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NLRB Update

Recent Decisions That Demand Your Attention

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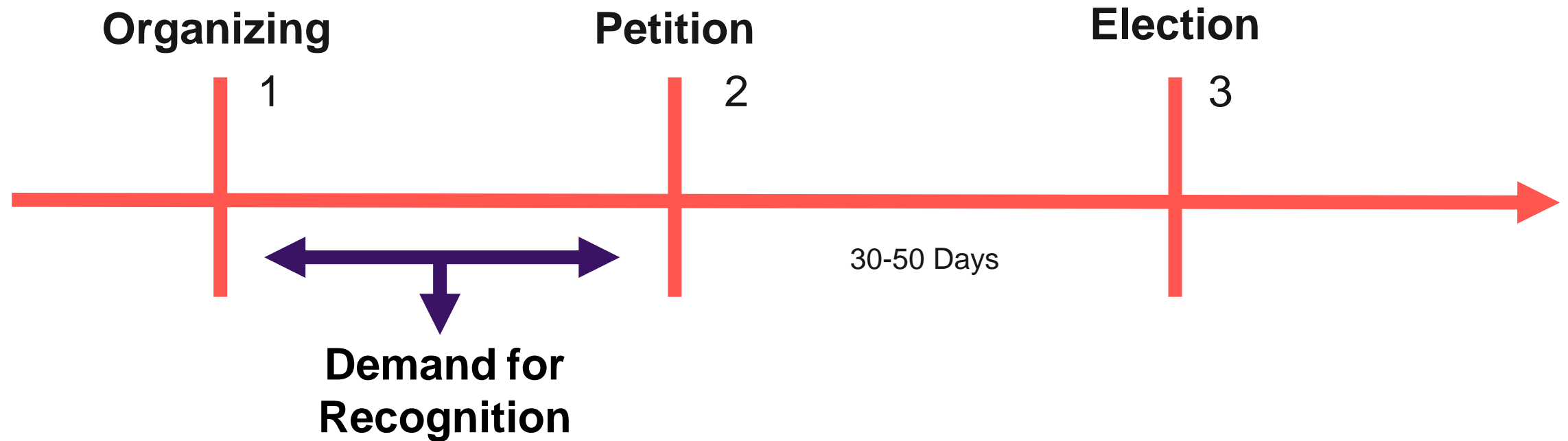
Cemex

