

# Labor Union Resurgence And Its Impact On Your Workplace

Joseph Baumgarten, Partner  
Howard Robbins, Partner  
Joshua Fox, Senior Counsel

October 23, 2023

Proskauer»

# Agenda

---

- Labor Union Resurgence: Who, What, Where, When, Why, and How...And **Why You Should Care!**
- NLRB Has Made It Far Easier For Unions To Organize Your Workplace – **What Can You Do About It?**
- Lawfulness of Handbook Rules And Employer Policies – **What Should You Do?**
- Other Important Recent Pro-Employee NLRB Decisions – For **Non-Union Employers and Union Employers**
- What's Next On The **Horizon...**



## Labor Union Resurgence – Why You Should Care!

# Labor Union Resurgence And “Summer Of Strikes”



## In The News

Deadline Studio CEOs Start Talks T... Expecting

The New Yorker Biden, Trump, and What's at Stake in the U.A.W. Strike

NPR Actors union SAG-AFTRA heads into negotiations with Hollywood studios

IndieWire WGA Vows 'Solidarity Forever' with SAG-AFTRA as Talks Begin Again

Axios After expansion now on strike

Deadline **A Summer of Strikes**  
Work stoppages in the United States this year are approaching heights rarely seen in recent decades.

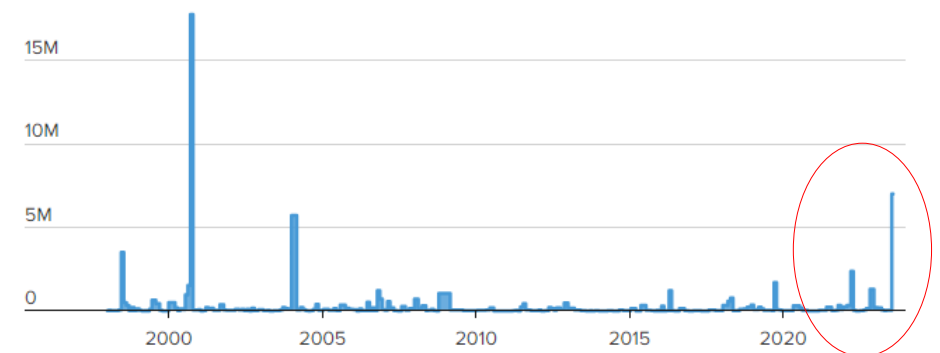
IndieWire **WGA Vows 'Solidarity Forever' with SAG-AFTRA as Talks Begin Again**

Axios **After expansion now on strike**

NPR **Actors union SAG-AFTRA heads into negotiations with Hollywood studios**

The New Yorker **Biden, Trump, and What's at Stake in the U.A.W. Strike**

**Days idle due to worker stoppages in the U.S.**  
Cumulative days idle for the month work stoppages ended



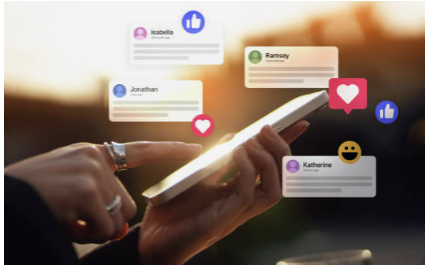
Source: CNBC analysis of data from the U.S. Bureau of Labor Statistics as of August 2023

# Many Issues Have Led To This Moment



**Pro-Union/Employee President  
and NLRB**

**Younger Workforce  
More Receptive to  
Unions**



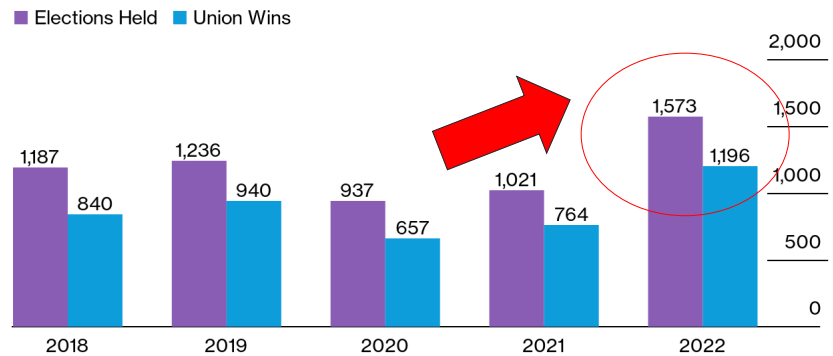
**COVID, Return to Office, Social  
Justice/DEI Issues, AI**

