

# 2023 NLRB Update

*Labor Law Shifts Dramatically Against Employers*

Scott P. Horton

Partner

*gunnercooke* LLP

Presented by

**HORTON**  
Management Law



# Overview

- Work Rules & Policies
- Election Rules & Results
- Bargaining Rules & Standards

# National Labor Relations Board

- ▶ Federal agency
- ▶ Enforces the National Labor Relations Act
- ▶ Policy set by 5-member Board in Washington, D.C.
- ▶ 26 Regional Offices (48 total field offices)
- ▶ Processes unfair labor practice charges and representation petitions

# Jurisdiction

- ▶ Private sector employers, employees, and labor organizations (with exclusions for agricultural workers, interstate railroads, and airlines)
- ▶ NLRB has discretion not to assert jurisdiction over all businesses “affecting commerce”
- ▶ Coverage standards vary by industry
- ▶ Annual revenue thresholds range from \$50,000 to \$1,000,000

# Section 7 Employee Rights

- ▶ To self-organization
- ▶ To form, join, or assist labor organizations
- ▶ To bargain collectively through representatives of their own choosing
- ▶ To engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection
- ▶ To refrain from any and all such activities . . . . .

# PRO Act

- ▶ Multifaceted legislation aimed to protect workers and unions
- ▶ Gives more workers right to unionize
- ▶ Restricts employers' ability to resist unionization
- ▶ Imposes new penalties on employers
- ▶ No chance it passes current Congress
- ▶ NLRB using existing law to achieve same ends

# **Work Rules & Policies**

# Old Work Rule Standard

## Three Categories

- ▶ Generally lawful rules
- ▶ Individualized scrutiny
- ▶ Unlawful rules



# Generally Lawful (Old Standard)

- ▶ Civility
- ▶ No-photography/recording
- ▶ Insubordination, Non-cooperation
- ▶ Disruptive Behavior
- ▶ Confidentiality
- ▶ Defamation
- ▶ Use of employer logos or intellectual property
- ▶ Speaking for the Company
- ▶ Disloyalty, Nepotism, Self-Enrichment

# Individualized Scrutiny (Old Standard)

- ▶ Conflicts of interests
- ▶ Confidentiality of employee information
- ▶ Disparagement/criticism of employer
- ▶ Use of employer's name
- ▶ Speaking to media
- ▶ Off-duty conduct that harms employer
- ▶ False/inaccurate statements

# New Work Rule Standard

- ▶ Eliminated categorical approach
- ▶ Employer work rules presumed unlawful if they chill employee rights
- ▶ Most employers should review handbooks and policies

# ***Stericycle, Inc. (Aug. 2, 2023)***

- ▶ Employer must ensure that no employee would reasonably interpret any rule as preventing them from doing anything that might be protected activity under Section 7
- ▶ NLRB “will interpret the rule from the perspective of an employee who is subject to the rule and economically dependent on the employer, and who also contemplates engaging in protected concerted activity”

# **Election Rules & Results**

# New Work Election Rules

- ▶ Reverts to “quickie election” rules
- ▶ Take effect December 26, 2023
- ▶ Drastically reduced timelines for pre-election procedures
- ▶ Tightened schedules for hearing dates and elections

# Posting of Election Notice

- ▶ Old Rule: 5 business days after employer receives a Notice of Hearing.
- ▶ New Rule: 2 business days after receiving a Notice of Hearing

# Pre-Election Hearings

- ▶ Old Rule (Until Dec 25, 2023): 14 business days from when an employer receives Notice of Hearing
- ▶ New Rule (Effective Dec 26, 2023): 8 business days from when an employer receives a Notice of Hearing



# Postponing Pre-Election Hearing/ Employer's Position Statement

- ▶ Old Rule: Regional Directors had discretion to postpone a hearing for an unlimited amount of time
- ▶ New Rule: 2 business days if a party demonstrates “special circumstances” and more than 2 business days if a party demonstrates “extraordinary circumstances”

# Employer's Position Statement

- ▶ Old Rule: By noon 8 business days (or 10 calendar days) after employer receives a Notice of Hearing.
- ▶ New Rule: By noon the day before the hearing (i.e., usually 7 calendar days after being served a Notice of Hearing)

# Responsive Position Statement

- ▶ Old Rule: 3 business days before the pre-election hearing
- ▶ New Rule: Orally at the start of the hearing

