



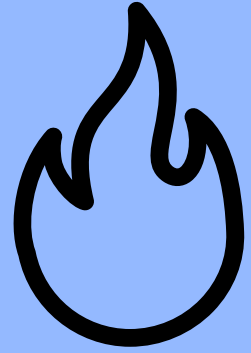
# Embracing Change In the Shifting Labor Relations Climate

JESS OSBORNE, JOHN STELLWAGEN,  
DAVID WORLEY, AND EDEN VASQUEZ

November 19, 2024  
2024 Employment Law Seminar

***Disclaimer: This presentation is not legal advice and is based upon current statutes, regulations, and related guidance that is subject to change. It is provided solely for informational and educational purposes and does not fully address the complexity of the issues or steps employers must take under applicable laws. For legal advice on these or related issues, please consult qualified legal counsel directly.***

# Speakers



**Jess Osborne**  
Partner



**John Stellwagen**  
Partner



**David Worley**  
Special Counsel



**Eden Vasquez**  
Associate



2024 Employment Law Seminar

# Polar Vortex or Superheat Event? Labor Law Check In



2024 Employment Law Seminar



**Wildfires:** Private sector status coming in hot



**Rising Tides:** Union activities on the rise—but for how long?



**Unpredictable Storms**



2024 Employment Law Seminar

# Wildfires



# Labor Relations: Wildfires



2024 Employment Law Seminar



Union Organizing  
Efforts



Strike  
Activity



Grievances &  
Arbitrations



Unfair Labor  
Practices (ULPs)

# Union Activity: Brief Overview of Private Sector



2024 Employment Law Seminar

## ▪ **Union Organizing Efforts**

- Union election petitions up 27% from FY 2023
- Increase from 2,593 to 3,286
- FY 2021, NLRB received 1,638 petitions
- Expanding into new industries: Wells Fargo
  - First big financial institution to open contract negotiations
  - Union effort to negotiate contract with broad scope and applicability

## ▪ **Unfair Labor Practice Charges: Private Sector**

- FY 2023 to FY 2024, ULP filings increased 7%
- Increase from 19,869 to 21,292 cases