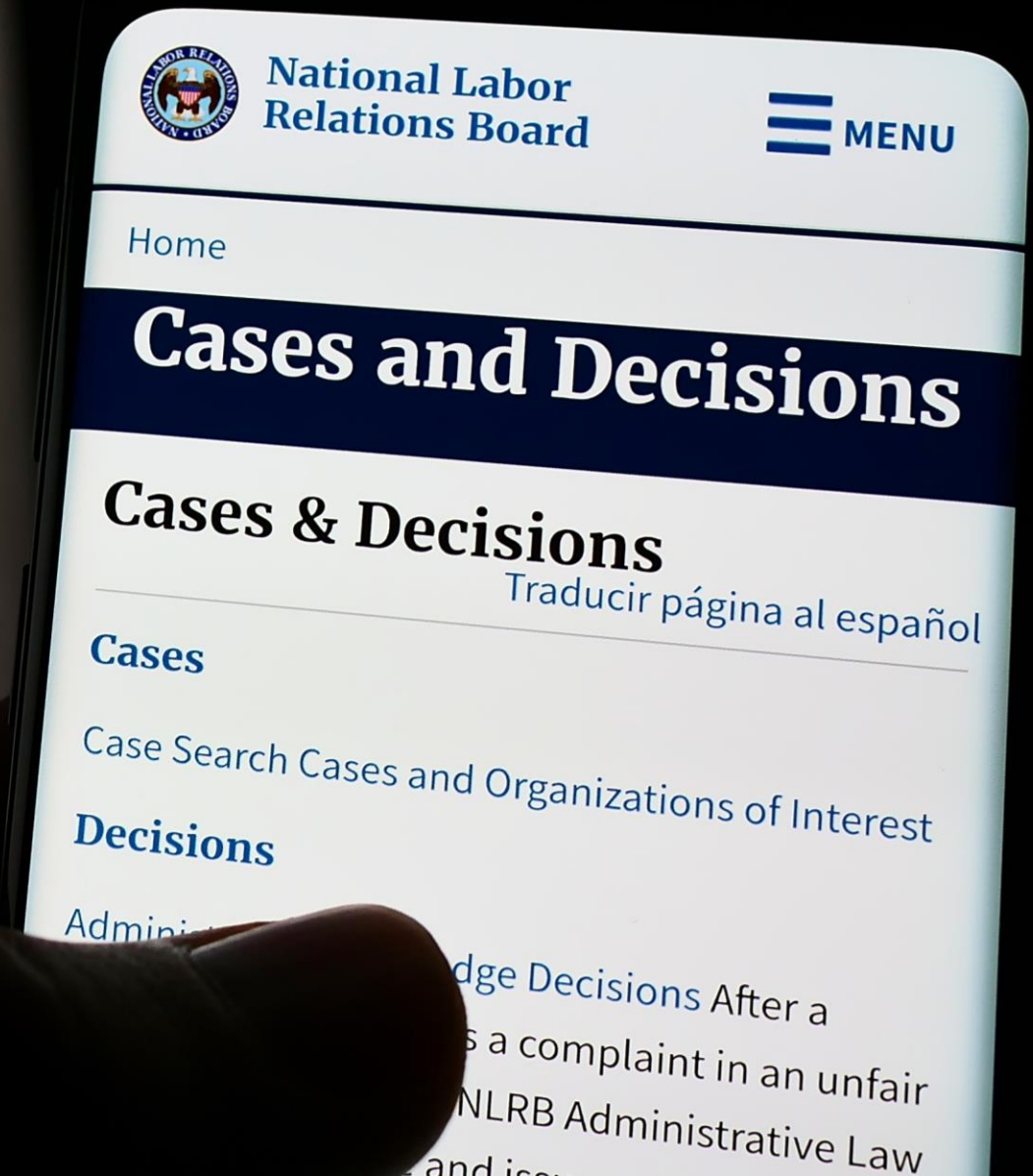
The Path to Representation: Before



- For decades, if an employer declined voluntary recognition, the union seeking representative status almost always had to petition the NLRB for an election.
- In the meantime, the employer could share its position and provide information to employees about the union and unions generally.

The Road to Unionization Before August 2023





CEMEX

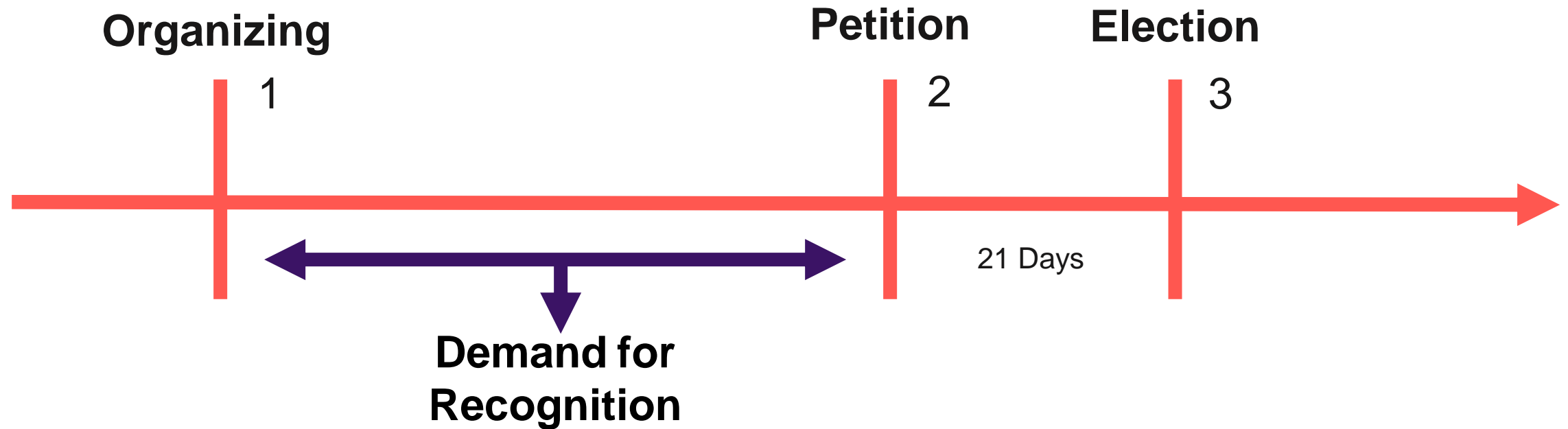
- However, in *CEMEX*, the Board changed its framework for elections and when employers must recognize a union without an election.



