SMITH ANDERSON

Today's Employee Organizing

What HR Professionals and Corporate Counsel Need to Know, and Do, Now!

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EXPECT EXCELLENCE®

Increased Interest in Organizing

- Gen Z to Boomers want a voice in their workplace
- Organizing, whether through a traditional labor union or by creating their own internal employee organizing committee, has captured employee attention to get that voice
- Healthcare, technology, professional services, manufacturing, construction, federal contractors . . . no industry is immune

REMEMBER:

- Union organizing does not require affiliation with a traditional labor union. Company employees can form their own internal employee organizing committee and "independent union" to be certified as the bargaining representative. Whether it is a traditional labor union or their own independent "union," it qualifies as a "union" and is referred to as such in this presentation.
- The National Labor Relations Act (NLRA) does not apply to government employees.
- The NLRA allows ***non-supervisory*** employees to organize and be represented by an exclusive bargaining representative. ***It does NOT apply to supervisors and managers, HR employees or other "confidential" personnel.***

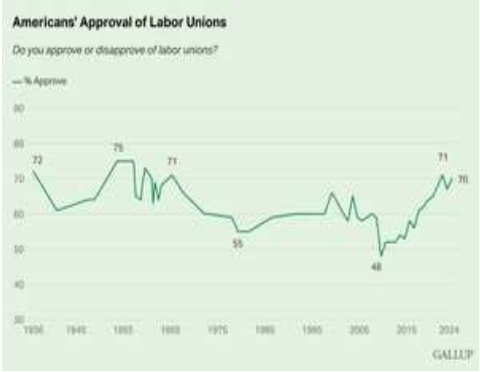
Additional Information: Workers want unions, but the latest data point to obstacles in their path: Private-sector unionization rose by more than a quarter million in 2023, while unionization in state and local governments fell | Economic Policy Institute (epi.org)

- In 2023, workers organized across a variety of work settings, including higher education, museums, nonprofits, entertainment, retail, and manufacturing (Greenhouse 2023; Shepardson 2023).
    - Greenhouse, Steven. 2023. "Focus Organizing Drives on Workers Without College Degrees, US Unions Told." *Guardian*, May 5, 2023.
    - Shepardson, David. 2023. "UAW Launches Bid to Organize Tesla and 'Entire Non-Union Auto Sector' in US." Reuters, November 29, 2023.

Favorable View of Unions *Increasing*

Public approval of labor unions increased to 70% in August

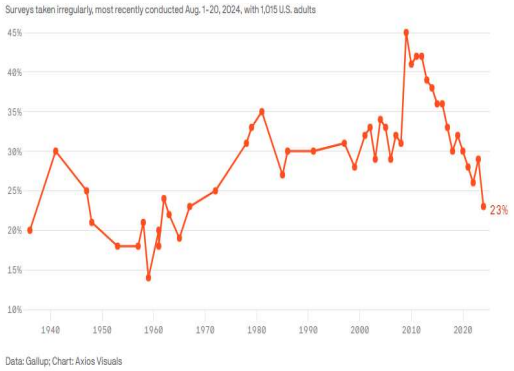
-- the second highest level in 57 years



Unfavorable View of Unions *Decreasing*

Only 23% of Americans disapprove of labor unions

--a number that has not been this low since September 1967



Organizing Efforts *Increasing*

2024

- 1st half FY 2024 (10/1 – 3/31): 1,618 election petitions filed *(compared with 1,199 1st half FY 2023)*
  - 1,137 RC-petitions (employee filed)
  - 281 RM-petitions (employer filed)
  - Union won 79.7% of elections 1st half 2024
- 2nd half FY 2024: Filings continued to rapidly increase
  - As of July: 2,600 petitions filed (more than entire FY 2023)
    - RC petitions increased by 13% from 2023
    - RM petitions increased by 2,000% from 2023

Unions' increase in popularity follows the NLRB's reporting of significant increases in union activity, including a 32% increase in union election petitions. This spike in petitions is driven by **employer** filed RM-petitions after the NLRB's controversial *Cemex* decision, which will be discussed in the following slides 13 - 22.

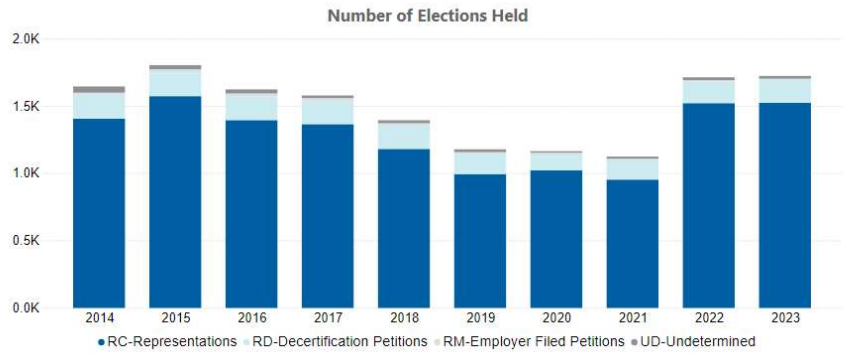
https://www.nlrb.gov/news-outreach/news-story/union-petitions-up-35-unfair-labor-practices-charge-filings-up-7-in-the

Definitions:

RC petition: This is the name for the petition filed by EMPLOYEES who are seeking an election to certify a "union" as their bargaining representative (remember, this can be a traditional labor union or the employees' created independent union)

RM petition: This is the name for the petition filed by EMPLOYERS who are seeking an election to verify a claim that a majority of employees support a "union" as their bargaining representative (remember, this can be a traditional labor union or the employees' created independent union)

Number of Elections Held Per FY



Industries with Highest Union Membership 2023

- Utilities 19.9%
- Transportation & Warehousing 15.9%
- Healthcare 13.2%
- Educational Services 12.9%
- Motion Picture & Sound Recording 12.1%
- Construction 11.4%

Union Members 2023, U.S. Bureau of Labor Statistics www.bls.gov/news.release/pdf/union2.pdf

REMEMBER: Union membership rate is the percent of wage and salary workers who were ***members*** of unions. In right to work states, employees in unionized workplaces do NOT have to be union members to get the benefit of the collective bargaining agreement.