## ▪ **Total: 24,578**

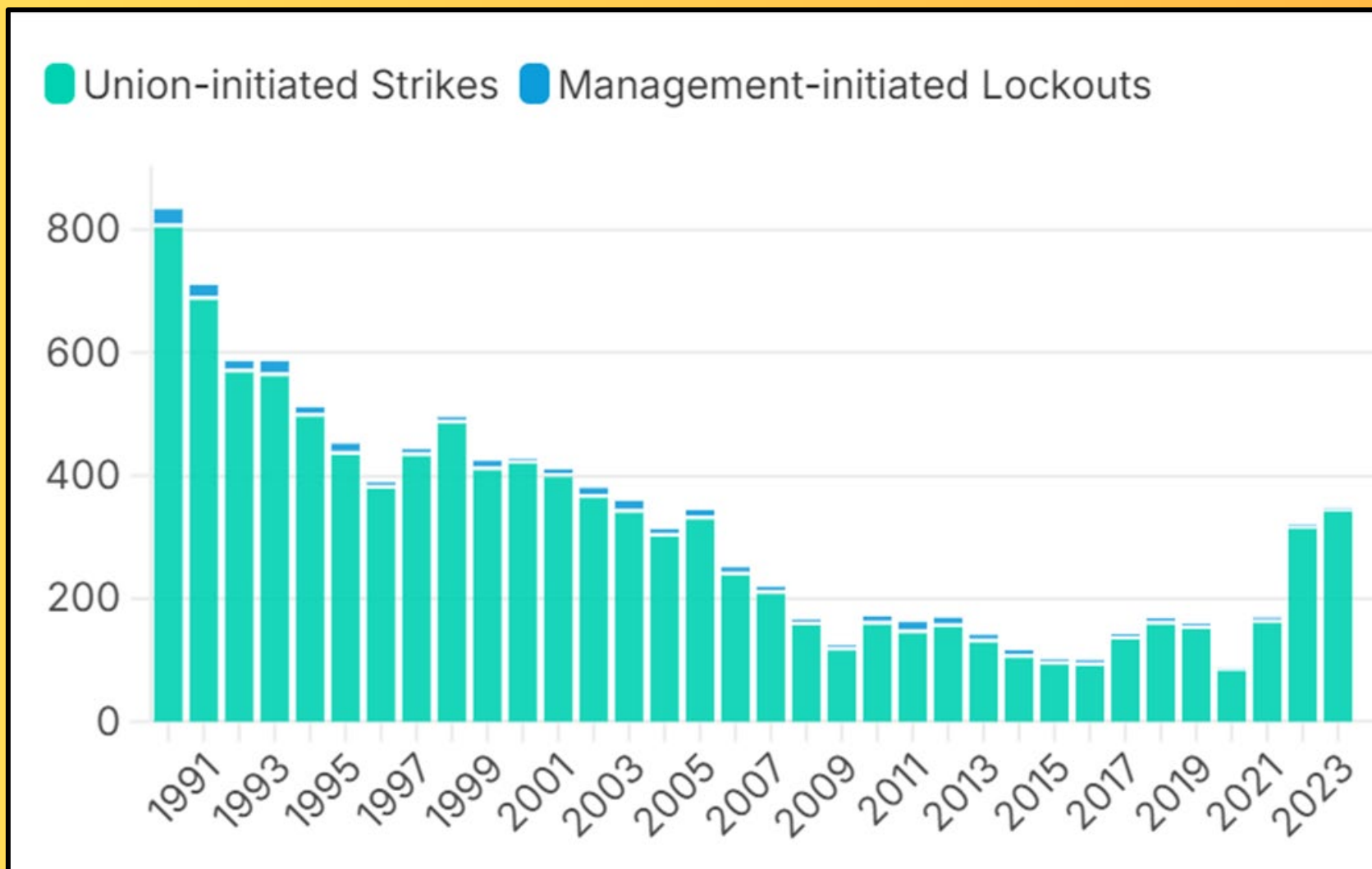
- Increasing number of petitions/ULPs
- Staffing shortages and turnovers at regional offices