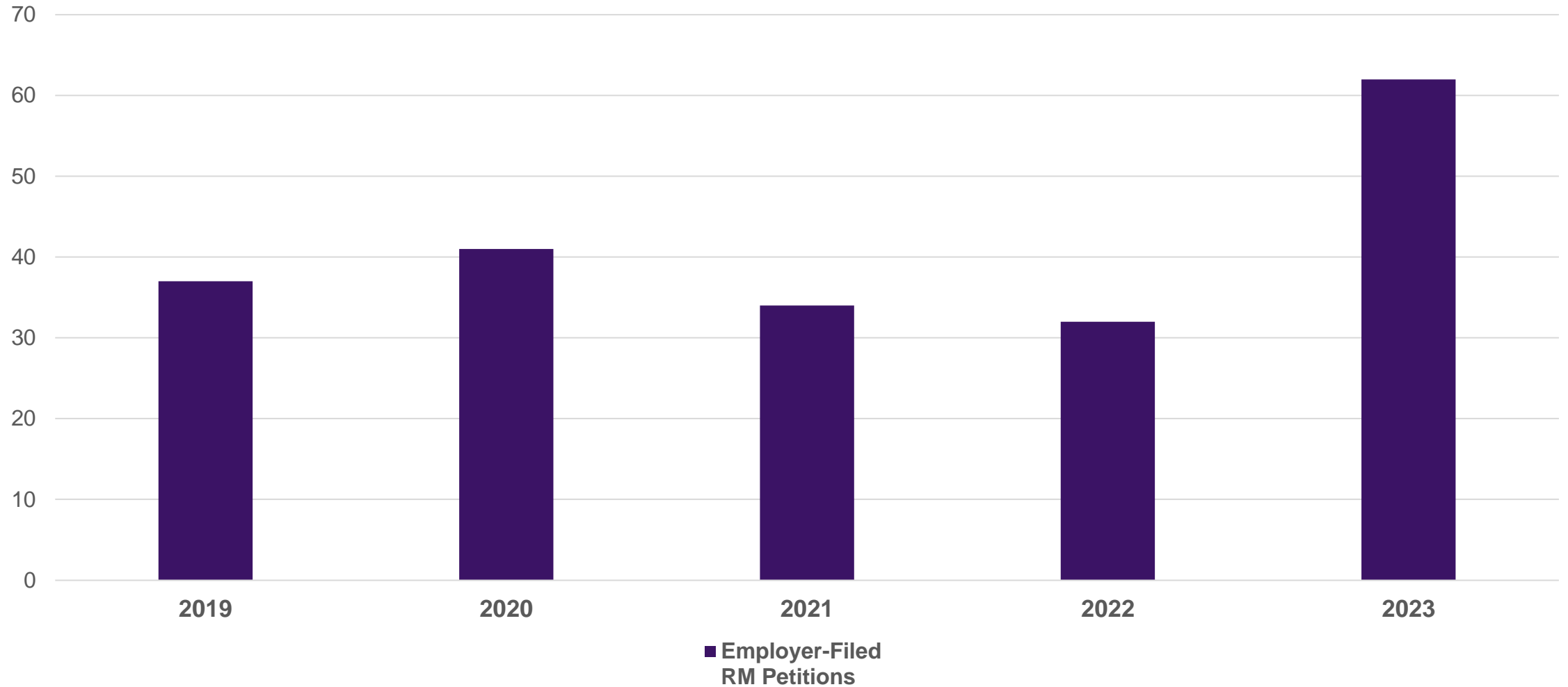
Cemex – Part 1

- If a demand for recognition is made, an employer must either:
 - Recognize the union and begin bargaining – with no election; OR
 - The employer must file a petition for an election within two weeks.
- If the employer fails to act, the Board will order the union certified and require bargaining.
- Also, much shorter election cycle time:
 - 21 days from petition to election due to the Board's return to “quickie election” rules that shorten the election timetable, limit pre-election litigation, and limit ability to resolve eligibility pre-election

The Road to Unionization in 2024 and Beyond



RM Petitions Have Skyrocketed Post-Cemex





Cemex – Part 2

- If the company is found to have engaged in an unfair labor practice during the campaign (any ULP), there will be no “re-run” election, which was normally the remedy. Instead, the Board will order the union in.
- Old Rule
 - ULP that is demonstrated to have an impact on the election will result in a new election
 - Only ULPs that are so severe as to prevent any opportunity for a fair and impartial election will result in *Gissel* Bargaining Order
- New Rule
 - Essentially any ULP = Bargaining Order
- Expect a lot of ULP Charges

Recent Bargaining Orders – Hinge on Timing?