New Trends in Industries

Allina Health Systems

In 2023, nearly 600 physicians, nurse practitioners, and physician assistants in MN and WI created the largest private-sector doctors union in the country, Doctors Council SEIU Local 10-MD

Chronic understaffing, high levels of burnout and compromised patient safety in pursuit of profits was their reasoning to seek union representation

"It sounds cliché, but I think the most important thing that we are asking for is a seat at this table." Allina Health Maplewood Clinic pediatrician Dr. Kristin Sanders-Gendreau

[600 Allina Health clinicians officially recognized as largest private-sector doctors union in the US - KSTP.com 5 Eyewitness News]

New Trends in Historically Low Unionized States

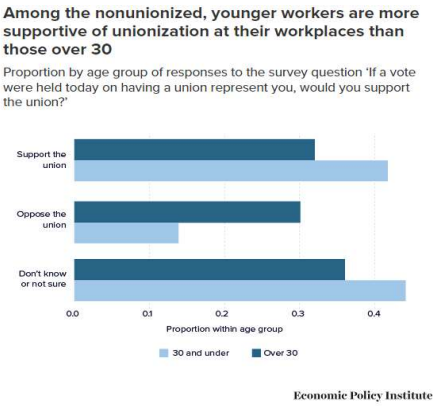
Mississippi union membership experienced a 97.4% growth rate between 2013 and 2023 (largest growth in the country)

Arkansas experienced a 63.2% growth rate (2nd largest)

North Carolina remains one of the least unionized states, but union membership has increased the last 4 years

https://www.achrnews.com/articles/155049-10-states-with-the-largest-declines-in-union-membership

Shifts in Culture & Organizing Approaches



- Recent polling from the Economic Policy Institute shows US workers today *are much less likely to oppose* union representation in their workplaces
  - Employees 30 and under *are far more likely to support unionization*
- Strikes, threats of strikes, and several recent high-profile collective bargaining agreements have secured large wage increases in a variety of industries, which has garnered support and interest from non-union employees

Younger workers are both more supportive *and* more uncertain about unions compared with older workers. This is an especially important finding given the fact that young workers have been the main push in recent organizing efforts at Amazon and Starbucks. Members of these generations appear to be more active in social movements and are turning out to vote at higher rates than earlier generations did in their 20s and 30s.

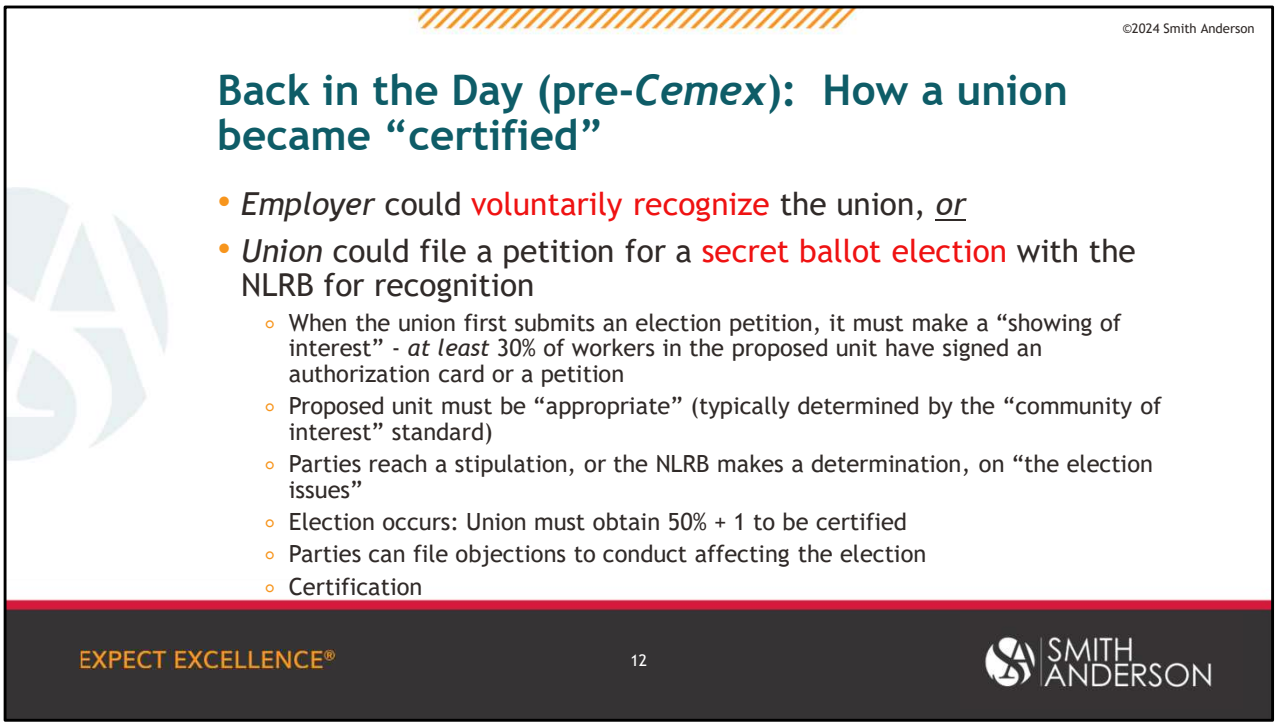
https://www.epi.org/publication/rise-of-the-union-curious/

Unions are also becoming better "marketers" of their successes with collective bargaining and strikes. Last year more than half a million American workers went on strikes. In October 2023, companies lost more workdays to strikes than any month during the past 40 years. Some of these high-profile strikes included the (1) Writers Guild of America and Screen Actors Guild's strikes, which each lasted several months; (2) the United Auto Workers strikes against Ford, GM, and Stellantis; and (3) the Teamster's threatened strike against UPS last summer primarily over part-time worker pay and air conditioning in trucks.

https://nhjournal.com/point-the-year-of-the-strike-could-be-a-turning-point-for-the-labor-movement/

Also, several recent high profile collective bargaining agreements secured large wage increases in industries ranging from parcel delivery to auto manufacturing, health care, and education.

https://www.epi.org/publication/major-strike-activity-in-2023/
https://www.cnbc.com/2024/01/28/unions-with-power-popularity-rising-are-still-losing-a-big-battle.html



Background Information On How Employees Become Represented By Unions
Generally, there are two paths employees can follow to certify a union as their exclusive bargaining representative: (1) the employer can voluntarily recognize the union (if there is evidence that a majority of workers have indicated interest in unionizing) or (2) the union can file a petition for a secret ballot union election with the NLRB.

