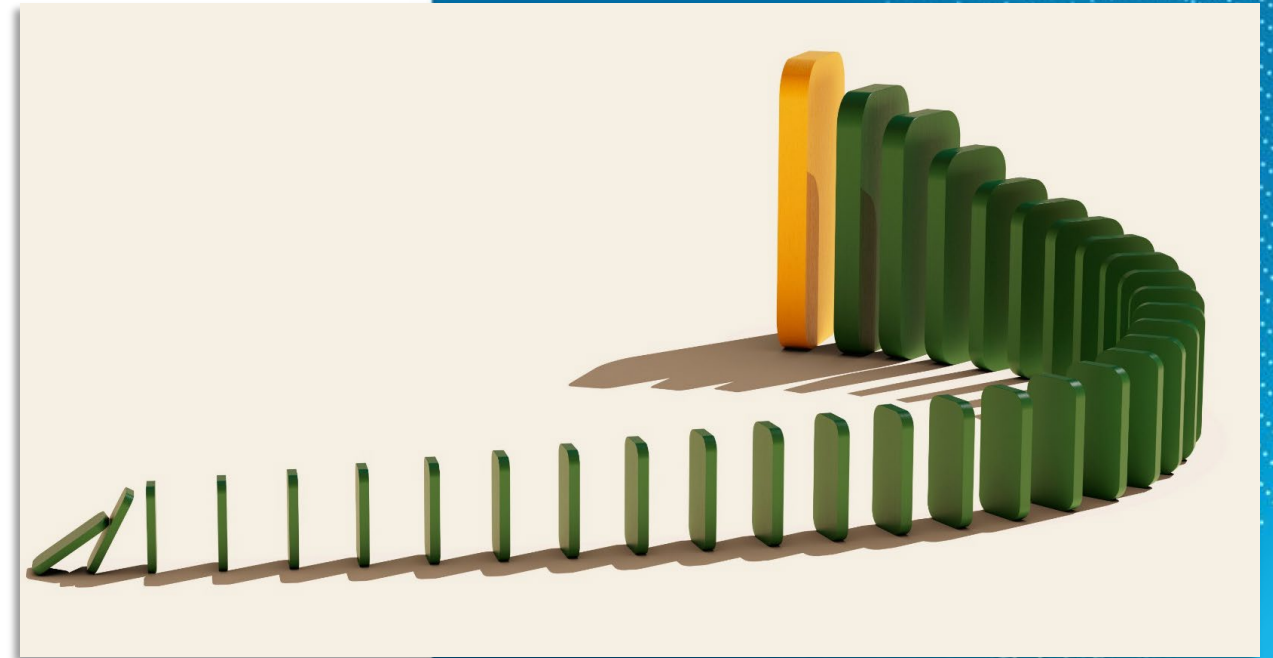


More Policies & Rules in the NLRB's Crosshairs

- Rules restricting speaking to the media or third parties, as opposed to rules restricting speaking on the employer's behalf
- Conflict-of-interest rules not specifically targeting fraud or self-enrichment
- Rules regarding disparagement or criticism of the employer
- Confidentiality rules encompassing "employer business", "employee information", "handbooks", other terms of employment, as opposed to customer or truly proprietary information

Other Potential Casualties in Your Handbook

- Dress codes
- Social media
- Off-duty misconduct
- Misconduct toward management
- Confidentiality of investigations



GC Seeks Expanded Remedies for Work Rule Violations

- GC Abruzzo recently urged the Board to issue new “make whole” remedies for illegal work rules
- Employees do not need to be identified in charge or investigation
- Expungement of records, reinstatement and backpay for all employees disciplined under the unlawful work rules during the prior 6 months, unless employer shows they were disciplined because their conduct interfered with business operations
- Recipe for protracted compliance litigation



Takeaways



Review handbook with *Stericycle* in mind



Identify business reasons for policies



Consider a narrowly-tailored disclaimer



Consider engaging experienced labor counsel

Employment Contracts Under Fire



Confidentiality and Non-Disparagement Agreements

- In McLaren Macomb, NLRB overturned two decisions that permitted employers to include confidentiality and non-disparagement provisions in severance agreements
- Theory is that confidentiality and non-disparagement agreements violate Section 7 because “[p]ublic statements by employees about the workplace are central to the exercise of employee rights under the act.”
- Merely offering an agreement with unlawful terms is a ULP. Acceptance by employee is immaterial.
- Reaffirmed that restricting access to the Board also unlawful
- GC guidance indicates she would apply same concepts to other agreements, like settlements and arbitration agreements

After *McLaren Macomb* – Managing Risk

- Customize: McLaren makes clear there is no one-size-fits-all approach.
 - Limit confidentiality to trade secrets and other proprietary information.
 - Limit confidentiality in a settlement agreement to the financial terms.
 - Limit non-disparagement to maliciously untrue statements.
- Disclaimer: Consider including an appropriate disclaimer along with other protected rights. This should include a reference to rights under Section 7 of the NLRA, and the employee's right to file a charge with the NLRA.
- Retroactivity: Notify employees that overbroad provisions in earlier agreements won't be enforced or provide an amended agreement.
- Severability: Ensure there is a severability clause in the agreement, such that if the agreement contains overbroad provisions, it will not invalidate the entire agreement.

Non-Competition Agreements

- GC Abruzzo's **GC 23-08**, announced her intention to urge the NLRB to declare all non-compete agreements unlawful, with limited exceptions.
- Theory is that non-competes “chill” certain collective activities, e.g. resigning concertedly to achieve better working conditions
- What Can Your Company Do to Manage Risk?
 - Remember GC 23-08 is just the GC's opinion! NLRB has not adopted.
 - Ensure that non-competes are narrowly tailored. Would a non-compete on an hourly worker even be enforceable under state law? Would a customer non-solicitation or non-disclosure of trade secrets agreement achieve your goals?
 - Review agreements for provisions that might violate Stericycle, like an overbroad confidentiality of business info clause

Joint Employer and Independent Contractor Issues



Joint Employer Rule

- What is the NLRB's current stance?
 - The National Labor Relations Board passed a rule that would make more businesses “joint employers”
 - The third change in three years
 - You're a joint employer if you have indirect or reserved control over certain “essential terms and conditions of employment”



Joint Employer Rule



- What does joint employment mean?
 - Joint responsibility for labor-law requirements
 - Joint liability for labor violations
 - Joint bargaining with the union

Joint Employer Rule

Whom
does this
affect?

- Everyone—not just unionized employers
- If you have employees and work with vendors, such as staffing companies, or have management contracts, you could be a joint employer

Joint Employer Rule

What
happens
next?

- Rule was scheduled to take effect 3/11. On 3/8, E.D. Texas vacated it and NLRB's rescission of 2020 rule
- NLRB is appealing to the 5th Cir
- Dueling lawsuit by SEIU in D.C. Cir says rule is too narrow
- President Biden vetoed bill disapproving NLRB rule

Bottom line: The rule's legal status is uncertain and in flux. Joint employment is still a concern under the NLRB's prior 2020 rule, although it is a more business friendly standard.

Independent Contractor Status

- *The Atlanta Opera, Inc.* (June 13, 2023)
 - overruled *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019).
 - New test reclassifies many independent contractors as employees
- *Velox* – Trump Board decision held that misclassification is not standalone ULP.
 - Case(s) pending before Board to reverse



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Resources

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Questions?

Please add any additional questions to the Q&A box

Thank you!

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