

# Labor Law Update: The Latest Developments in the Changing World of Unions and Union Organizing

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## Today's Topics

- Today's Environment
- Increased Pressure on Employers
  - Cemex – one year later
  - Demands for Voluntary Recognition
- Blocking Charges
- Non-competes

## Today's Labor Environment: The Pressure Builds

## High Profile Union Organizing

HEALTH

### Corewell Health nurses file petition to organize 9,600 at hospitals



**Kristen Jordan Shamus**  
Detroit Free Press

Published 6:33 p.m. ET Sept. 27, 2024



**Tennessee Volkswagen employees overwhelmingly vote to join United Auto Workers union**

AP

### San Francisco Amazon Workers Demand Union Recognition



Sustainable Finance & Reporting | Employee Benefits & Executive Compensation | Worker Rights | Employment

By Emily Brill · October 3, 2024, 4:45 PM EDT

### Starbucks agrees to US union organizing 'framework'

By Daniel Wiessner

February 27, 2024 6:05 PM EST · Updated 8 months ago



## Public Support for Unions Remains High

- 70 percent of the public supports labor unions, according to a September 2024 Gallup poll.
  - This is the highest levels ever – and nearly the same as public support for unions in their heyday.
  - This is the eight consecutive year where public support for unions is above 60 percent, which is the longest streak since the 1960s.
- The public supports unions flexing their muscles.
  - 75 percent of the public supported the UAW in its strike against the Big 3.
  - 72 percent of the public supported the TV and films writers in their strike with TV and film studios.
  - 67 percent of the public supported the TV and film actors in their strike.

Source: Gallup

## Union Activity on the Rise

- Almost 100,000 workers organized in NLRB elections in fiscal year 2023 – the largest number since 2000.
  - Unions won 76 percent of those elections (up from 72%).
- So far in FY 2024 (through March 31), petitions were up 35 percent from 2023.
- Over 500,000 workers engaged in union-initiated strikes in 2023 – the second highest number since 1990.
- The rate of private sector employees represented by a union rose slightly to 6.8 percent.

Sources:  
Bloomberg Law  
National Labor Relations Board  
Bureau of Labor Statistics

## Why Is This Happening?

## Serious Headwinds

- Changes to the law have made it increasingly difficult for employers to oppose union organizing.
  - The impact of the landmark *Cemex* decision
  - Limits on employer speech rights (captive audience ULPs)
  - Microunits
  - “Quickie” elections
  - Scrutiny of Work Rules
  - Aggressive posture in settlement of ULP charges

Topics / Employment Policy / Unions /



U.S. Chamber of Commerce

## NLRB's Cemex Decision Denies Workers' Rights to Make Free and Fair Choice About Unions

The NLRB's *Cemex* decision threatens to impose collective bargaining on employers and employees with a secret ballot election.

## Biden's NLRB Brings Workers' Rights Back From the Dead

A decision last Friday makes union organizing possible again.

BY HAROLD MEYERSON AUGUST 28, 2023

WSJ OPINION

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### ... And Union 'Card Check' by the Back Door

The NLRB rewrites labor law to deny secret-ballot elections.

### Companies That Try to Union-Bust Will Be Forced to Recognize Union, NLRB Says

The National Labor Relations Board just made it a whole lot harder to union-bust.



## ***Cemex* - A Fundamental Shift**

- For decades, unions had only two ways to begin representing a group of employees without an election:
  - Get over 50 percent of the unit to sign union cards, ask for recognition and have the employer agree. But, the employer could simply refuse and the union *must* seek an election – and win!
  - If over 50 percent of the unit signed cards and the employer refused recognition, but then the employer committed “egregious” or “hallmark” ULPs that made a fair election impossible, the Board could order the employer to recognize the Union. This is called a “Gissel bargaining order.”
- Why? That’s the way that the NLRB preferred it.

## ***Cemex* - A Fundamental Shift**

- “One of the principle protections of the NLRA is the statutory right of employees to bargaining collectively through representatives of their own choosing or to refrain from such activity.” *Skyline Distributors v. NLRB*, 99 F.3d 403, 411 (D.C. Cir. 1996).
- “[S]ecret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support.” *NLRB v. Gissel Packing*, 395 U.S. 575, 602 (1969)

## Unions Without Elections

- In August, the NLRB issued its decision in Cemex, which paves the way for unions without elections:
  - Unions with majority support on authorization cards can demand recognition
  - Absent prompt employer legal action (2 weeks), the union will automatically become the employees' representative

## Unions Despite Election Results

- Employees can lose their final say
- Under Cemex, Unions with enough employee support can file an unfair labor practice charge, and if successful, get a “bargaining order” to become the employees’ representative—even if employees vote against the union in an election.
- Virtually any unfair labor practice in the “critical period”
  - Old Standard: “Egregious”
  - New Standard: “So minimal and isolated that it is virtually impossible to conclude the misconduct could have affected the election results”
  - And no actual impact required!