Secret Ballot Elections
Traditionally, the secret ballot election has been the preferred method to determine union support because of the anonymity. Obviously, there can be potential peer pressure with authorization cards or signing a petition.

1-First, the union must make what is called a "showing of interest" to the NLRB. This means at least 30% of the proposed unit has signed authorization cards or signed a petition that they want union representation. Most unions will not file the petition until they have at least 70% of the relevant workers have signed an authorization card. This is because once the petition is filed the employer can campaign against the union. Typically, the union wants to keep the fact that they are soliciting signatures quiet so the employer cannot get out in front of it by adjusting the main source of the grievance, whether it be pay, benefits, or some other issue on the job.

2-Once the petition is filed:
- The employer cannot make ANY changes to wages, hours, or working conditions of the

employees. The status quo must remain the same until the election is complete. If there are changes or promises of changes during the election period, the union can file objections to conduct affecting the election, and the employer will face unfair labor practice charges. Specific remedies for these charges and objections are discussed in slides 13 - 22.

- The NLRB will then quickly investigate to make sure they have jurisdiction, the union is qualified, and there are no existing labor contracts or recent elections that would bar an election.
- Once this is completed, the NLRB will seek an election agreement (called a stipulation) between the employer and the union setting the date, time, and place for voting, the appropriate unit, and a method to determine who is eligible to vote. To ensure the unit of employees is "appropriate", NLRB typically uses the "community of interest" test. This test looks at a number of factors like hours worked, location, job duties, supervision, and a number of others to ensure the employees have enough in common where it would be appropriate for one union to represent them all. There are a number of exceptions to the community of interest test.

3-Once an election agreement is reached, the parties authorize the NLRB's Regional Director to conduct the election at the specific time and place. If no agreement is reached, the Regional Director will hold a hearing and rule on those issues not agreed to. Following new rules, elections are now held on the earliest practicable date after a Regional Director's order. This can be an extremely quick turnaround.

4-Then an election is held. For a union to be certified they must receive a majority of the ballots cast. (So, 50% plus 1). A tie means the employer wins because a majority of the employees did not want union representation.

5-After the election, both parties have 7 days to file objections to conduct affecting the election.

- So, if any unlawful conduct occurred after the petition was filed and before the election, the parties can point this out to the NLRB and provide evidence. This can be from a number of things including the employer threatening union-supporting employees, the union threatening employees, changing wages or benefits during the election period. It can be a lot things.
- If no objections are filed and the union wins, the union becomes certified and the exclusive representative of the employees, and the employer must begin to bargain with the union.
- If the union losses, they cannot attempt to unionize the same employees for 1 year. This is called an election bar.

Organizing Made Easy(ier)…by *Cemex*

***Cemex Construction Materials Pacific, LLC.*, 372 NLRB No. 130 (2023)**

- Cemex now requires non-governmental employers to take certain actions, and refrain from other actions, *once a union or internal employee organizing committee claims to represent a majority of the employees*
- Any employer mis-step or a late response to the demand for recognition risks serious consequences, *including a bargaining order*

Why you should care: If there is a bargaining order,…

Employer cannot make changes in wages, hours, working conditions, or other mandatory subjects of bargaining before negotiating with the union, including:

- Salary, bonuses, commissions, paid time off, severance
- Benefits
- Promotions, demotions, transfers, corrective action, termination, RIFs
- Codes of Conduct and work rules

On August 25, 2023, the NLRB issued a far-reaching decision in *Cemex Construction Materials Pacific, LLC*. The *Cemex* decision effected a drastic overhaul to how American workers may become represented by labor unions.

What Happened in *Cemex*

- Teamsters attempted to organize cement truck drivers in 24 facilities in California and Nevada
- The employees voted against the union
- The union filed election objections and unfair labor practice (ULP) charges alleging *Cemex* engaged in "extensive unlawful and otherwise coercive conduct before, during and after the election"
- An NLRB Administrative Law Judge (ALJ) found that *Cemex* engaged in more than two dozen ULPs, and recommended setting aside the election and ordered a re-run election

The main case that has affected the most change with elections and certifying unions over the past two years is the *Cemex* case. This case arose as a result of a campaign to organize a bargaining unit of cement truck drivers and driver trainers led by the Teamsters Union. The Cemex employees were located across 24 facilities throughout Southern California and Nevada. An election was held, and the employees voted against representation by a thin margin.

The union filed several charges and election objections alleging that the company had engaged in "extensive unlawful and otherwise coercive conduct before, during and after the election" that included:

- threatening employees who appeared to favor the union,
- engaging in surveillance of employees,
- restricting employees from communicating with union representatives,
- hiring security guards to intimidate employees, and more. *Cemex*, 372 NLRB No. 130 at *2.

An NLRB ALJ found that the company violated Section 8(a)(1) of the Act more than two dozen times. The ALJ recommended setting aside the election and ordered a rerun election.

What Happened in *Cemex* *(con't)*

- NLRB affirmed the ALJ's decision with one major change: NLRB did not order a re-run election, *but instead issued a remedial affirmative bargaining order*
- NLRB effectively ruled that, by committing ULPs during the election period, the employer had so polluted the representation process that the union should **automatically** be found to have attained a majority of votes

The ALJ's decision was affirmed by the NLRB, but with one major change: the NLRB did not order a re-run election, but instead issued a remedial affirmative bargaining order.

In so doing, the NLRB effectively ruled that, by committing unfair labor practices during the election period, the employer had so polluted the representation process that the union should **automatically** be found to have attained a majority of votes.