- A Massachusetts cannabis retailer was the first company to receive a *Cemex* bargaining order in September 2023
 - Illegally fired key union organizers prior to an election that a UFCW affiliate lost
 - ALJ ordered the company to recognize and bargain with the union
- A second cannabis dispensary in Missouri agreed to a bargaining order in a settlement after it fired union organizers (and committed other ULPs)
- Conversely, an ALJ declined to issue a bargaining order after a Las Vegas warehouse fired workers before they signed authorization cards and a request for recognition was made
 - Rather, the ALJ ordered the company to hire the workers back and stated that the company’s “subsequent conduct and/or the election results” will determine whether a bargaining order is necessary

Stericycle

Handbook Rules & Workplace Policies: Background

- In 2017's *Boeing Co.*, the Board established a new standard:
 - A balancing test assessing “the nature and extent of the [rule’s] potential impact on NLRA rights” against the “legitimate justifications associated with the rule.”
 - As a result of new balancing test, NLRB outlined three categories of employment policies, rules, and handbook provisions:
 - Category 1 – rules that were generally lawful
 - Category 2 – rules warranting individual scrutiny
 - Category 3 – rules that were unlawful
 - Provided consistency for employers

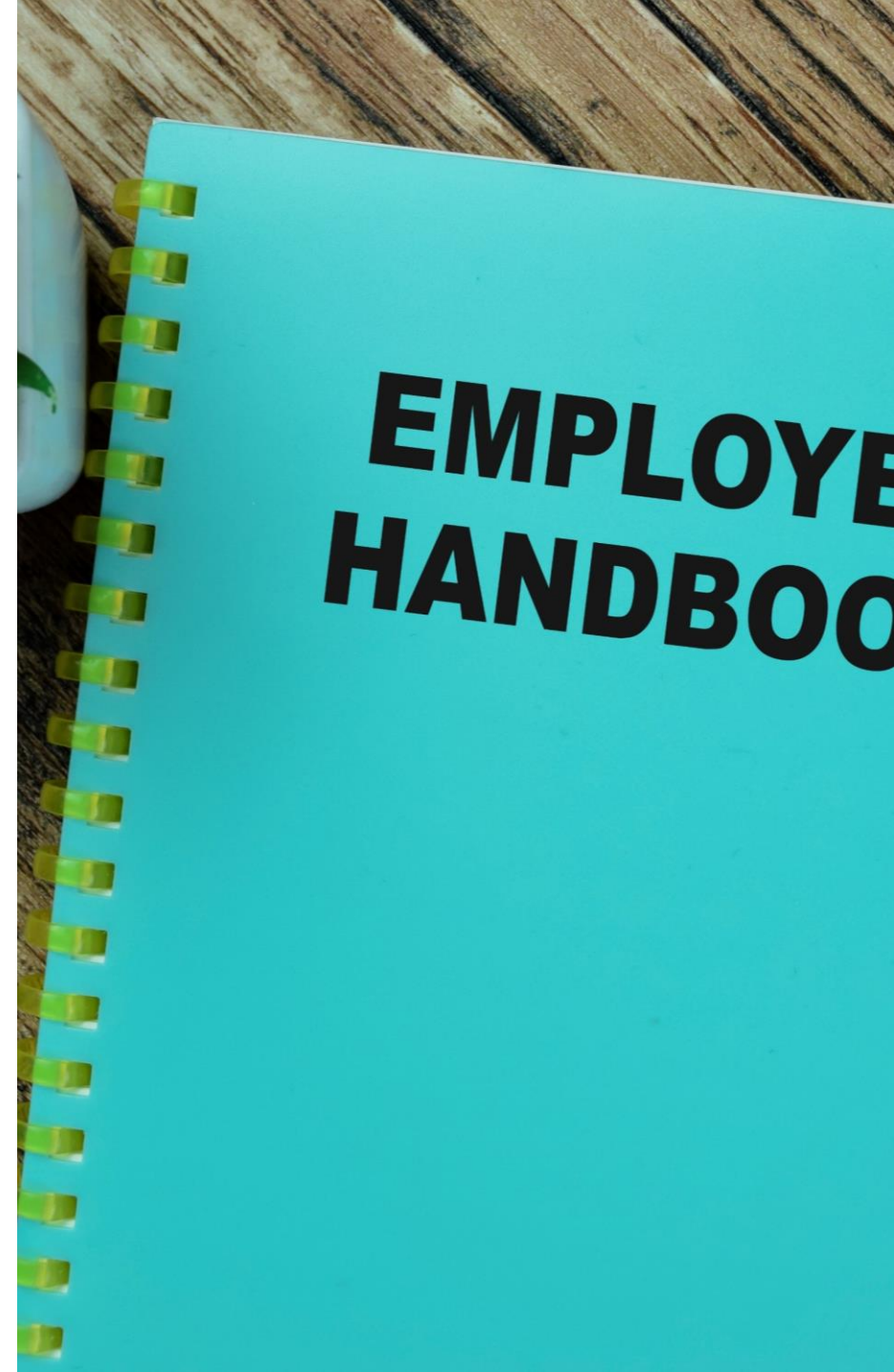
Stericycle, Inc. – A New Work Rules Standard