# Post-Hearing Briefs

- ▶ Old Rule: Up to 5 business days after the hearing, with an extension of 10 additional business days upon a showing of good cause
- ▶ New Rule: Only with the Regional Director's special permission

# Scheduling of Election

- ▶ Old Rule: Elections had to be scheduled for “the earliest date practicable” but there had to be a 20-business day waiting period between a DDE and the election
- ▶ New Rule: No 20 business-day waiting period and elections must now be scheduled for “the earliest date practicable”

	Current	New
Notice of Hearing	Day 0	Day 0
Post Notice of Election Petition	Day 5	Day 2
Employer's Position Statement	Day 10	Day 7
Responsive Position Statement	Day 15+	Day 8
Pre-Election Hearing	Day 18+	Day 8
Post-Hearing Briefs	Day 23+	N/A
Decision and Direction of Election (DDE)	TBD	TBD
Election	TBD + 20 days	ASAP

# ***Cemex* (Aug. 25, 2023)**

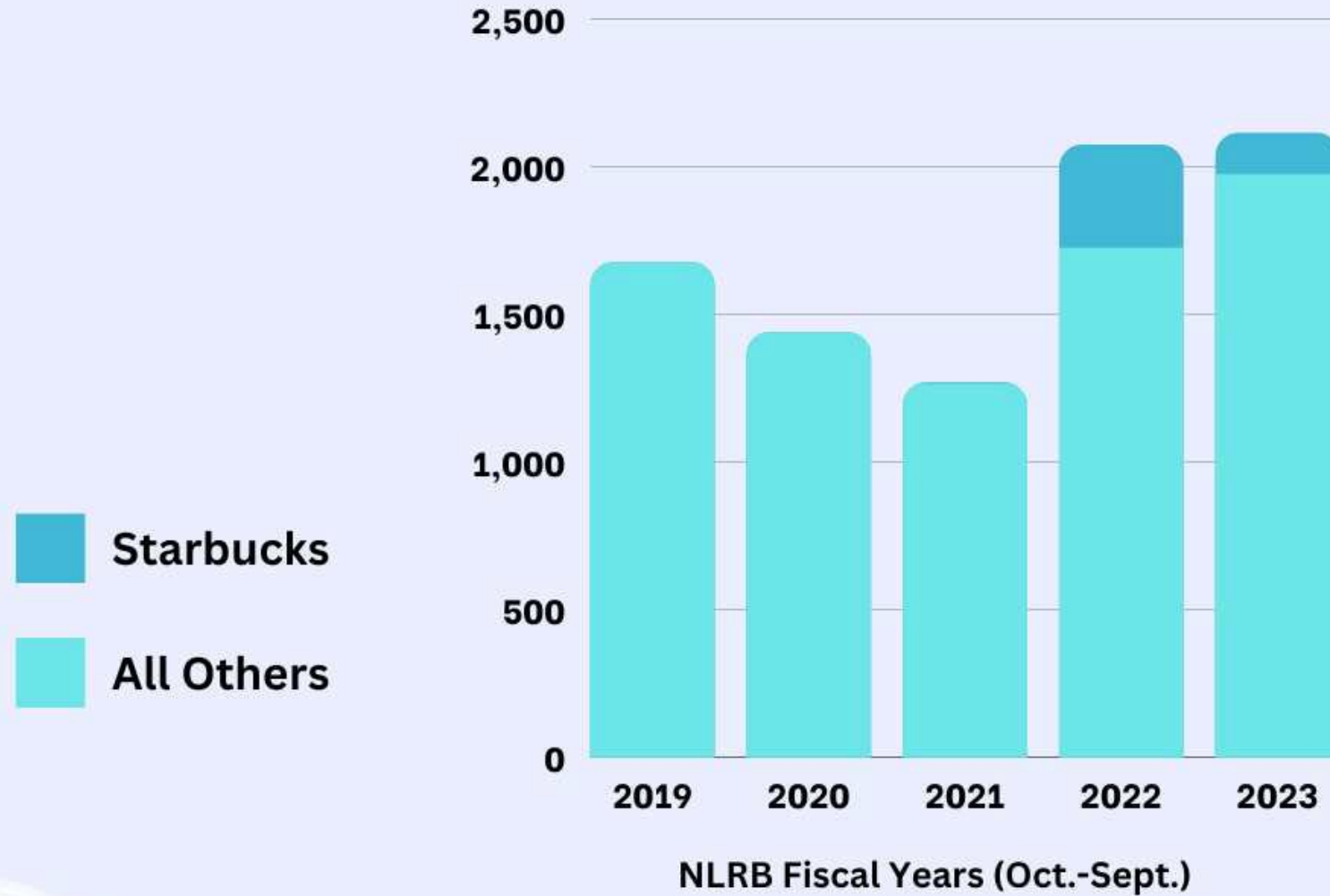
- ▶ Reverses approximately 50 years of NLRB precedent
- ▶ Affects employer response to union request for “card check” recognition
- ▶ Employer must either voluntarily recognize the union or promptly petition for an election
- ▶ Promptly = within 2 weeks