The NLRB's previous standard in these type of circumstances was to **set aside** the results of the election where the unlawful conduct occurred during the critical election period ("critical period") unless the election results could not have been affected by the violation. NLRB would issue re-run elections because the preferred and default method for union certification was a secret ballot election, so employees can freely make their decision without the threat of reprisal or intimidation from either the company, union, or their co-workers.

The NLRB deviated from that norm and set out a new framework in *Cemex*, where regardless of the results of the secret ballot election, the Board can certify the union as the employees' exclusive bargaining representative because of the unfair labor practices committed during the election period. **Just for reference it is very common for ULPs to occur during an election, because there are very specific, non-common sense rules that apply.**

Today's Organizing (post-*Cemex*): How a union becomes "certified"

Once the demand for recognition is made, the **employer** must either:

- voluntarily recognize the union and begin bargaining, *or*
- **IMMEDIATELY file an RM petition with the NLRB** requesting an election to verify the union's majority status
  - If the employer files the petition and is subsequently found to have committed ULPs:
    - **NLRB will dismiss the petition and order the employer to recognize and bargain with the union**
- If employer fails to file the petition, the union can file a ULP and request a bargaining order

Cemex drastically changed how elections work and placed additional requirements on employers when faced with a union's demand for recognition.

NLRB General Counsel Guidance on *Cemex*

Cemex was a drastic shift in precedent, and as a result, the NRLB General Counsel issued guidance on how employers should comply

Memorandum GC 24-01 Response to Inquiries about the Board's Decision in Cemex Construction Materials Pacific, LLC (April 29, 2024)

The decision in *Cemex* left many questions. After the ruling, the NLRB General Counsel issued guidance in *Memorandum 24-01 Response to Inquiries about the Board's Decision in Cemex Construction Materials Pacific, LLC* (April 29, 2024) to explain her interpretation of the decision. Although the General Counsel's guidance does not carry the weight of law, it is meaningful insofar as it helps employers understand how the NLRB will attempt to enforce the precedent.

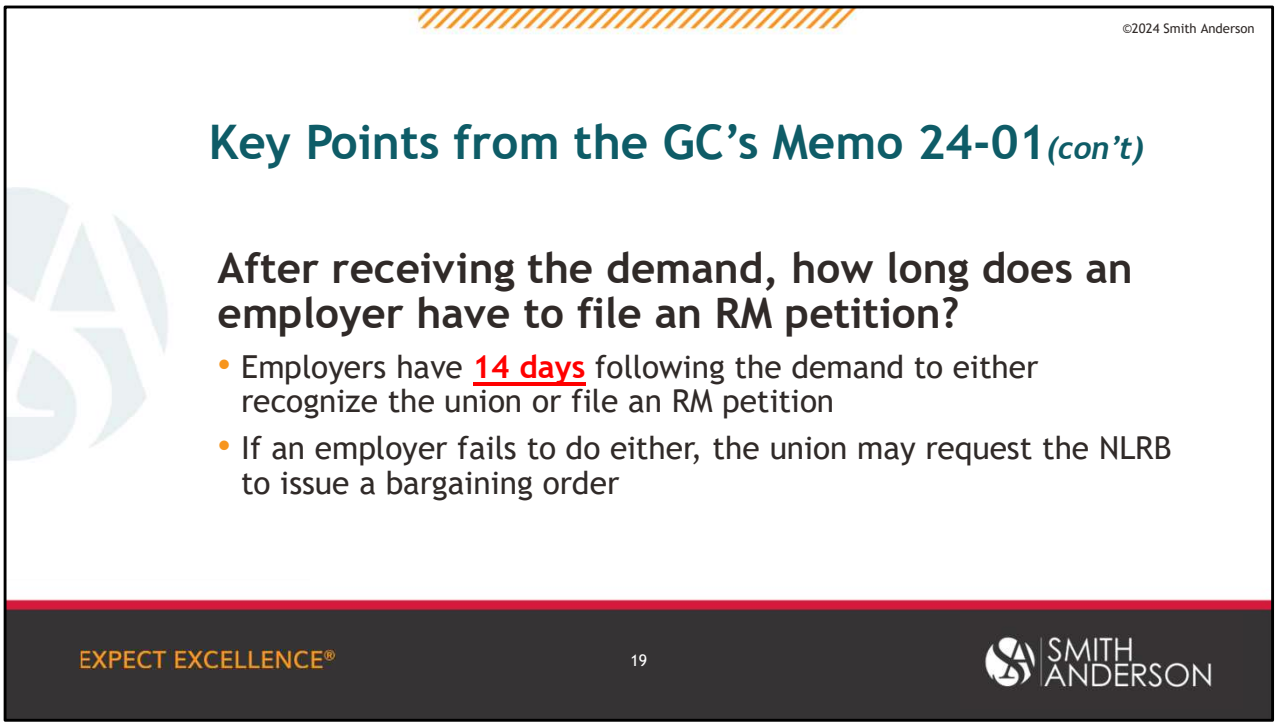
Key Points from the GC's Memo 24-01

What qualifies as a demand for recognition that will trigger the *Cemex* framework?

- Any informal, **oral** or written demand for recognition made to **anyone** acting as an agent of the employer will satisfy the requirement and trigger an employer's obligation to either recognize the union or file an RM petition.
  - ***This includes ANY manager or supervisor.***