**Inflation, Economic Uncertainty  
and Low Unemployment**

**Ease of Union Organizing  
through Social Media**

# Unionization And Union Elections On The Rise

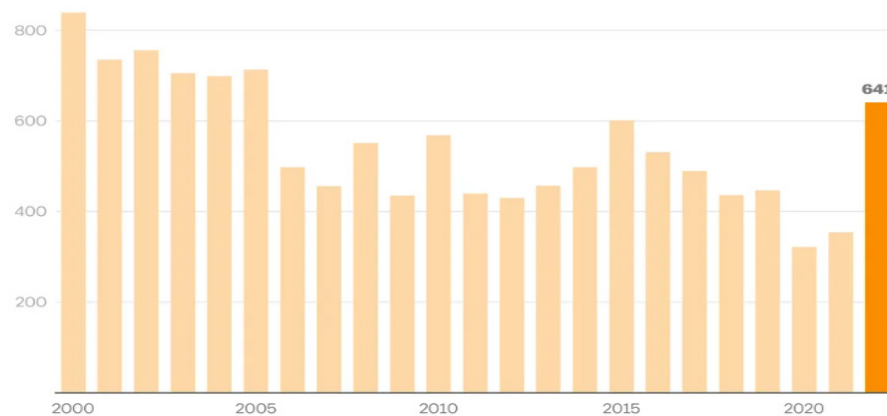
## NLRB Representation Elections



Bloombera Law

## Unions won more elections in 2022 than they have in nearly 20 years

Data for National Labor Relations Board elections, January through June each year



Source: Bloomberg Law

Recent NLRB Developments Webinar

recode BY Vox

October 23, 2023

- Prior to 2022, unionization had been on a **steady decline** for decades
- Now?
  - Union elections **up by 3%** after a historic increase of **53%** the previous year
  - Union win rate in elections has increased – **76.6%** (as of 2022)
- We expect this trend will **continue to rise...**

Proskauer >

# Americans Support Labor Unions At A Much Higher Rate...

## Americans Stand With Workers in 2023 Labor Disputes

Next, I'm going to read you a list of recent U.S. labor disputes. For each, please indicate which side you sympathize with more. How about ... [random order]?

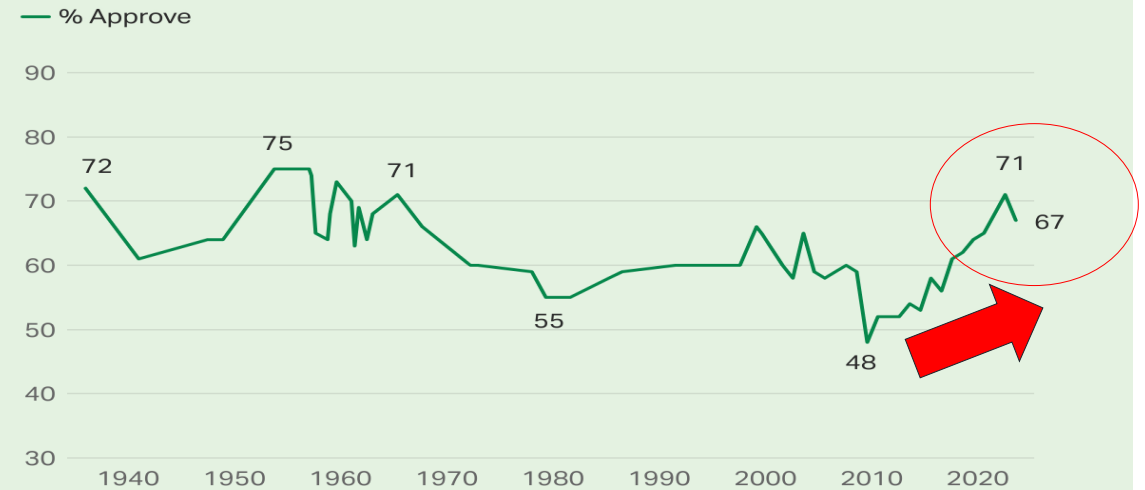
	Side with workers %	Side with employer %	Both equally (vol.) %	Neither (vol.) %	No opinion %
United Auto Workers or the U.S. auto companies	75	19	1	2	3
Television and film writers or the television and film studios	72	19	1	5	3
Television and film actors or the television and film studios	67	24	1	7	2

Aug. 1-23, 2023

GALLUP

## Americans' Approval of Labor Unions, 1936-2023

Do you approve or disapprove of labor unions?