# Total Strikes and Lockouts: 1991-2023

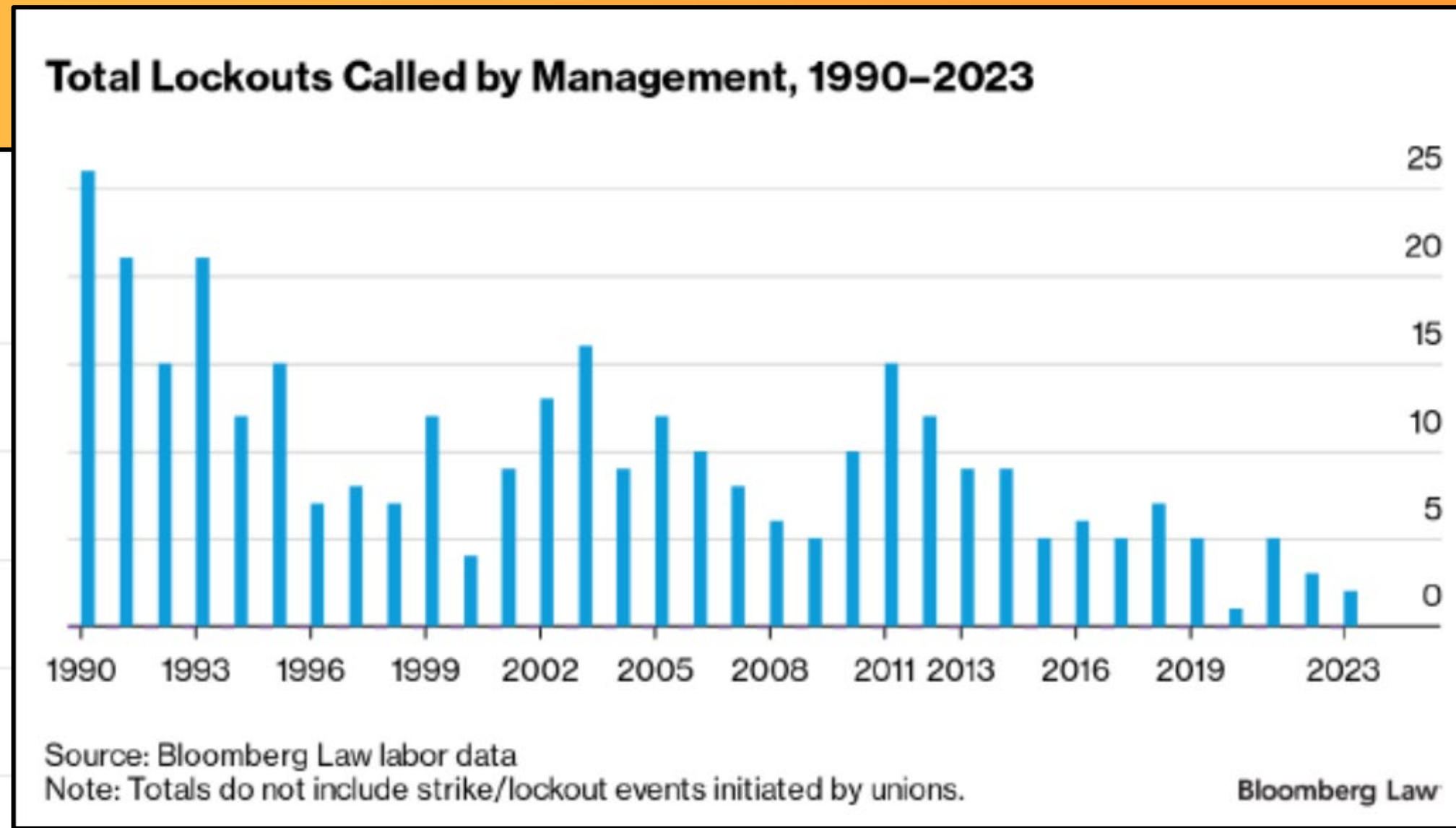


2024 Employment Law Seminar



Source: Bloomberg Law Labor Data •  
 Note: Strike totals include strike/lockout events initiated by unions.

**Bloomberg Law**



Source: Bloomberg Law labor data  
 Note: Totals do not include strike/lockout events initiated by unions.