- Old Rule

- On August 2, 2023, the Board overturned the Trump Board’s *Boeing* decision, adopting a new legal standard for assessing the lawfulness of work rules and abandoning the categorical approach.
 - Employee-friendly standard
 - Case-by-case assessment

- New Rule

- Work rules now are “**presumptively unlawful**” if they have a “reasonable tendency” to chill employees from exercising their organizing rights or if they have a coercive meaning.
- A two-step analysis will determine whether the rule or policy is unlawful.



Stericycle – Impact on Handbooks

- It is a reversal to a standard similar to that applied during the **Obama Administration**
- While we can look to Obama-era decisions for guidance, we have no clarity on how far the current NLRB will take this
- This is an uninterpreted **employee-friendly** standard

Stericycle – Impact on Handbooks

- **Risk factor:**

- Unlike the normal remedies with an unlawful policy (rescission, posting, and perhaps even election reversal), there is a concern that an improper policy could lead to a bargaining order after *Cemex*
- **Based on language in the decision, a facially unlawful policy could be deemed an NLRA violation sufficient to warrant a bargaining order**

Two-Step Analysis

1

Board GC must prove an employee could reasonably interpret the rule to have a chilling effect on protected activity. If the GC meets this burden, the rule is presumptively unlawful

- Look at the specific wording of the rule, specific industry, workplace context, etc.
- Through the lens of an economically dependent employee on their employer who contemplates engaging in Section 7 activity

2

Employer may rebut the presumption by proving the rule advances a legitimate and substantial business interest that cannot be advanced with a more narrowly tailored rule

***Stericycle* and *Cemex*: An Uncertain New World**

What We Need to Understand

- We are back to “facially neutral” policies being considered unlawful
- Many employers became more open with policy language during the Trump Administration due to *Boeing* and the limited type of policy language that would be found facially unlawful
- It is likely many rules that were once considered facially lawful will be deemed unlawful under the current Board
- It is uncertain whether disclaimer language will “cure” unlawful language, but still is likely helpful

The Intersection



- Failure to file a petition after denying request for recognition will lead to a bargaining order.
- That and other NLRA violations (*e.g.*, unlawful handbook rules) may result in an order to recognize union without an election.
 - Triggering violation could be an overly broad employee handbook policy implemented years before the election

Best Practices

Best Practices

- Employers should carefully review policies and conduct a risk assessment weighing the business interests in maintaining each rule and the impact it may have if the Board finds it unlawful
- Conduct management training in tandem with policy revisions
- Develop a plan for responding to demands for recognition
- Prevention is the best medicine – the time to work on employee engagement is now
- Jackson Lewis offers training for supervisors and other leaders to ensure understanding and consistent application of employer handbook policies

Facially Unlawful Policies – What Do We Need to Know?

Basic Principles

- Could the factfinder conclude that employees would interpret language as limiting them from engaging mutual aid and protection?
 - Recognize this is not an unbiased factfinder – they are looking to find something
- Unions seeking to organize will get their hands on handbooks to frame issues
- Is the specific policy language worth the risk?