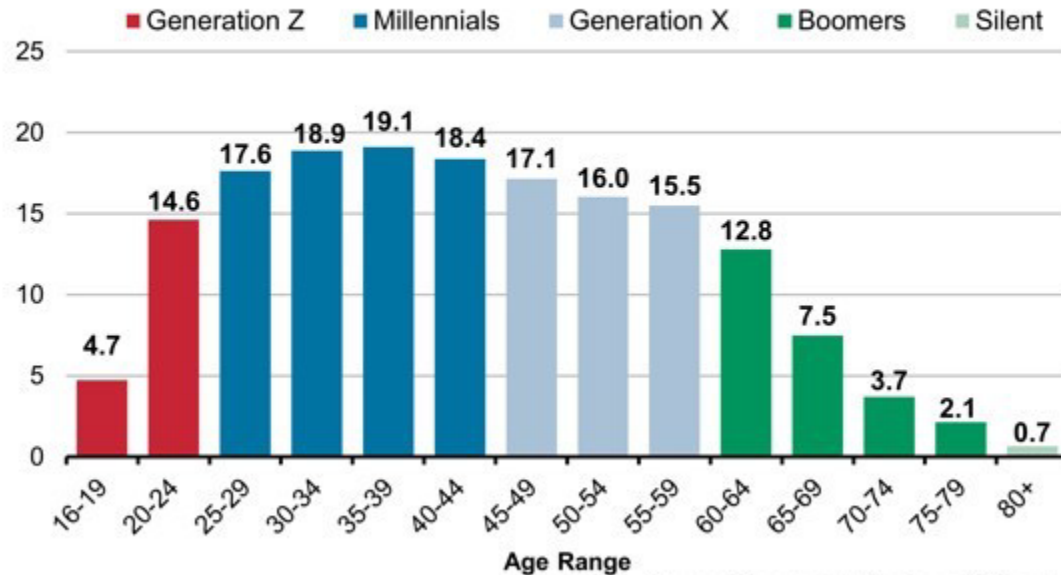
GALLUP

This sentiment likely will impact the political landscape in 2024, and beyond...

# ...Due In Part To A Generational Shift In The Workplace

## The Workforce in 2025

Projected size of U.S. labor force (in millions) by age, for the year 2025



Source: Department of Labor | WSJ.com

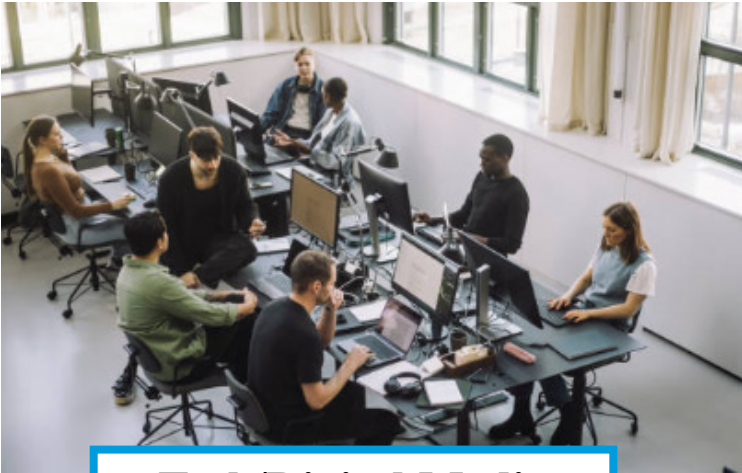
## Generation Z is the generation most supportive of unions

Mean union approval rating by generation, 2020



Chart: Center for American Progress • Source: American National Election Studies, "Time Series Cumulative Data File (1948-2020)," available at <https://electionstudies.org/data-center/anes-time-series-cumulative-data-file/> (last accessed June 2022).