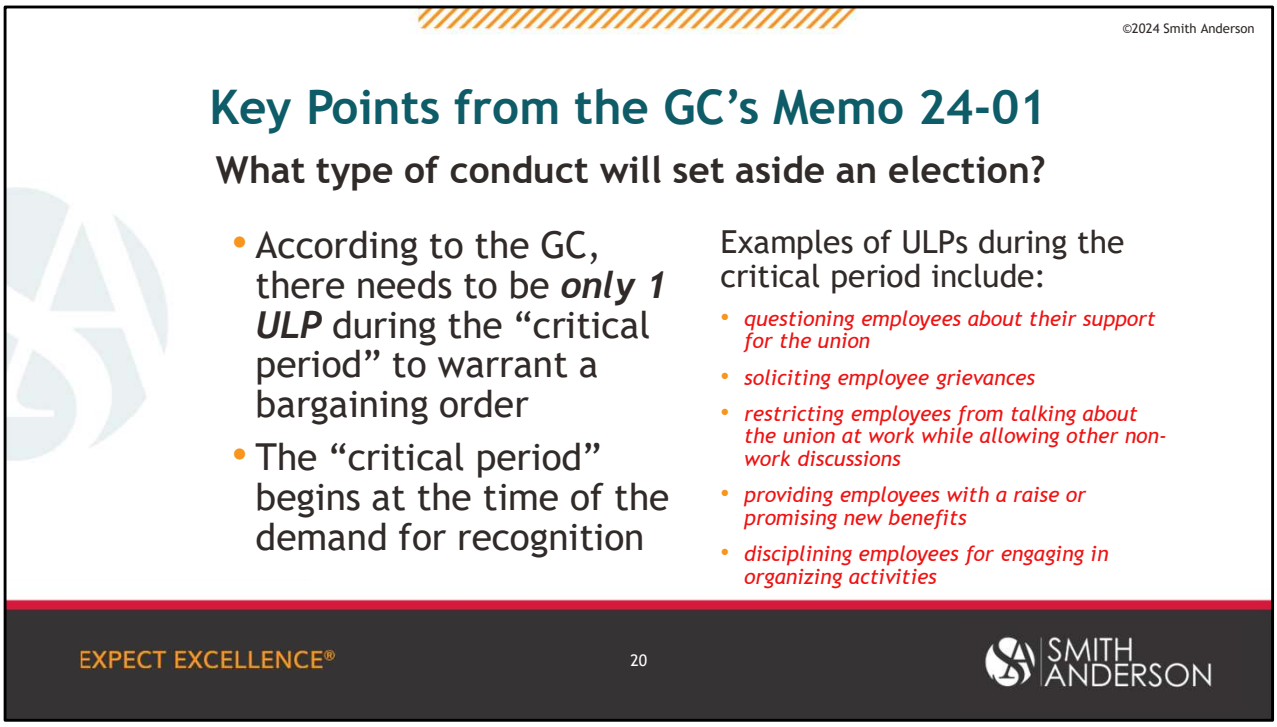
In the General Counsel's Memo, any informal, oral or written demand for recognition **made to anyone** acting as an agent of the employer will satisfy the requirement and trigger an employer's obligation to either recognize the union or file an RM petition. Although the recognition demand must specify the unit of employees the union seeks to represent, there is no requirement that the demand be in writing.

This means if a demand is made to a manager or **any supervisor**, regardless of the supervisor's involvement in or understanding of labor relations, then it will effectively trigger *Cemex* under the General Counsel's interpretation. The General Counsel has made clear that the employer is "on the clock" as soon as any agent, including low-level supervisors, receive a demand for recognition. **This underscores the need to train ALL supervisors about immediately reporting anything that could be interpreted as a demand for recognition from an employee up the chain of command.**



How long does an employer have after receiving the demand to file an RM petition?

According to the General Counsel's memorandum, employers will have two weeks following a demand to either recognize the union or file an RM petition. If an employer fails to do so timely, then a union's request to the NLRB for a bargaining order will likely be granted. **This is an extremely short period of time. This is why it is imperative for employers to train all supervisors on what to do when presented with a demand for recognition.**



What types of unfair labor practices require setting aside an election?

According to the General Counsel's memorandum, there needs only be one ULP to warrant a bargaining order. **The Board may also consider conduct that occurred before the employer files an RM petition when determining "whether the election was invalidated." This could be critical for employers given the recent wave of precedent shifting standards that require a case-by-case analysis to determine the lawfulness of the employer's actions.**

Even "less serious" violations during the "critical election period" like questioning employees about their support for the union, or asking if they have ever attended a union meeting, or giving all employees a raise, can result in a bargaining order.

- But the General Counsel has stated the NLRB will continue to assess "the number of violations, their severity, the number of unit employees subject to the violation, the proximity of the misconduct to the election date, and the size of the proposed unit" before making a ruling.
- Thus, it is clear that the determination of whether or not a bargaining order will be issued is heavily dependent on the specific facts of a single case, and decisions will be made on a case-by-case basis.

Winning the Battle, Losing the War…

- Employer received a letter signed by the majority of employees demanding union recognition
- ***Union petitioned for an election, which it lost***
- Union filed charges and objections alleging the employer:
  - Solicited employee grievances
  - Promised employees new benefits
  - Restricted employees from talking about the union at work while allowing other non-work discussions
  - Discharged employees for union activities
- The ALJ found that the company committed several ULPs and given the recent holding in *Cemex*, ***determined that a re-run election was an inadequate remedy, and, therefore, a bargaining order should be issued***

I.N.S.A., Inc., Case 01-CA-290558 (2023)

I.N.S.A., Inc. is another example of a Board ALJ finding numerous ULPs during the critical period of an election and issuing a *Cemex* bargaining order. In *I.N.S.A., Inc.*, a cannabis company, received a letter signed by the majority of employees demanding union recognition and bargaining. The union then petitioned for an election. The employees voted against the union by a 17-11 margin.

Following the election, the union filed a number of objections and charges against the company alleging (1) the company solicited employee grievances and made promises of better benefits if they refrained from supporting the union; (2) the company restricted employees from discussing the union, while allowing discussions on other non-work related topics; and (3) the company discriminatorily enforced work rules and policies by disciplining and discharging known union supporters.

The ALJ found that the company violated the NLRA and given the recent holding in *Cemex*, determined that a re-run election was an inadequate remedy, and therefore, a bargaining order should be issued.

Cemex Takeaway

Employer conduct is under intense scrutiny, both before and after an election petition is filed, and unfair labor practices are more likely to result in a Board-imposed bargaining order should the employer commit any unfair labor practices during the critical period

In June, the NLRB issued its first mandatory bargaining order to an employer post-*Cemex: Red Rock Casino Resort Spa*, 373 NLRB No. 67 (2024)

In *Red Rock*, the Board found that the casino's extensive anti-union campaign involved both threats and the promise of new benefits—both of which violated the NLRA. Not only was the bargaining order warranted under the longstanding *Gissel* standard (the pre-Cemex standard), but the NLRB also applied a *Cemex* bargaining order, the first under the new standard.