**Bloomberg Law**

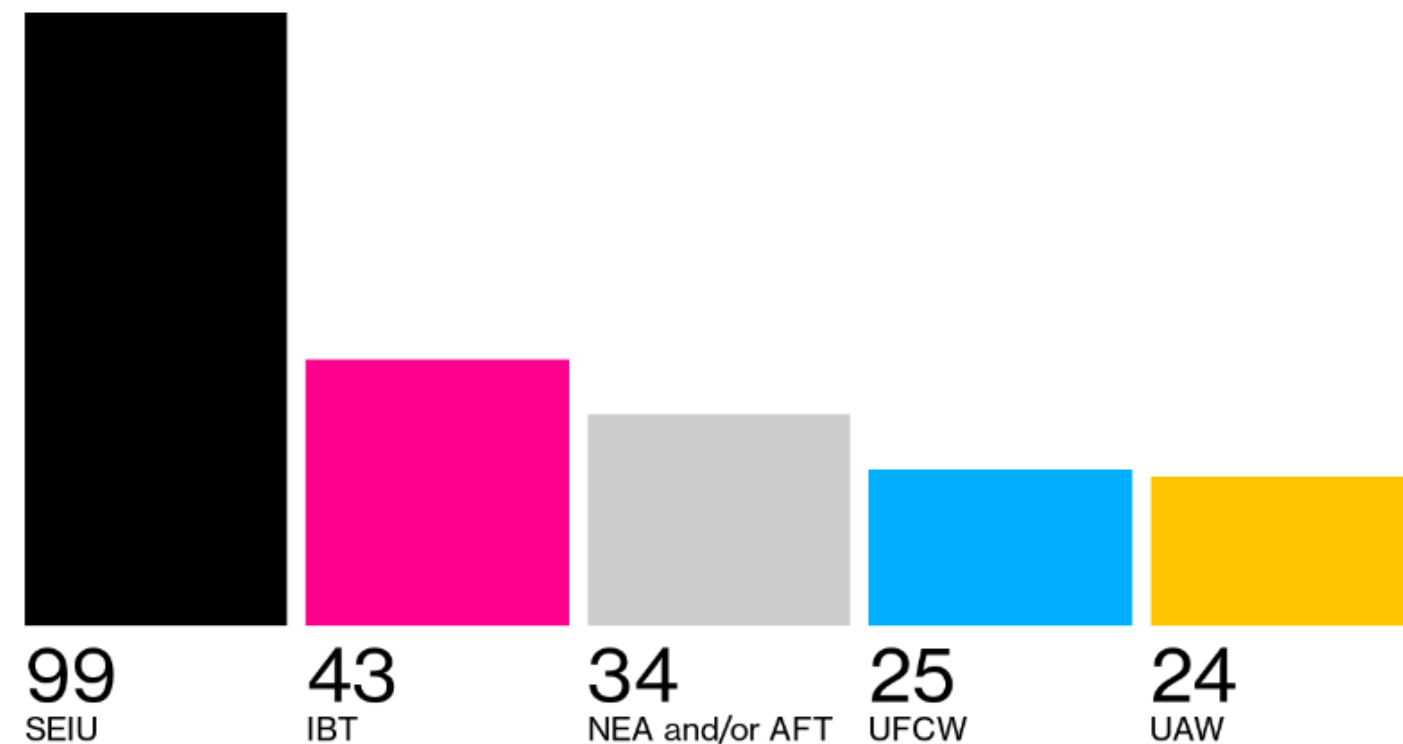
## Disappearing Lockouts



# Strike Activity: When and Who?



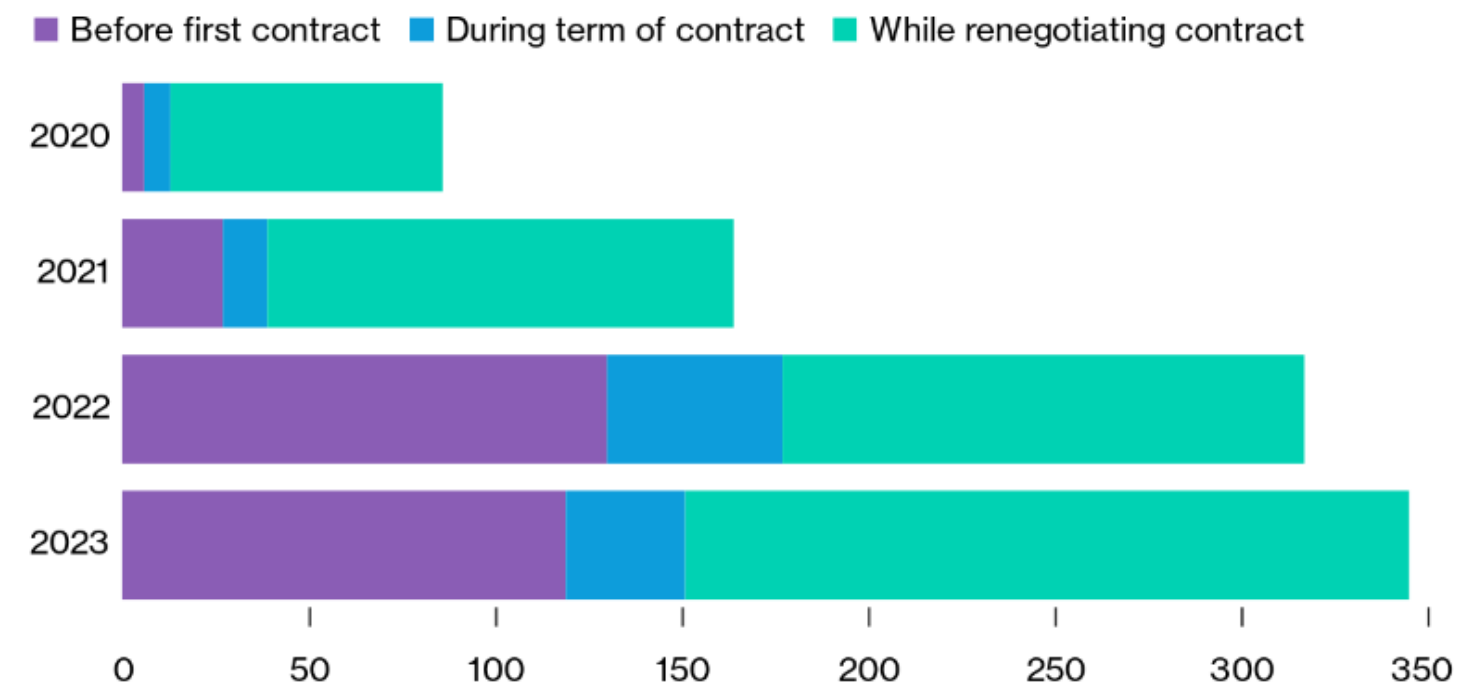
## Top 5 Unions by Strikes Called, 2023



Source: Bloomberg Law labor data. Note: Strikes called by multiple unions are added to the totals for each union.

Bloomberg Law

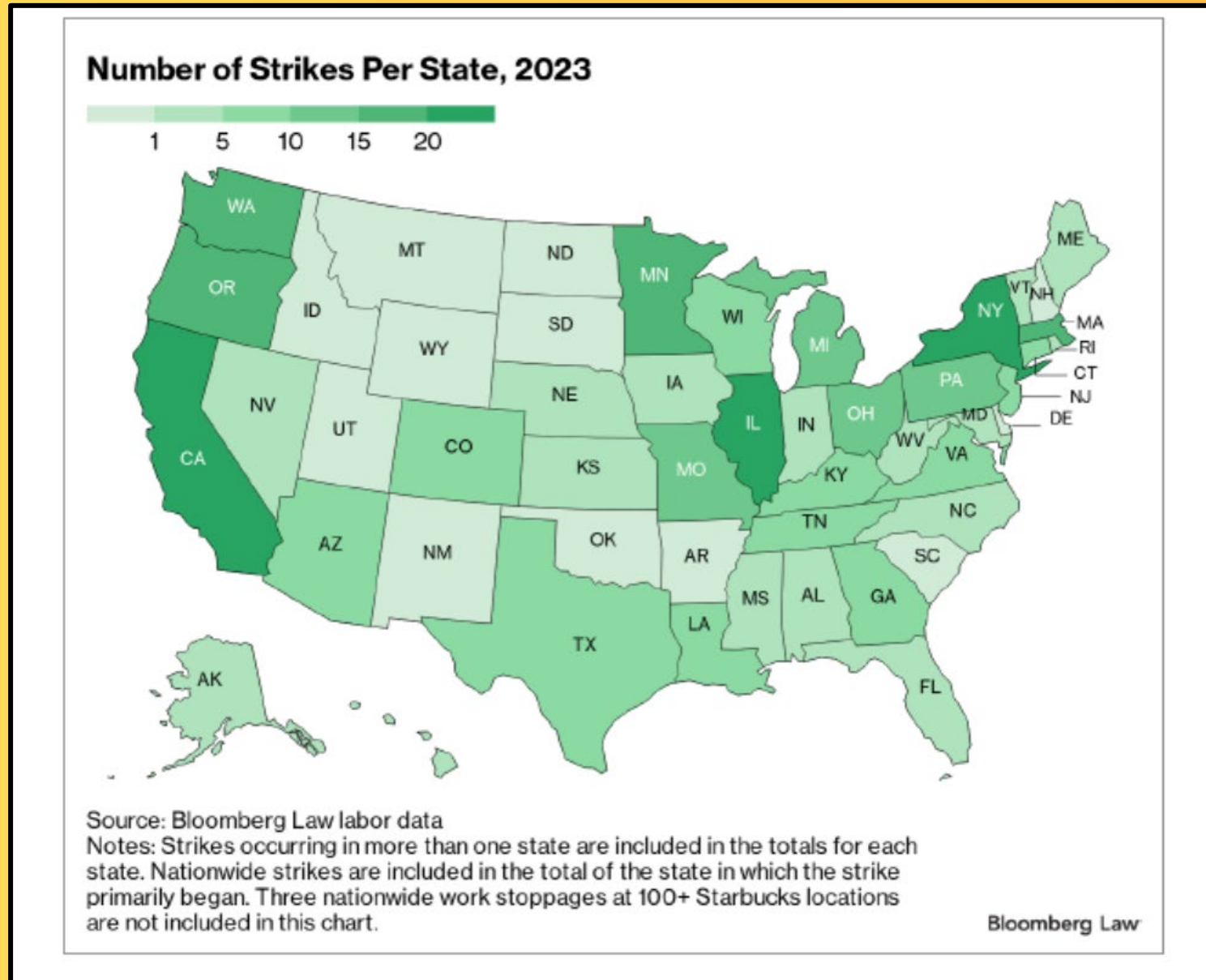
## When Unions Initiate Strikes, 2020-2023