# Industry Shifts: White-Collar, Tech, Higher Ed, Retail



**Tech/Digital Media**



**Office Workers**



**Higher Education**



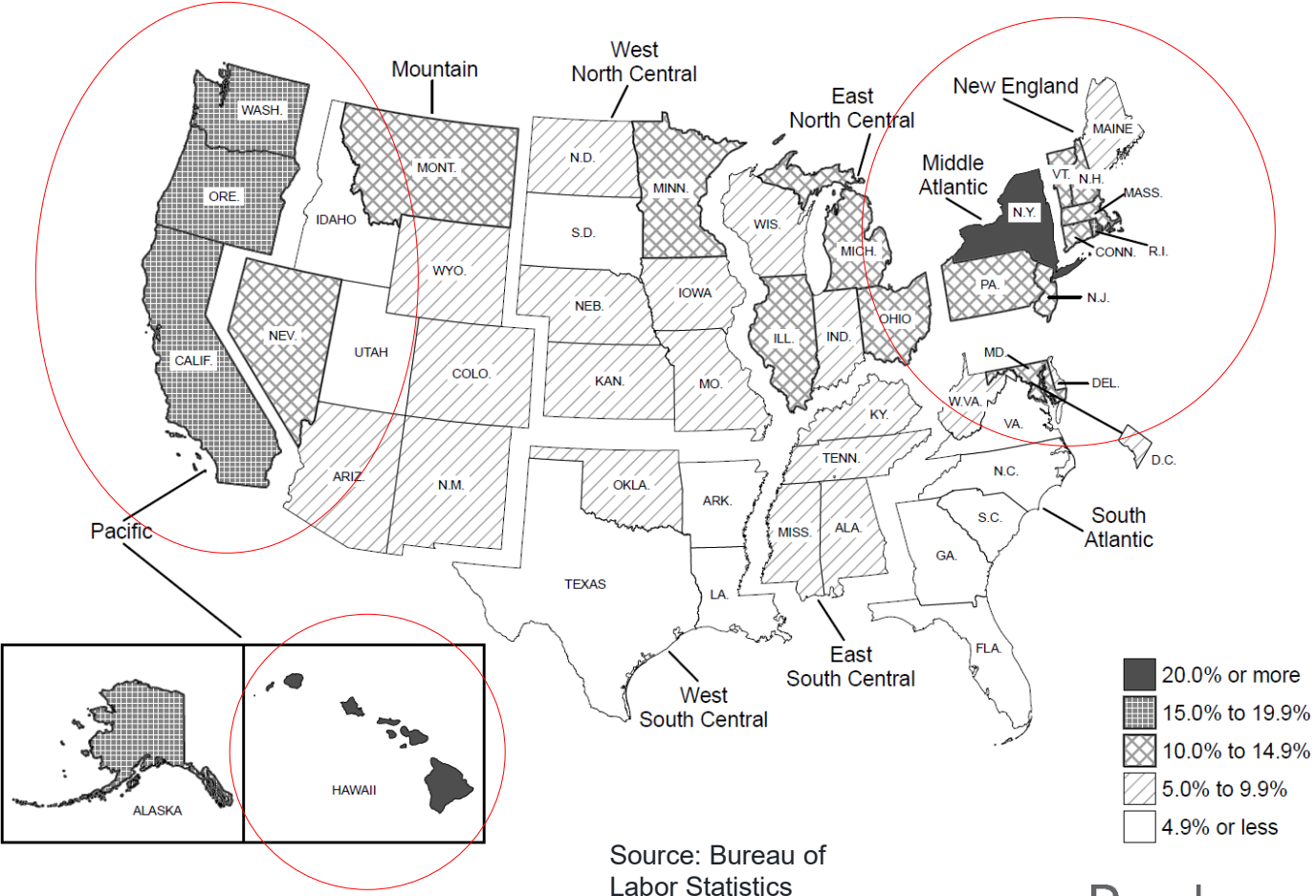
**Retail**

# Where Is Union Activity Occurring? Northeast And West Coast

- Highest unionization rates in the **Northeast, Midwest, and West Coast.**
- Lowest rates in right-to-work states in the South and middle of the country.
- States with the **largest increases in the number of workers represented by unions in 2022** were **Alabama (+40,000), Maryland (+40,000), Ohio (+52,000), Texas (+72,000), and California (+99,000).**

Chart 1. Union membership rates by state, 2022 annual averages

(U.S. rate = 10.1 percent)



# What Are The Issues Driving This Resurgence?

- Workers have reported not having enough voice on **benefits, compensation, promotion and job security** – those issues are driving unionization.
- Workers have also highlighted non-economic concerns, such as **social justice issues, DEI, health and safety**, as driving work stoppages.

Work stoppages occurred for a variety of reasons in 2022



\*A single work stoppage may have multiple demands. This list is not exhaustive.

DEMAND	Work Stoppages*	Approximate Workers Involved	Strike Days
Pay	234	169,080	3,845,159.5
Health Care	77	46,691	1,263,464
COVID-19 Protocols	30	46,075	298,467
Health and Safety	107	38,978	336,364.5
First Contract	35	7,323	45,904
Racial Justice	22	8,172	121,565
Staffing	86	56,370	513,499
Job Security	30	6,012	119,805.5
Retirement Benefits	29	30,324	758,769
Union Recognition	31	8,701	77,796
End to Sexual Harassment	6	123	8,063
Scheduling	54	4,214	71,329.5
End to Anti-Union Retaliation	60	3,618	13,000
Reinstate Terminated Union Activist	29	711	10,984.5

# The NLRA And The NLRB's Role

---

- **National Labor Relations Act** (passed 1935) is the primary law governing collective bargaining and unionization.
- **National Labor Relations Board** has the authority to interpret and apply the NLRA.
- **Only** judicial body that can change NLRB precedent is the U.S. Supreme Court, and NLRA cases rarely reach that stage.