# Bargaining Orders

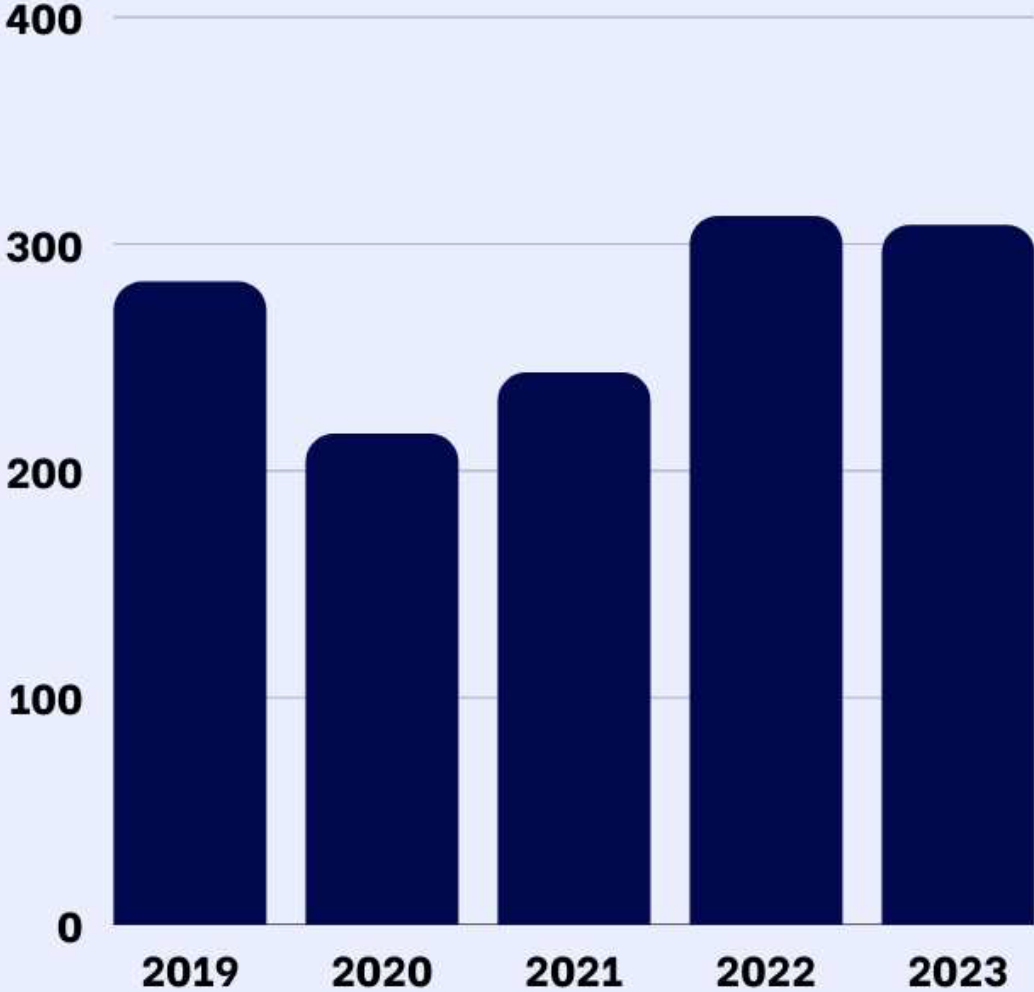
- ▶ Any violation of NLRA leading up to election may result in bargaining order without election and regardless of employee votes
- ▶ Factors
  - ▶ Number and severity of ULPs
  - ▶ Proximity to timing of election
  - ▶ Size of unit and margin of vote
  - ▶ Number of employees the misconduct reached