Source: Bloomberg Law labor data  
Note: "Before first contract" total includes strikes called by unions as part of labor organizing efforts.

Bloomberg Law

# Strike Activity: Where and How Long?



1. California
2. New York
3. Illinois

4. Oregon
5. Washington/  
Massachusetts

**Durations of Strikes in States With 10 or More Strikes, 2023**

State	Total	Days: 1-7	8-14	15-30	31-60	60+	Unknown
California	71	47	6	3	6	3	6
New York	48	39	2	1	3	1	2
Illinois	27	12	5	1	6	1	2
Oregon	19	12	0	3	2	1	1
Massachusetts	18	17	0	0	1	0	0
Washington	18	11	4	1	1	0	1
Minnesota	16	12	1	1	2	0	0
Pennsylvania	15	8	1	1	3	1	1
Michigan	14	4	1	2	4	2	1
Missouri	13	8	2	0	1	0	2
Ohio	13	5	2	1	4	0	1
New Jersey	10	5	0	1	1	1	2
Virginia	10	6	0	2	1	1	0

Source: Bloomberg Law labor data  
Notes: Strikes occurring in more than one state are included in the totals for each state. Nationwide strikes are included in the total of the state in which the strike primarily began. Three nationwide work stoppages at 100+ Starbucks locations are not included in this chart.

Bloomberg Law

Most strikes resolved in **1-7 days**

# NLRB Authority:

## *Loper Bright Enters. v. Raimondo*



2024 Employment Law Seminar

- 6-2 decision, overruling long-standing *Chevron* Doctrine
- Administrative Procedure Act (APA) requires courts to exercise **independent judgment** in determining whether an agency acted within statutory authority
- Courts no longer defer to the agency interpretations of ambiguous laws

**NLRB Implications:** Reversal of *Chevron* Doctrine likely to have a substantial effect on review of NLRB cases, allowing courts to deviate and disregard NLRB rationale for decisions

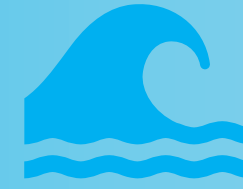


# NLRB Authority: *SEC v. Jarkesy*



- SEC's authority to seek civil penalties outside of federal court
- SCOTUS ruled that SEC's claim was "legal in nature" and subject to Seventh Amendment right to jury trial
- Penalties were meant to punish and deter wrongful conduct, not restore status quo
- NLRB Implications:
  - Parties have raised *Jarkesy* in pending cases
  - NLRB has taken the position that the Board's ULP proceedings fall within public rights exception and under *Jarkesy*, the Board's make-whole remedy is equitable

