MCMAHON BERGER NLRB UPDATE

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NLRB APPOINTS ITS FIRST CHIEF ARTIFICIAL INTELLIGENCE OFFICER: WHAT EMPLOYERS NEED TO KNOW

- On August 29, 2024, the NLRB appointed David K. Gaston its first Chief Artificial Intelligence Officer (CAIO). This new role, mandated by President Biden's 2023 executive order, positions the NLRB to play a critical part in ensuring compliance with federal AI regulations, including privacy, safety, and the protection of employee rights.
- As CAIO, Gaston will oversee the NLRB's use of AI technologies, ensuring that employers' automated decision-making systems align with federal guidelines. This appointment has major implications for employers, particularly those using AI in hiring, performance evaluations, or disciplinary actions.
- AI tools that disproportionately affect workers engaged in union organizing or collective bargaining could come under scrutiny, mainly if these systems are found to have a chilling effect on employees' rights under Section 7 of the NLRA.

NON-SOLICITATION AGREEMENTS UNDER FIRE: A GROWING TREND OF REGULATION

- The NLRB's increasing scrutiny of non-solicitation agreements is another area of concern for employers. These agreements, commonly used to prevent employees from recruiting colleagues to competing businesses, are now being viewed through the lens of NLRA protections.
- The shift began with NLRB General Counsel Jennifer Abruzzo's 2023 Memorandum (GC Memo 23-08), which challenged the legality of non-compete agreements under the NLRA. The memo argued that non-competes often violate workers' rights to organize, seek better working conditions, or engage in collective bargaining activities. While the GC Memo primarily addressed non-compete clauses, it set the stage for the NLRB's increasing focus on non-solicitation agreements.
- The J.O. Mory, Inc. decision further clarified the NLRB's stance, with an administrative law judge (ALJ) ruling that certain non-solicitation and non-compete provisions were overly broad and could "chill" protected employee activities. Although this case is still under appeal, it illustrates the NLRB's growing intolerance for restrictive covenants that interfere with Section 7 rights.

HOW THE RECENT NLRB DEVELOPMENT WILL IMPACT EMPLOYERS EVERYWHERE

Interagency Partnership:

- NLRB now partners with DOJ, DOL, and FTC on labor issues through Memorandum of Understanding direct collaboration.
- The announcement was issued on August 28, 2024, through an internal Memorandum of understanding between these particular agencies enabling sharing of labor-related data, technical assistance, and training between agencies. For employers involved in any mergers or acquisitions, the MOU signals a more intensive scrutiny to evaluate the potential impact a merger has on workers and labor unions.
- Specially, the MOU allows the DOJ's Anti-Trust Division and the Federal Trade Commission to access critical labor data provided by the NLRB and the DOL, ensuring that the effective mergers on wages, job conditions, and labor competition becomes a crucial focus during anti-trust reviews. Historically, merger and acquisition reviews have primarily focused on competition and product markets, but the MOU now shifts the Federal Governments attention to competitive labor market issues.

NLRB GIVES FULL VETO POWER TO CHARGING PARTIES ON NON-ADMISSIONS CLAUSES

- The NLRB issues decision ending the practice of consent orders or the utilization of "non-admissions clause" language.
- In Metro Health, the Board overturned UPMC (2017) and held that the NLRB will no longer accept "consent orders" where an Administrative Law Judge resolves an unfair labor practice case on terms offered by the Respondent but objected by the charging party and/or the general counsel. The NLRB indicated that they would not accept a non-admission clause language in settlement agreements where the union objected to the inclusion of the language. Union's now have the right to "veto" settlement agreements simply because of the existence of non-admissions language.