## UNION ELECTION (RC) PETITIONS

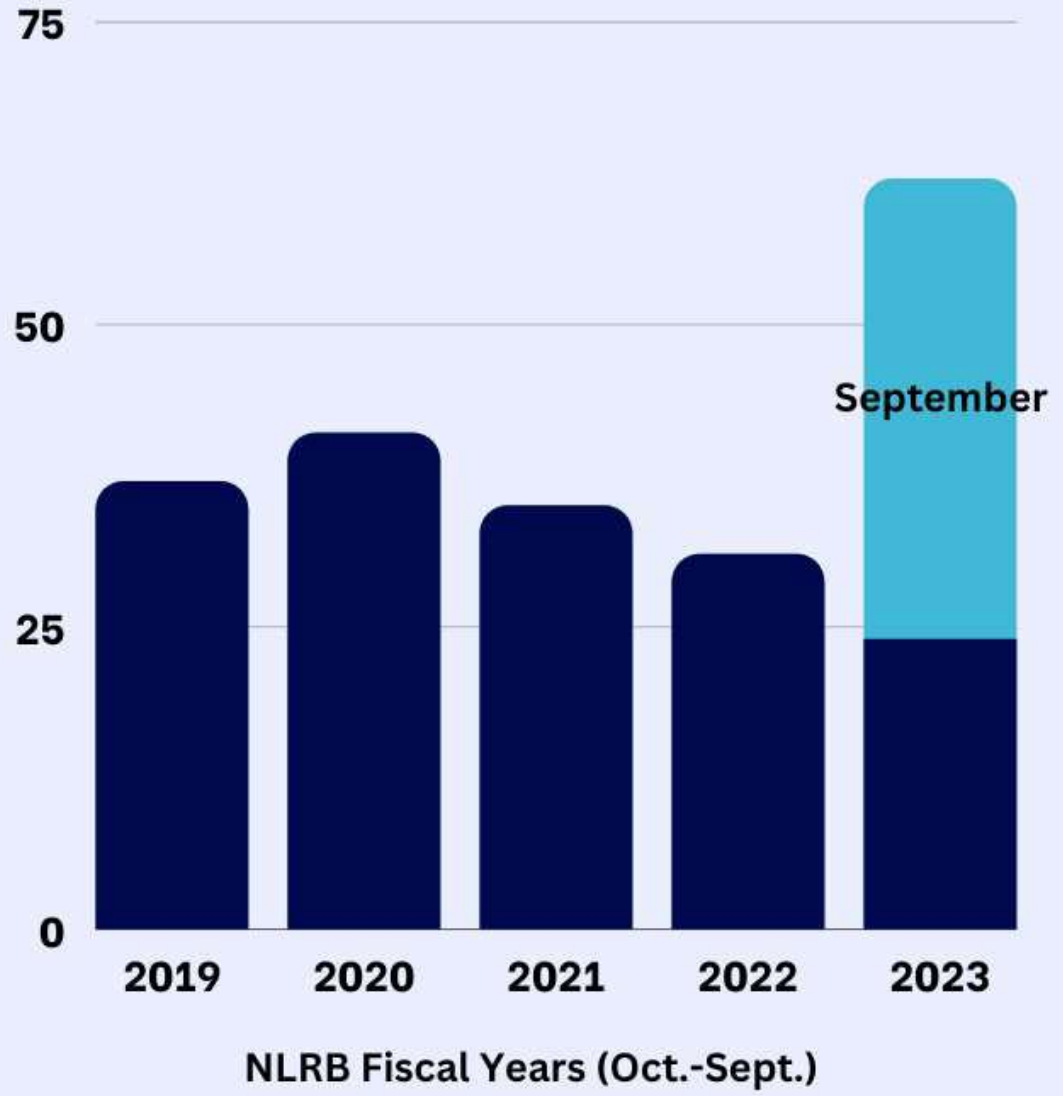


# UNION DECERTIFICATION (RD) PETITIONS

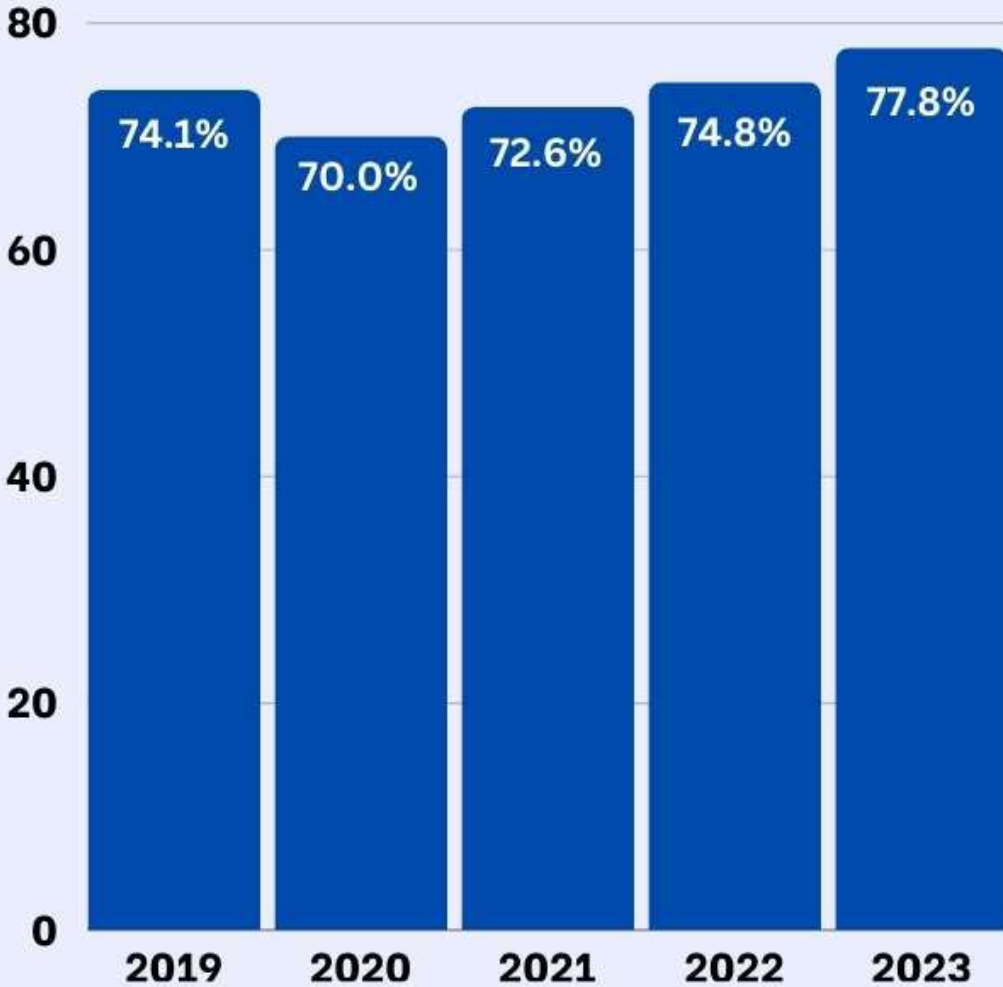


NLRB Fiscal Years (Oct.-Sept.)

# EMPLOYER ELECTION (RM) PETITIONS



# UNION (RC) ELECTION WIN RATE



NLRB Fiscal Years (Oct.-Sept.)

# **Bargaining Rules & Standards**

# Employer Unilateral Changes

- ▶ Two new cases signify a notable shift in NLRB's stance on employers' rights to make unilateral decisions concerning work conditions during contract negotiations and post-agreement expiration

# ***Raytheon Company (Dec. 15, 2017)***

- ▶ Employers could make discretionary changes to work conditions during contract negotiations if they were "similar in kind and degree" to past practices.

# ***Wendt Corporation (Aug. 26, 2023)***

- ▶ Unilateral changes only permitted if consistent with
  - ▶ “Long-standing past practice”
  - ▶ That “is not informed by a large measure of discretion” involve “a large measure of discretion” and emerged post-union certification.
- ▶ “Long-standing past practice” must occur with regularity and frequency such that employees reasonably expect them to continue



# ***Tecnocap LLC* (Aug. 26, 2023)**

- ▶ Expands further than *Wendt* in prohibiting employer unilateral changes
- ▶ Discretionary unilateral changes under an expired management-rights clause are unlawful
- ▶ Waivers of the right to bargain over subjects of management-rights clause expire upon CBA expiration

# What's Next

- ▶ More Card Check Presentations & RM Petitions
- ▶ More and More Unfair Labor Practice Charges
- ▶ Review/Revise Handbooks & Policies
- ▶ Increase proactive measures to prevent unionization
- ▶ Industry specific challenges

# Questions?



scott.horton@gunnercooke.com  
(716) 508-7748