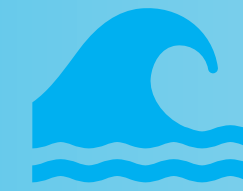




2024 Employment Law Seminar

# Rising Sea Levels

# Protected Speech/Activities



2024 Employment Law Seminar

- ***Lion Elastomers, LLC v. NLRB***

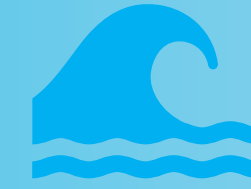
- On July 9, 2024, the Fifth Circuit ordered the NLRB to reconsider the standard for determining whether abusive or inappropriate speech is protected under Section 7 of the NLRB.
- In doing so, the Fifth Circuit reinstated the previous standard in *General Motors, LLC (GM)*, 369 NLRB No. 127 (2020). GM set forth clear standards, consistent with workplace anti-harassment laws, allowing employers to discipline employees engaging in abusive PCA-related conduct.

- ***Clackamas County Employees' Association v. Clackamas County*, 331 Or App 149 (February 24, 2024) (nonprecedential memorandum opinion)**

- The Court of Appeals affirmed ERB's decision dismissing the union's unfair labor practice complaint finding the employee's sending of an insulting email to another employee was not protected activity.

**These trends seem likely to continue post-January 2025.**

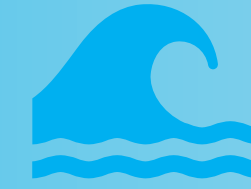
# Shifting Public Attitude/ National Rhetoric



2024 Employment Law Seminar

- **55% of Americans** say labor unions have a positive effect
- NLRB—representation petitions have doubled from **1,638 in 2021** to **3,286 in 2024**
- Strikes were **up 52%**
- Starbucks, Amazon, REI, Trader Joe's, grad students, police sergeants
- Is this noise or real? Reality is that the number of union jobs has grown but not actually faster than non-union jobs keeping the rate around 10%
- **1983 – 20.1 %** of Americans were represented
- **2023 – 10.0%** according to Bureau of Labor Statistics
- Remains to be seen...

# *Cemex* and Its Impacts/ Changes to the Election Process



2024 Employment Law Seminar

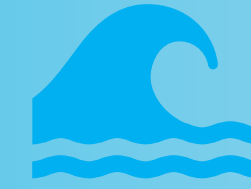
Under *Cemex*, if a union claims majority support of employees in a proposed bargaining unit and seeks voluntary recognition from the employer, the employer must either:

1. Voluntarily recognize the union, or
2. File its own representation petition (an “RM” in NLRB parlance) within 14 days of the union demand

If the employer does not voluntarily recognize or file an RM petition, the NLRB will order **mandatory union recognition without an election.**



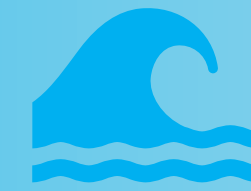
# *Cemex* and Its Impacts/ Changes to the Election Process



2024 Employment Law Seminar

- Under *Cemex* (GC 24-01): If the employer commits a ULP during the election period, the remedy will (in nearly all cases) be a mandatory bargaining order requiring union recognition by the employer.
- The prior rule: re-run the election if the ULP could have affected the outcome.
- Now, the union wins unless it is *virtually impossible* that the ULP affected the result.

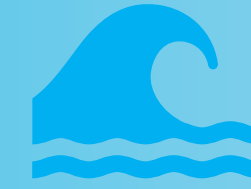
# *Cemex* Takeaways for Now



2024 Employment Law Seminar

- If a union makes a claim of majority support, demand to see the evidence of the majority support.
- Is the union's proposed unit appropriate? Is the union cherry-picking those that signed authorization cards, narrowing the unit to get a foot in the door?
- If the employer believes the union may lack majority support, or the unit is not appropriate, employers should challenge by filing an RM petition.
- Have a training plan in place to educate supervisors on how to navigate communications with supervised employees during a union campaign.