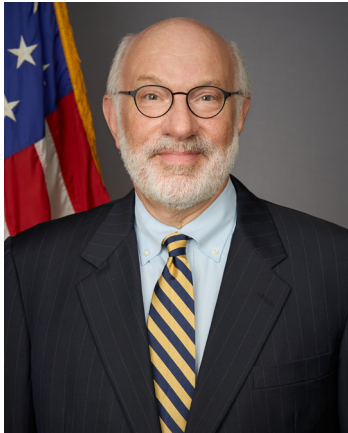
# NLRB Will Feature A **Democratic Majority** Through At Least December 2024



**Lauren McFerran,**  
**Chairman**  
**Term Expires:**  
**December 16, 2024**



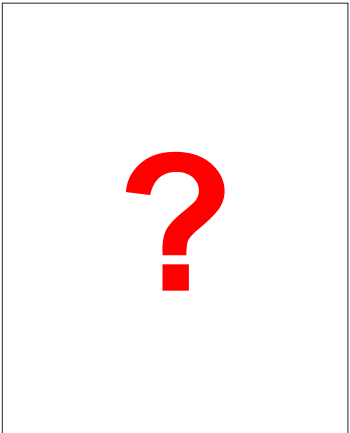
**Marvin E. Kaplan,**  
**Member**  
**Term Expires:**  
**August 27, 2025**



**David M. Prouty,**  
**Member**  
**Term Expires:**  
**August 27, 2026**



**Gwynne A. Wilcox,**  
**Member**  
**Term Expires:**  
**August 27, 2028**



**Republican Seat**  
**Vacant Since**  
**Member Ring's**  
**Term Expired on**  
**December 16, 2022**

The outcome of the next Presidential election in 2024 will determine whether NLRB precedent shifts back again, or whether the NLRB continues on its current path.

# Who Is Covered By The NLRA?

- **Only “employees” are covered** (including, potentially, former and prospective “employees”)
- Union **and non-union employees**
- **Supervisors not covered** –12-factor test applies
- Other workers **not** covered: public-sector, agricultural and domestic workers, independent contractors, managerial, confidential



# What Does The NLRA Protect? Section 7 Rights

---

## Employee Rights Protected under the Act

- Organize (or not)
- Bargain collectively
- Engage in other protected “concerted activity” for the purpose of collective bargaining or **“other mutual aid or protection”**



## The NLRB Has Made It Far Easier For Unions To Organize Your Workplace – **What Can You Do About It?**

# Representation Process for the Past 50 Years

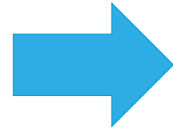
## Union Action

## Employer Action

## Result

1

Showing of interest and election petition



(1) Challenge scope of bargaining unit / supervisors; or (2) no challenge.



Election

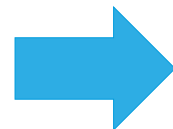
Or

Or

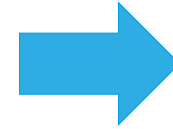
Or

2

Union seeks voluntary recognition with majority support



(1) Voluntarily recognize; or (2) **nothing**



(1) Union representation; or (2) **nothing**  
(Union may file election petition)

# The NLRB Dramatically Changed The Representation Process In *Cemex*

## *Cemex*

- **New Rule:** Employer **must** recognize a union that has demonstrated majority support – unless the employer files election petition within **2 weeks**.
- Unfair labor practices during the critical period will result in a bargaining order if sufficient to set aside the election – the employer will be **required** to recognize the union.