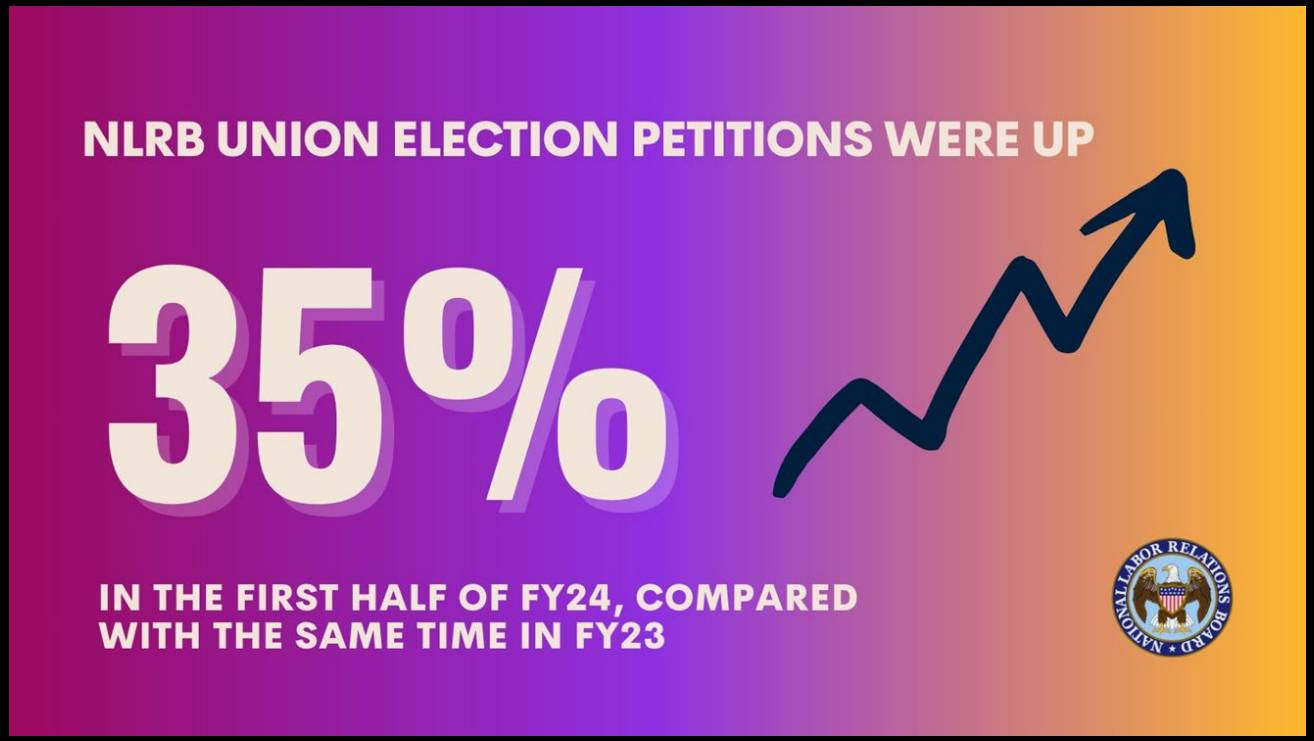
NLRB RETURNS TO "BLOCKING" ELECTIONS RULE AND 9(A)RULES

- On July 26, 2024, the NLRB issued its "Fair Choice Employee Voice Rule", implementing three key policies that provide workers with a fair opportunity to decide whether they want union representation in the workplace in a process that respects workers' choices. The NLRB returned to the Board's pre-2020 practice on blocking charges before an election, restoring a Region Director's authority to delay an election if fair unfair labor practice conduct is sufficiently serious to interfere with employee free choice, based upon the discretionary determination by the Regional Director. Additionally, the rule removes the 2022 rules requirement that when an Employer chooses to voluntarily recognize the union the represents the majority of its workers, the parties provide for a mandatory 45-day period to allow the opportunity for minority of workers to demand an election questioning that choice. The rule now vacates that 45-day requirement (Dana Corp.) and allows binding voluntary recognition where the parties have so chosen.
- Additionally, the NLRB granted parity now between unions and the construction industry and other unions. The new rule allows construction workers to more readily establish the same 9(a) protections as other unions, providing a more stable foundation for collective bargaining.