Some Things Have and Always will be Facially Unlawful

Some Examples – Need to understand the simple examples to parse/offer solutions on less straightforward language

- Limitations on discussing wages and terms and conditions of employment
- Limitations on disparaging the employer
- Limitations on any contact with the media
- Prohibiting all employee solicitation
- Stating terms and conditions of employment are confidential

Specific Policies That Require Focused Review

- In essence, the policies that pose the highest concerns are those that could potentially restrict Section 7 rights – examples include:
 - Electronic Communications
 - Confidentiality/Non-Disclosure
 - Speaking to the Media
 - Civility/Professionalism
 - Solicitation/Distribution
 - On-Duty Conduct
 - Off-Duty Access
 - Social Media

And again, this program is focused solely on the language itself and not application



Specific Policy Examples

Sample Unlawful Policy: Confidentiality

Employees are prohibited from disclosure of confidential information, including Company, customer information, and employee information maintained in confidential personnel files.

Why Unlawful? Employees would reasonably conclude that this language barred them from disclosing information about wages and other terms and conditions of employment.

Sample Unlawful Policy: Solicitation/Distribution

No one shall be allowed to distribute literature in working or guest areas at any time. Team Members may not solicit other Team Members for any purpose during scheduled work time. Work time does not include break time. In addition, a Team Member who is on his/her break may not solicit or distribute literature of any kind to a Team Member who is working.

Why Unlawful? The rule is unlawfully overbroad because it prohibited distribution of literature in “guest areas” where work was not being performed and where the employer had no compelling interest to suppress or control activity protected by the Act. For example, the rule could arguably apply to areas such as restrooms, which may be considered “guest” areas, not working areas, where distribution would be permitted.

Sample Unlawful Policy: Professionalism

All employees are expected to behave in a professional manner that promotes efficiency, productivity, and cooperation. Employees are expected to maintain a positive work environment by communicating in a manner that is conducive to effective working relationships with internal and external customers, clients, co-workers, and management.

Why Unlawful? The rule is unlawfully ambiguous and vague. The rule would reasonably lead employees to construe the rule to restrict protected discussions out of fear that the company will find them inconsistent with a positive work environment.

Sample Unlawful Policy: Social Media & Civility

Employees may not perform any act that may discredit, defame, libel, abuse, embarrass, tarnish, present a bad image of, or portray in false light the employer, its personnel, business partners, or customers.

Why Unlawful? The rule suggests that its primary purpose is to restrict employee criticism of the employer, necessarily prohibiting Section 7 conduct, such as engaging in online criticism of the employer. It also disallows courteous online protected conduct.

Civility Recommendations

- Avoid words/phrases such as:
 - “Interfere with”
 - “Abusive”
 - “Injurious”
 - “False”
 - “Insulting”
 - “Disparaging”
 - “Intimidating”
 - “Derogatory”
- These were problematic under the Obama-era Board and are likely to be problematic to the Biden Board

Sample Unlawful Policy: Speaking to the Media

Employees should not contact or comment to any media about the Company unless preauthorized by public relations.

Why Unlawful? The pre-approval requirement would reasonably lead employees to conclude that the rule applies to protected communications to the media regarding labor disputes.

Sample Unlawful Policy: Insignia and Dress Code

Only [employer] approved pins, badges, and professional certifications may be worn. Badge reels may only be branded with [employer] approved logos or text.

Why Unlawful? The employer's blanket rule that employee badges can only be branded with employer's logo was unlawful because it effectively banned employees from wearing badge reels with union's insignia.

Insignia and Dress Code - Nuance

As noted earlier this is an art and not a science and detail-oriented review is needed.

For example,

- what about prohibiting “offensive” pins; or
- “political” pins or decals?

And industry differences – healthcare, for example

Sample Unlawful Policy: Recordings

You shall not photograph or record through any means the employer's operations, systems, presentations, communications, voicemails, or meetings.

Why Unlawful? The rule prohibits employees from documenting their working conditions and lacks limiting language and any mention of the privacy interest the employer seeks to protect.

Best Practices

Work Rules Going Forward – Broken Record Time

- Under *Stericycle*, work rules that were once facially lawful may no longer be considered lawful → greater uncertainty for employers
- *Cemex* is expected to lead to more card-based bargaining orders and fewer elections
 - A triggering ULP could be as innocuous as an overly broad employee handbook policy implemented years before the election
- Difficult to predict what policies will be found lawful prior to Board scrutiny on the issue to avoid ULPs and thus bargaining orders
 - For example, we cannot predict how professionalism and civility policies will be interpreted
 - Must be judicious

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Questions?

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Thank you.