- *Gissel* is a 1969 US Supreme Court case, which upheld a narrow exception carved out by the NLRB in cases involving severe unfair labor practices during an organizing campaign. *Gissel* bargaining orders are rare have been reserved for only the most egregious misconduct from employers. The reason the *Gissel* standard is so high is because when a bargaining order is issued, it deprives the workers of their free choice on whether or not to unionize. ***Cemex* greatly reduces this standard.**

In Red Rock, the NLRB concluded that (1) Red Rock refused the union's request to bargain; (2) at a time when the union had been designated representative by a majority of employees; (3) in an appropriate unit; and then (4) committed unfair labor practices requiring the election to be set aside. As such, a bargaining order was warranted.

Cemex is currently on appeal and awaiting oral argument in the U.S. Court of Appeals for the Ninth Circuit. But, although the Circuit Court—and potentially even the U.S. Supreme Court—may vacate

the *Cemex* decision, *Red Rock* makes clear that the force of the new standard is fully in play.

Actions to Take Now to Avoid ULPs Resulting in Bargaining Orders

- Establish a channel for reporting demands for recognition/claims of majority support and other organizing activity to senior management
- Train ALL supervisors and managers on what to do if they receive a demand for recognition – REMEMBER THE 2-WEEK CLOCK IS RUNNING
  - There is no prescribed format for a union to demand recognition
    - IT CAN BE ANY COMMUNICATION THAT THE UNION REPRESENTS A MAJORITY OF EMPLOYEES AND SEEKS TO ENGAGE IN BARGAINING
- Conduct TIPS training for ALL HR and ALL supervisors and managers
- Review all handbooks and policies for any that violate the NLRB's *Stericycle* unlawful rules decision

Recommendation: Appoint a senior official in Human Resources or in the company's legal department to whom any such demands should **immediately** (hours, not days) be reported to.

What To Do If An Organizer Makes A Demand For Recognition?

- If the organizer attempts to show the supervisor authorization cards or a petition, **DO NOT LOOK AT OR TAKE THE DOCUMENTS**
- Do NOT engage in discussion or agree to anything
- End the conversation and IMMEDIATELY report the demand to senior management
  - Just sending an email or leaving a voicemail is NOT sufficient – time is critical

TRAIN ALL SUPERVISORS AND MANAGERS ON THE ABOVE

Conduct TIPS Training for All Supervisors

- Many things that a supervisor would naturally do in response to union organizing are unfair labor practices
  - After *Cemex*, these natural responses can lead to a union certification, even if the union loses the election
  - Supervisors and management MUST be trained on what is lawful and unlawful when dealing with organizing activity
- Once the demand is made, the "critical period" starts
  - Delaying training until a demand is made may be too little, too late to avoid ULPs
- Require TIPS training for all newly-hired supervisors AND newly promoted supervisors as part of orientation

TIPS Training: Things A Supervisor Cannot Do

(T)hreats
(I)nterrogation
(P)romises
(S)urveillance

TIPS is a helpful acronym used to remind supervisors on what not to do. It stands for Threats, Interrogation, Promises, and Surveillance (spying).

Threats

(T)hreats—Cannot "threaten" employees with loss of overtime, closure, decreased pay, discharge, etc., if the union wins the election

Examples:

- "The Company will never sign a contract with this union."
- "The Company will get those employees that are for the union."
- "You will never get another promotion or wage increase here."
- "Say goodbye to your bonuses if the union wins."
- "The company will just shutdown and move to South Carolina."

Interrogations

(I)nterrogation—Cannot question employees about union activity.

- There is nothing wrong with listening and if you listen long enough you may learn what the employees know. Just avoid any hint of "Who," "What," "Why," or "Where"

Examples

- "Who is going to the union meeting tonight?"
- "How do you feel about the union?"
- "Why do employees want the union?"
- "What have other employees been saying about the union?"

Promises

(P)romises—Cannot promise employees anything after a petition has been filed, such as a raise or better benefits

Examples

- "If you vote against the union, I'll see to it that:
  - You get a raise;
  - You get that extra week of vacation;
  - You are promoted."
- "The Company will take care of its friends after the election."

Surveillance

(S)urveillance—Cannot spy on organizing meetings or activities, or follow the organizer/leader around

- Even the "impression of surveillance" is unlawful

Examples

- "The Company knows who is for the union."
- "I heard you had a lot to say at the union meeting last night."

No Retaliation

- Employees cannot be terminated or laid off in retaliation for organizing or union activity
- Loud union supporters often are problem employees, but disciplinary action against them for performance reasons requires careful consideration and legal review in advance
- Any discipline against vocal union supporters will be thoroughly investigated by the NLRB

Don't Forget: State Prohibitions on Captive Audience Meetings

- Under federal law, employers can hold mandatory meetings on company property during work hours to address matters related to union organizing.
- In April 2022, the General Counsel issued a memo arguing that captive audience meetings violate the NLRA, but to date, the NLRB has not overturned any precedent.
- A number of states have state law prohibitions against captive audience meetings. Employers operating in those states must comply with applicable state law.

State	Year Became Effective
California	2025
Connecticut	2022
Hawaii	2024
Illinois	2025
Maine	2023
Minnesota	2023
New York	2023
Oregon	2009
Vermont	2024
Washington	2024

Another relevant change in election law has occurred at the state level. In 1948, NLRB ruled that employers could hold mandatory meetings on company property during work hours to address matters related to union organizing. Since then, these meetings, which are called "captive audience" meetings, have become a good way for employers to express their views about union organizing and its impact on companies, and to discourage employees from voting to unionize. These meetings MUST be on paid working time, and employees can be required to attend or face disciplinary action.

In April 2022, the NLRB General Counsel issued a memo arguing that captive audience meetings violate the law, but the NLRB has yet to overturn the 1948 decision. Memorandum GC 22-04, *The Right to Refrain from Captive Audience and other Mandatory Meetings* (April 7, 2022). Following the General Counsel's memo several states passed their own legislation banning or restricting captive audience meetings. These states include California, Hawaii, Connecticut, Illinois, Maine, Minnesota, New York, Washington, Oregon, and Vermont. All of these states except Oregon have passed these laws since the General Counsel's memo in April 2022.