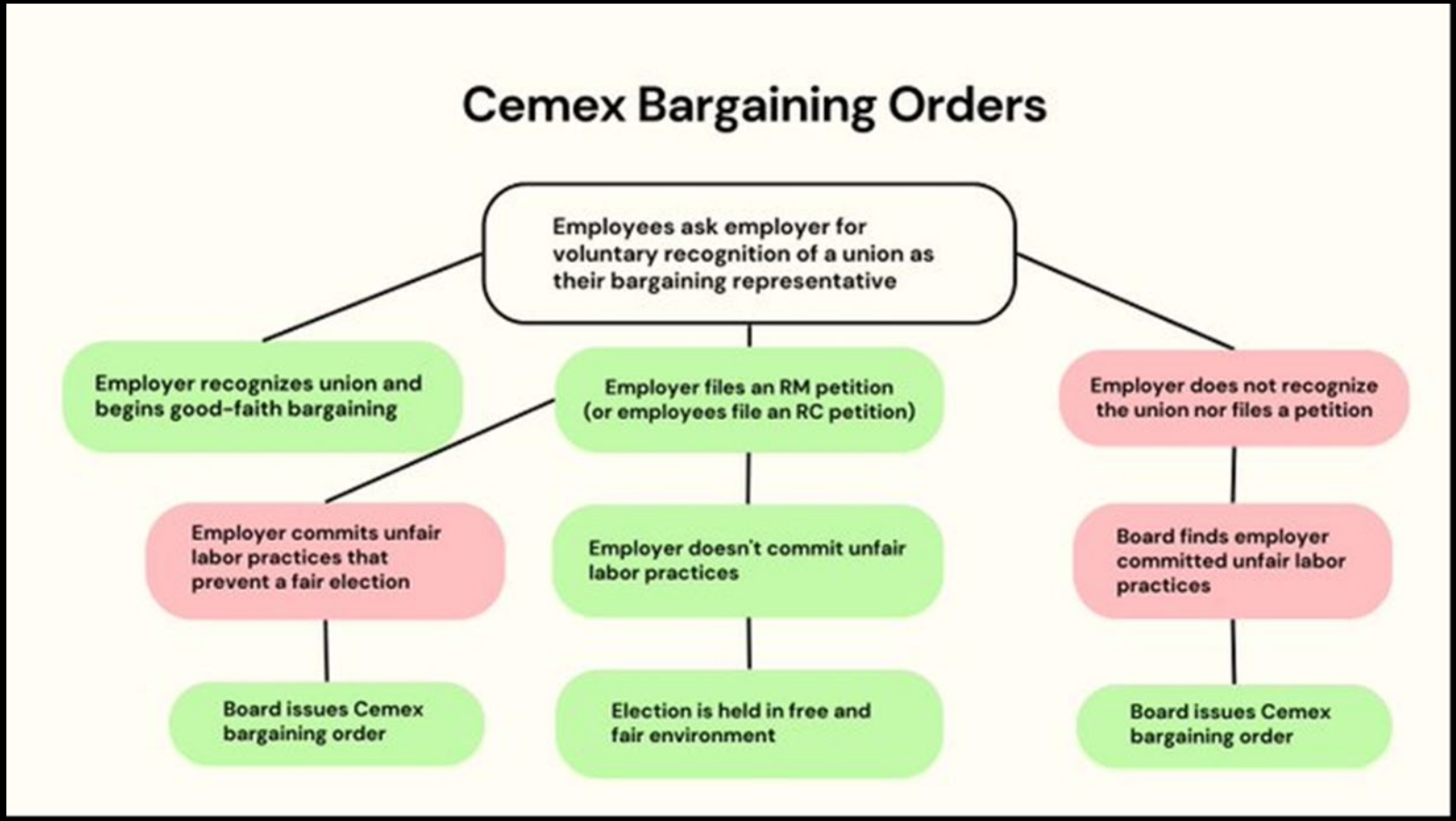
UNION ELECTIONS UP!
NLRB CHARGES UP!

- NLRB issued its technical correction to the representation rule as well and published it (see attached).

- Union petitions are up 35%, unfair labor practice charge filings are up 7% in the first fiscal year of 2024.



DON'T FORGET CEMEX IS STILL IN PLAY



QUESTIONS?