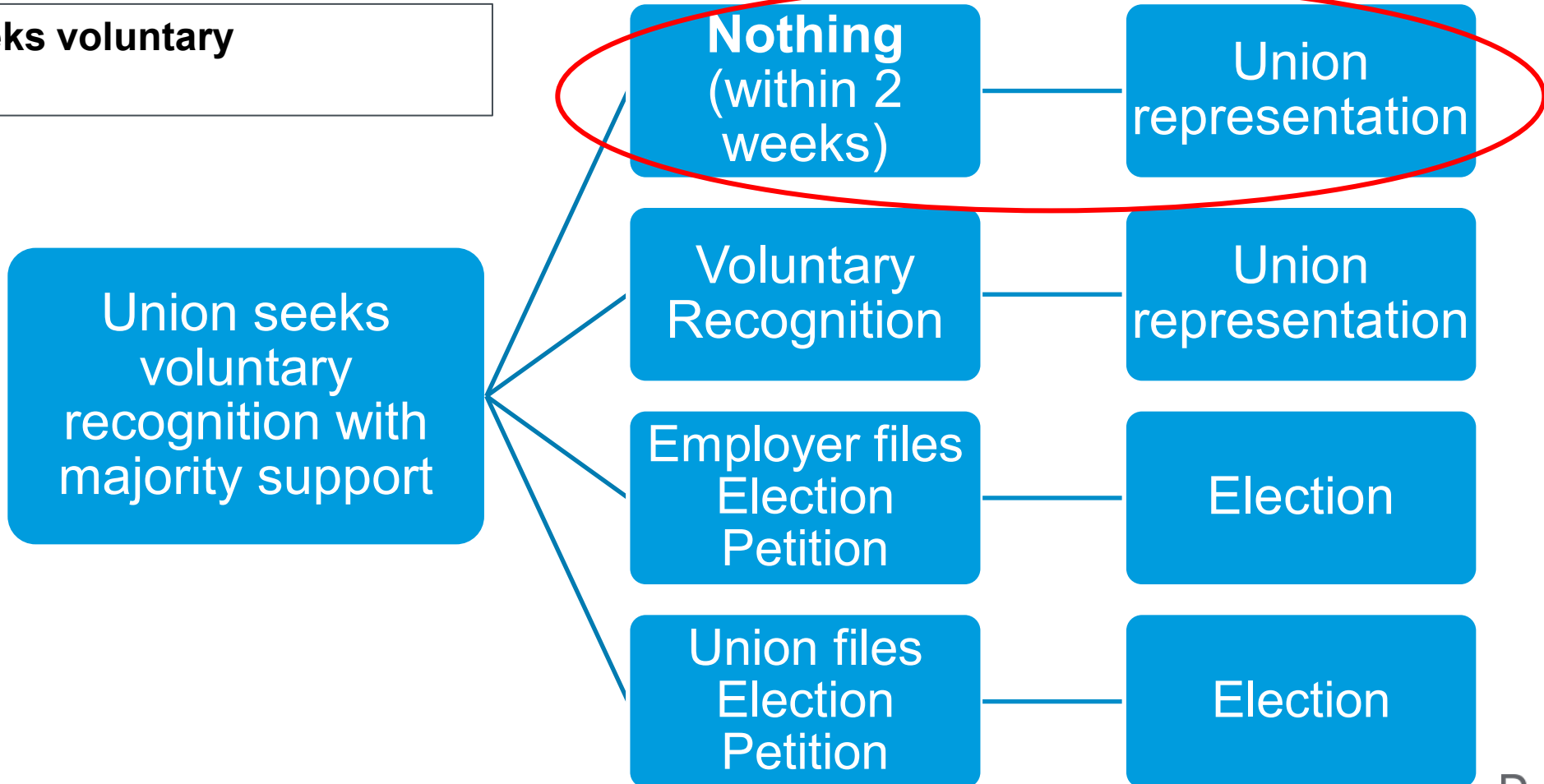
# What Is The Practical Impact On Employers?

## Union Action

## Employer Action

## Result

If a Union seeks voluntary recognition...



# Takeaways From *Cemex* Decision

- Increased voluntary recognition requests.
- **Employers must respond to such requests within 2 weeks** or face union representation without an election.
- Risk of remedial “**bargaining order**” is **greater**.



# Reversion To “Quickie” Election Rules

- Effective **December 26, 2023**
- Faster timeline from petition to election.
- Individual eligibility and inclusion issues will **not** be litigated during pre-election hearing.



# Takeaways From “Quickie” Election Rules

- Increased wave of petitions from **December 26, 2023 through early 2024.**
- Postpones resolution of scope of unit and supervisory status.
- Limits employers’ ability to message during campaign.
- Puts pressure on employers not prepared.



# Captive Audience Meetings Under Attack

---

- NLRB General Counsel asserted captive audience meetings are unlawful under the NLRA.
- New York State Law prohibits captive audience meetings. Subject to potential preemption challenge.
- Risk assessment for employers in delivering message to employees.