Although each states' statutes are slightly different, they all prohibit employers from disciplining or threatening to discipline employees for refusing to attend an employer-sponsored meeting if the purpose of those meetings is to share the employer's opinion on religious, political, or union matters. Most of these statutes are being challenged in federal courts due to the 1st Amendment implications.

Revise Employee Handbooks & Policies

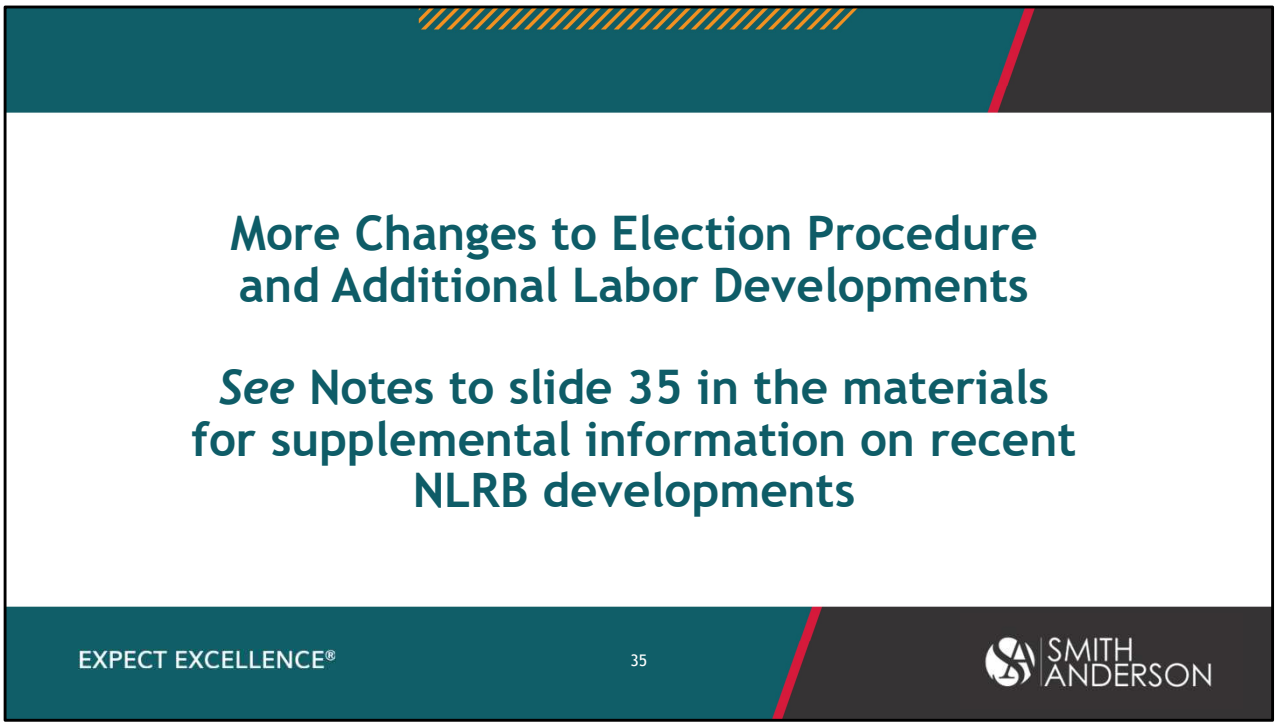
- NLRB increased scrutiny of employee handbooks and workplace rules in the *Stericycle* case
- ***Overly broad*** policies and rules that *reasonably chill* an employee's Section 7 rights are UNLAWFUL (meaning they are an ULP that can lead to a bargaining order)
  - REMEMBER: No rule is automatically lawful based on its subject matter
- Adoption and maintenance of an overly broad rule is unlawful, even if never enforced
- Confidentiality and non-disparagement provisions and policies frequently are found to be overly broad and unlawful

Stericycle – A New Standard for Legality

- Does the rule have a reasonable tendency to chill employees from exercising their Section 7 rights when viewed from the perspective of an employee who is economically dependent on the employer and who contemplates engaging in protected concerted activity?
- "Where the language is ambiguous and ***may be*** misinterpreted by the employees in such a way as to cause them to refrain from exercising their statutory rights, then the rule is invalid ***even if interpreted lawfully by the employer in practice.***"
- Employer can rebut the presumption that a rule is unlawful by proving that it advances legitimate and substantial business interests that cannot be achieved by a more narrowly tailored rule.

Other Policies Warranting Close Review

- Civility, disruptive behavior and related conduct
- Use of company logos, IP
- Conduct harming business reputation, conflicts of interest
- Requiring complaints and investigations to be kept confidential
- No recording, use of personal devices
- Use of company communications systems
- Social media, media contact policies
- Dress code



NLRB Reverts to "Ambush Election" Rules

- On August 24, 2023, the NLRB announced a new final rule for union elections that revives the prior "quickie" or "ambush" election rules. *See* 29 CFR Part 102 *et seq.*
- This rule greatly reduces the time period between the time a petition is filed and the actual election.
- This makes it more difficult for employers to educate employees about unions and unionization prior to a vote.
- According to the NLRB, the new rule seeks to: (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.
- The changes include, pre-election hearings will now generally be scheduled for eight calendar days from the service of the notice of hearing, which is ten days sooner than under the 2019 rule. § 102.63. This means that employers will now be required to present documents and witness testimony at the hearing with significantly less time to prepare.
- Regional directors will only have the discretion to postpone a pre-election hearing for up to two business days "upon request of a party showing special circumstances" or for more than two days if a party shows "extraordinary circumstances." § 102.63(a). Under the 2019 rule, regional directors could postpone for an unlimited time upon a showing of good cause.
- Union petitioners can respond orally at the pre-election hearing as opposed to being required to submit a statement of position 3 business days prior. This change relieves unions of the requirement to file and serve their responsive statement, leaving employers in the dark on the

relevant issues until the day of the hearing.