## ULPs That Could Trigger A *Cemex* Bargaining Order

- Maintenance of an unlawful work rule or policy
  - overbroad non-solicitation rule
  - overbroad confidentiality provision
  - a work rule requiring civility and professional treatment of coworkers
  - Work rules prohibiting employees from walking off the job
  - Overbroad social media policy
  - Improper restrictions on employee use of company email, electronic systems or other property
- A discharge or discipline of one employee for misconduct that also implicates union or protected concerted activity

## ULPs That Could Trigger A *Cemex* Bargaining Order (Cont.)

- Inconsistent application or enforcement of non-solicitation or distribution rules
- A supervisor making comments or answering questions in a way found to be an implied promise of benefits – such as comparing union and non-union wages and benefits
- A supervisor making comments or answering questions in a way found to be an implied threat of “unspecified reprisals” – such as expressing negative experiences with unions
- Supervisors failing to give warnings and to secure consent before speaking with employees about union organizing



## Demands For Union Recognition

- Two components
  1. A claim to represent a majority of a group
  2. A request for recognition
- May be oral or in writing
- Can involve any agent with actual or apparent authority
- Supervisors approached should disclaim any authority and direct the union representative to HR (designated rep)
  - I don't have authority
  - I can't help you with that
- Identify the person(s) with authority.
- Report immediately to HR

## Limiting Employer Speech Rights

- In the NLRB General Counsel's Cemex brief, she also asked the Board to overrule 74 years of precedent.
- The General Counsel wants to make it unlawful for employers to speak to employees on work time if the content involves union or other protected activity and employees are not free to leave.
  - This includes "captive audience" speeches and other conversations where employees are "cornered"
- Broader than just union organizing.
- Requires that employers give employees warnings and assurances.
- The Board in Cemex did not decide the issue, but it likely will be decided by the Board in the near future.
- Given the current Board, the General Counsel's position is expected to become law.

## Micro Units

- Since late 2022, the NLRB has returned to the rule permitting “micro units” to be organized – i.e. small groups of employees within a workforce.
- What is a micro unit?
  - A “readily identifiable” group of employees that shares a “community of interest.”
  - Could be based on job classification, department, skills, work location, etc.
  - The employer would have the burden of showing anyone excluded shares an “overwhelming” community of interest.
- Why does this matter? It gets the union in the door!

## Quickie Election Rules

- The Board recently issued new (old) election rules.
- In many ways, these rules are a return to the so-called “quickie” or “ambush” election rules.
- The rules are designed to shorten the amount of time from the filing of a petition to an election.
  - The NLRB holds any hearing over the scope/size of the bargaining unit within 8 days and often decides without briefing.
  - The election is then scheduled for “the earliest date practicable.”
- The return of “blocking” charges



## ***Stericycle & Work Rules***

- In its 2023 *Stericycle* decision, the Board re-instated a modified version of its Obama-era standard on workplace rules.
- The Obama Board’s standard prohibited any workplace rule that would be interpreted by a reasonable employee as “limiting protected activities.”
- The NLRB’s standard under *Stericycle* is even harsher in some respects.



## ***Stericycle (Cont.)***

- Now, the Board will now evaluate workplace rules and policies in two steps:
  - The NLRB will first determine if an employee “could” (not “would”) “reasonably interpret” a rule to restrict or prohibit protected activity. If so, the Board will find the rule to be presumptively unlawful.
    - Intent does not matter. Nor does it matter if the rule has another reasonable interpretation that does *not* restrict protected activity.
    - It also doesn’t matter if the rule has not been applied to impact rights.
  - If the rule is presumptively unlawful, the employer must show both:
    - The rule furthers a legitimate and substantial business interest; and
    - The rule is as narrow as it can be to protect that interest.

## ***Stericycle (Cont.)***

- Some rules that will now likely be found unlawful:
  - Prohibiting statements or social media postings that adversely affect the employer's business interests
  - Prohibiting the use of cameras or cell phones in a way that could be construed as prohibiting employees from using cameras or video equipment in break areas during break time.
  - Requiring "civility," "professionalism," or "respect" toward coworkers.
  - Requiring confidentiality
  - Prohibiting employees from distributing materials and literature.

## **Settlement Negotiations**

- Settlements to include "full relief" with 100% backpay and lost benefits – with consequential damages included
- Refusal to include "non-admissions" language; some requiring admissions language
- Letters of apology
- Training of supervisors and employees approved and/or conducted by the NLRB
- Public reading of notices by executives
- Refusal to permit non-board settlements

## What Can You Do?

## The Foundation for Avoiding Union Organizing

- Know how unions organize – it's all about the cards
  - 30 percent to get an election
  - 50 percent to demand recognition (and potentially get a bargaining order)
- Understand the tactics used to get cards signed
- Understand what it means for an employee to sign a union card
- Know what you can and cannot say to employees
- Make sure supervisors are armed with this knowledge
- Understand the importance of employee engagement!



## What's Most Important to Employees?

What factors are most important to employees today:

- Appreciation for your work
- Good relationships with colleagues
- Good work-life balance
- Good relationships with superiors
- Company's financial stability
- Learning and career development
- Job security
- Attractive wages
- Interesting job content
- Company values



Source: Boston Consulting Group, 2014

## What is “Employee Engagement?”

- According to Gallup, employee engagement is comprised of factors like:
  - Feeling clear about your role;
  - Having the opportunity to do what you do best;
  - Having opportunities at work to develop;
  - Enjoying strong coworker relationships; and
  - Working with a common mission or purpose.
- Each of these “are all factors that managers can influence directly.”



*“4 Factors Driving Record-High Employee Engagement in U.S.”*  
Gallup.com, February 4, 2020

## Increased Employee Engagement Leading to the Decline of Unions

- Employees who join a union are more dissatisfied with their jobs, i.e., they fall into the “disengaged” camp - Harvard Business Journal, 2017
- A 2022 Gallup poll published in August 2022 found that union employees are more likely to be “actively disengaged” from their job than non-union counterparts (24 percent to 17 percent).
- The same Gallup poll found there were less “engaged” employees than in a non-union environment (33 percent to 27 percent).

Questions???



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