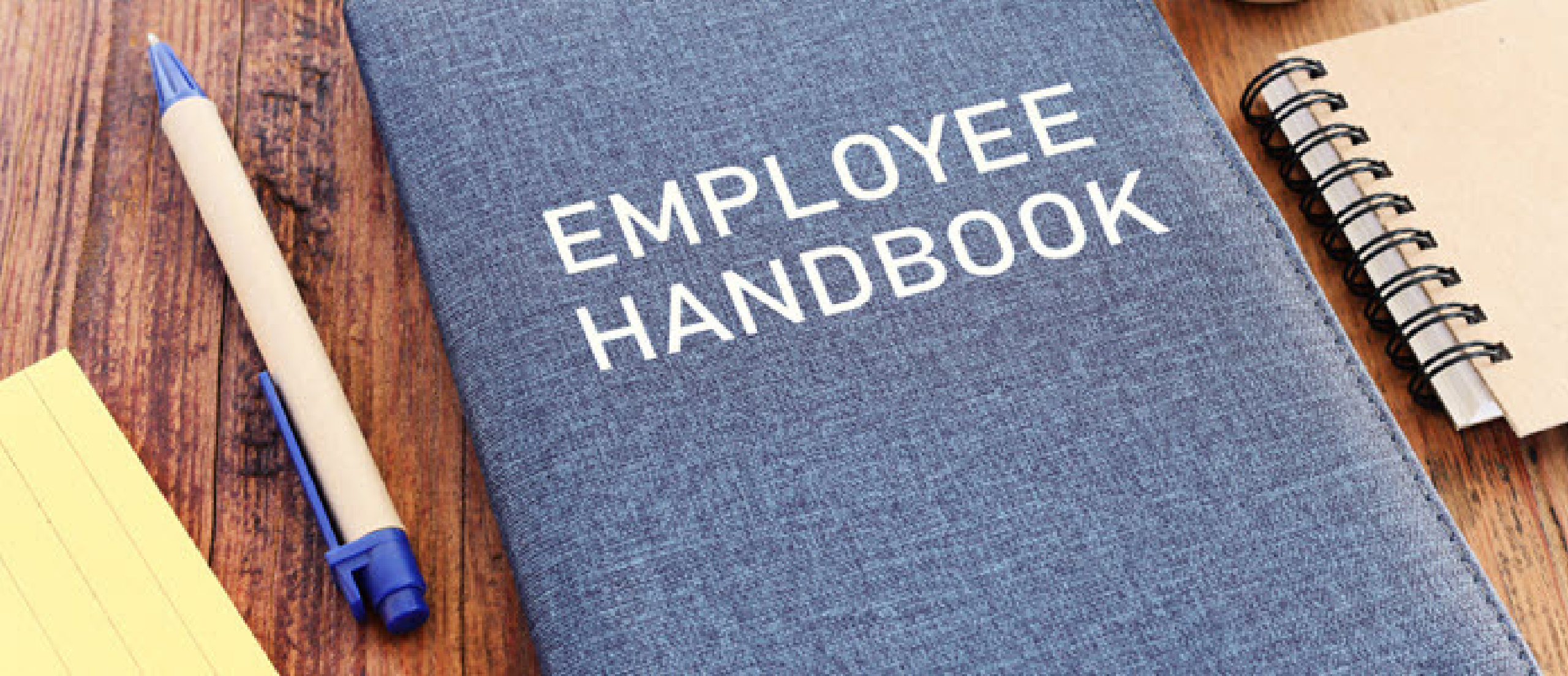


# Practical Guidance In Light Of These Changes

---

- Evaluate supervisory status
- Assess for vulnerabilities
- Evaluate Company's position
- Conduct Supervisor training
- Centralize points of contact





## Lawfulness of Handbook Rules And Employer Policies – **What Can You Do About It?**

# Lawfulness Of Handbook Rules And Policies

- **Background:**

- **Facially-neutral handbook rules** and employer policies could violate NLRA because they infringe on the employees' exercise of Section 7 rights.

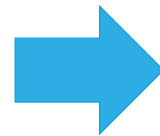
- **Why should you care?**

- Affects union **and non-union employees**
- Applies regardless of whether an adverse employment action is taken
- Most problematic if an election petition is pending; could result in “bargaining order” and certified union without an election

# Once Again, The Law Has Shifted In Favor Of Employees...

- **Old Rule (*Boeing*):** Evaluates facially-neutral handbook rules based on:
  - (i) the nature and extent of the potential impact on NLRA rights, and
  - (ii) legitimate business justifications for the promulgated rule.

NLRB categorized rules for ease of application.



- **New Rule (*Stericycle*):** Two-step test now applies:
  - **Step 1:** GC must show that a challenged workplace has a **reasonable tendency to chill Section 7 rights.**
  - **Step 2:** The employer may rebut the presumption by establishing that the rule advances **legitimate and substantial business interests that cannot be achieved with a more narrowly-tailored rule.**
- Case-by-case analysis; no categorization

# Which Rules Are Most Problematic Now?

- No-recording
- Civility (“be professional”)
- Appearance and conduct
- Social media
- Internal investigations and searches



Best time to reevaluate is **right now** – before the expected wave of union election petitions at the end of 2023.



## Other Important Recent Pro-Employee NLRB Decisions – For Both **Non-Union Employers** and **Union Employers**

# Mutual Aid and Concerted Activity

- Employees can act for “mutual aid or protection” even when acting on behalf of **non-statutory employee**.
- Employees can invoke Section 7 for issues affecting non-employees as long as those efforts **also help statutory employees**.