- An employer will have 2 business days after the service of a notice of hearing to post and distribute a notice of petition for election to its employees, which is 3 days sooner than under the 2019 rule. § 102.63(a)(2).
- The new rule clarifies that "the purpose of the pre-election hearing is to determine whether a question of representation exists" and that disputes over the eligibility or inclusion of certain individuals "ordinarily do not need to be litigated or resolved prior to an election." § 102.64. This new rule eliminates the 2019 rule to the extent that the 2019 rule requires individual eligibility and inclusion issues to be resolved by the regional director prior to the election.
- Parties will only be allowed to file post-hearing briefs with special permission of the regional director following a pre-election hearing. § 102.66(h). The 2019 rule had allowed parties up to 5 days to file briefs.
- Finally, under the 2019 rule, elections were not scheduled before the 20th day after a direction of election was issued. Now, Regional directors will have to schedule elections for "the earliest date practicable" after a decision and direction of election. § 102.67(b).
- **Under the new rule, if an employer waits for there to be union activity before they decide what their labor strategy is, it will likely be too late. Employers need to proactively prepare their labor strategy now.**

Fair Choice-Employee Voice Final Rule

On July 26, 2024, NLRB issued its Fair Choice – Employee Voice Final Rule, which rescinds a trio of April 2020 amendments to the NLRB's Rules and Regulations affecting the NLRB's processing of petitions that ultimately make it easier for unions to maintain recognition and stifles employee choice in whether or not to be represented by a union. *See* 29 CFR Part 103. The Final Rule touches on three areas of the NLRB's processing of petitions for elections:

- It revives the blocking charge to delay elections – the Rule allows regional directors to delay representation and, importantly, decertification elections upon a filing and resolution of an unfair labor practice charge upon the request of the party who filed the charge. § 103.20. Delaying, or blocking the election benefits unions, who are able to file meritless charges in order to block an election and allows them to continue their organizing campaigns during the delay. During this pause, which could take *up to a year* to rule on, employers must continue to refrain from making changes to the terms and conditions of its employees' employment, including wage increases or performance-based bonus payouts, because these changes will draw additional ULP charges.

- Next the rule, returns to an immediate voluntary recognition bar – the Final Rule removes the 45-day window so employees will no longer be able to request an election to challenge an employer's recent voluntary recognition of a union. *See* § 103.21.
    - Under the NLRA, an employer may voluntarily recognize a union, based on the union's claim of majority support among its employees without an election. Over the years, the Board has shifted its position on how long employees must wait before they are allowed to challenge (or decertify) the status of the voluntarily recognized union. When Democrat-appointees control the NLRB, an employer's voluntary recognition of a union immediately prevents the employees from challenging the union's status for "a reasonable period of time." § 103.21(a). A reasonable period of time was typically defined as between 6 months to a year. When Republican-appointees control the NLRB, there cannot be a voluntary recognition bar, unless and until affected employes were first provided notice of the employer's voluntary recognition and were afforded 45 days from

the notice to file an election petition to question the union's majority status in an NLRB-conducted secret ballot election. This rule again removes the 45-day widow for the employees to seek an election to challenge the representation.

- Finally, the rule impacts employer/union relationships in the construction industry – by easing the standard required for a union in the construction industry to demonstrate majority support for what is called a 9(a) collective bargaining relationship. Under Section 9(a) of the NLRA, a union must have majority support among the employees in an appropriate bargaining unit to be recognized as the exclusive bargaining representative. As a general rule, employers may not bargain with a union that does not have majority support of the employees.
    - Section 8(f) of the NLRA provides for a limited exception in the construction industry – a construction employer and a union may enter into a pre-hire agreement providing the union as the exclusive bargaining representative, even in the absence of majority support. An employer can leave an 8(f) relationship at any time.
    - For a Section 8(f) relationship to become a Section 9(a) relationship, the union must demonstrate a clear showing of majority support from the unit employees, much like unions representing employees in non-construction industries. This rule lowers the standard of proof a construction union must demonstrate to obtain 9(a) status by allowing contract language alone between an employer and union that (1) the union requested recognition as the majority representative of unit employees; (2) the employer recognized the union; and (3) the employer's recognition was based on the union showing or offering to show evidence of its majority support.

Project Labor Agreements Required For Large Federal Construction Projects

On January 22, 2024, the Federal Acquisition Regulatory Council issued its final rule requiring project labor agreements ("PLAs") for most large-scale federal construction projects. 88 Fed. Reg. 88708

The rule implements an executive order (E.O. 14063) issued in 2022, which required PLAs on projects where the estimated cost to the federal government totals at least $35 million, unless an exception applies. 48 CFR § 22.503(d). The final rule provides, with certain exceptions, government contractors and subcontractors working on federal construction projects that meet the threshold of $35 million must "become a party to a project labor agreement with one or more appropriate labor organizations." 48 CFR § 22.503(c)(1).

The Administration has stated that the rule will increase efficiency on construction projects because all parties – including contractors, subcontractors, and unions – are required to negotiate the set terms, and the rule will further "avoid labor-related disruptions on projects by using dispute-resolution processes to resolve worksite disputes and by prohibiting work stoppages, including strikes and lockouts."

The final rule does provide exceptions to be made case-by-case, so that some larger projects may end up not requiring PLAs. Nevertheless, construction employers should assume that large-scale federal projects that require coordination among various contractors and subcontractors across several trades will require a PLA that, at a minimum, complies with the rule's requirements.

ADDITIONAL INFORMATION ABOUT PLAs:
Project Labor Agreements – What Was Optional is Now Mandatory (smithlaw.com) June 25, 2024

Labor or Bust? President Biden Orders Project Labor Agreements for Large Federal Construction Projects (smithlaw.com) February 23, 2022

Tips & Final Thoughts

- Be *vigilant* of employee organizing activity – STOP IT BEFORE IT HAPPENS
- Have a reporting plan in place before a demand for recognition is made
- Train ALL supervisors and managers on:
  - how to respond to a union's demand for recognition
  - no TIPS
- Update overly broad workplace policies

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Today's Employee Organizing

What HR Professionals and Corporate Counsel Need to Know, and Do, Now!

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Nelson A. McKown
October 29, 2024

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