## MUTUAL AID



*American Federation for Children*

- An **individual's actions** may qualify as “concerted activity” that is protected under Section 7 of the NLRA.
- Assessment is based on the totality of the record evidence.

## CONCERTED ACTIVITY



*Miller Plastic Products*

# Takeaways

- Employee actions on behalf of non-employees **may be protected**.
- Question is if advocacy could also benefit statutory employees – likely will be interpreted **broadly** by NLRB.
- Impact on **independent contractors, supervisors, managers, interns, volunteers, etc.**



- Whether single employee’s conduct is protected and “concerted” will be based on **all facts and circumstances**.
- More **difficult to evaluate**.
- **Expect more ULPs** filed by unions or employees.

# If You Are Unionized...

- During hiatus period without a contract, unilateral changes can **only** be made when:
  - Consistent with longstanding practice **AND**
  - Non-discretionary
- Past practice before union involvement immaterial
- Management rights clause irrelevant

*Wendt Corp. and Tecnocap LLC*





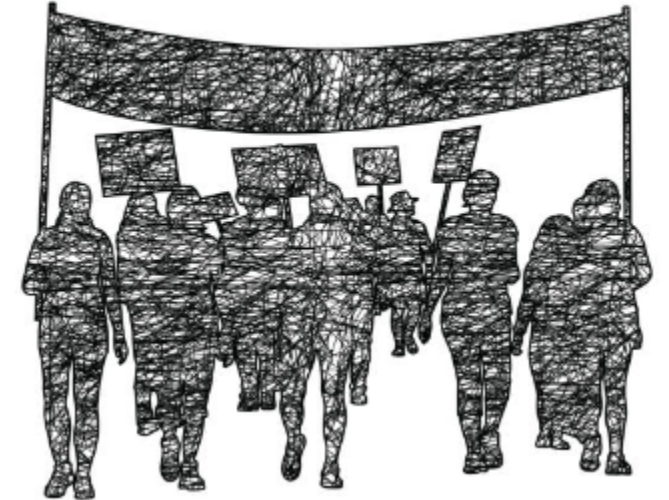


## What's Next On The **Horizon**...

# Here's What We're Watching...

---

- **Election Rules/Cemex:**
  - Federal court interpretation
  - Guidance issued to Regions
  - Increased representation petitions end of 2023 and early 2024
  - Expansion of industries in unions' cross-hairs heading into 2024
- **Strike activity:**
  - Whether pace of strikes continue
  - Impact on contract terms
- **2024 election and political impact on these issues**



# Next Issues Likely Up On The NLRB's Docket

- **Joint Employer:** NLRB indicated it would issue a new joint-employer rule at the end of the month, which we expect to be employee-friendly and broad.
- **Non-Competes:** GC Abruzzo expressed that nearly all non-compete agreements violate the Act. Region recently issued a complaint against a company related to its enforcement of a non-compete.
- **Separation Agreements:** NLRB held that separation agreements that include overbroad non-disparagement and confidentiality provisions are unlawful (*McLaren Macomb*).
- **Employee Status:** NLRB will decide issues concerning employee status of college athletes, graduate students, and potentially other similar classes.



# We're On Top Of These Developments...

## Labor Relations Update



Share RSS

Covering the latest legal developments and practical solutions for employers.



### Episode 47: The new NLRB standard on Handbook Policies and Workplace Rules

Wednesday Aug 23, 2023

In this episode of The Proskauer Brief, senior counsels [Jurate Schwartz](#), [Joshua Fox](#), and special employment law counsel [Laura Fant](#) discuss the new standard on personnel policies and workplace rules set forth by the National Labor Relations Board (NLRB) in its August 1, 2023 decision in [Stericycle, Inc., 372 NLRB No. 113 \(2023\)](#). Be sure to tune in as we discuss why employers should take this opportunity to review their existing handbooks and policies with counsel in light of the new standard.

Download Share

# Questions?

---



# Labor Union Resurgence And Its Impact On Your Workplace

Joseph Baumgarten, Partner  
Howard Robbins, Partner  
Joshua Fox, Senior Counsel

Proskauer»

The information provided in this slide presentation is not intended to be, and shall not be construed to be, either the provision of legal advice or an offer to provide legal services, nor does it necessarily reflect the opinions of the firm, our lawyers or our clients. No client-lawyer relationship between you and the firm is or may be created by your access to or use of this presentation or any information contained on them. Rather, the content is intended as a general overview of the subject matter covered. Proskauer Rose LLP (Proskauer) is not obligated to provide updates on the information presented herein. Those viewing this presentation are encouraged to seek direct counsel on legal questions. © Proskauer Rose LLP. All Rights Reserved.