# *Cemex* Takeaways for Now

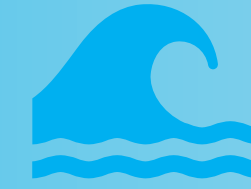


2024 Employment Law Seminar

- After filing an RM petition, employer should take great care to avoid committing a ULP before the election is held. The remedy for a violation will no longer be a rerun of the election, but mandatory recognition and a bargaining order.
- Contact counsel for guidance on avoiding ULPs.

# Cemex—January 20, 2025

## Now What?

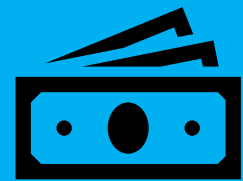


2024 Employment Law Seminar

- Is *Cemex* dead? Will the NLRB return to *Linden Lumber*, the Supreme Court standard for 52 years and again reject the *Joy Silk doctrine*?
- Will the NLRB reverse course on bargaining orders consistent with *Cemex* in the event the employer commits a ULP during the course of an election that has no significant impact on the election?
- Is the recent 9<sup>th</sup> Circuit case a predictor of things to come?



# Bargaining Topics



High Wages—Market adjustments/COLA Proposals over 30%



Retirement—A return to pensions and increased contributions



Health and Safety Proposals—No one feels safe at work



Layoff and Seniority Proposals—Concerns about job protection



Economic Wish Lists—Longevity pay, incentives, premium, clothing allowances, overtime, travel reimbursement – death by a thousand cuts in wide-ranging economic packages



MILLER  
NASH<sup>LLP</sup>

2024 Employment Law Seminar

# Unpredictable Storms

# Young Employees Working to Unionize Workplaces—Salting



2024 Employment Law Seminar

- With increasing frequency, employers are seeing employees, typically Gen-Z immediately seek to organize the workplace upon hiring. See, e.g., <https://www.bbc.com/worklife/article/20230831-the-gen-zers-leading-a-new-pro-union-push>
- More than 75% of young Americans support unions (Gallup)
- Pro-union views sourced from a variety of places
  - Feeling of loss of opportunity
  - Lower job prospects, especially those without college educations
  - Desire for profession to align with ideology
  - Combatting social and other inequities
- All employees have rights under the NLRA, but limitations and workplace rules still apply

# Best Practices in Addressing Employees Looking to Organize Workplace



2024 Employment Law Seminar

- Enforce workplace rules evenly
  - Employees organizing will typically be aware (at least in the abstract) of NLRA protections
  - They may also perceive those protections as far broader than the NLRA actually provides
  - Some workplace rules may conflict with NLRA protections (depending on the NLRB current view)
- Do not excuse misconduct, poor performance, hostility, or other violations of rules
- Acknowledge the employee does have the right to engage in organizing activities
  - Activities “for mutual aid or protection” is broad and amorphous
- Contact counsel



# Effects of Precedent Change and How This Instability Is Affecting the Workplace



2024 Employment Law Seminar

- New General Counsel, New Focus
  - Recission of virtually all prior GC Memos. No more:
    - Expanded Remedies for Consequential Costs (GC Memo 24-04)
    - “Full Remedies” in Settlement Agreements (GC Memo 21-07)
    - Section 10(j) injunctive relief
    - Non-admission clause barred in settlement agreements
    - Prohibition on Captive Audience meetings
- Employer-friendly interpretation of workplace rules
  - Return to *Boeing* standard of balancing test
- No automatic union recognition per *Cemex*

# New WA Statute Prohibiting Mandatory Meetings re. Unions



2024 Employment Law Seminar

- Washington Employee Free Choice Act
  - Illegal for any employer to **require** employees to:
    - Attend or participate in an employer-sponsored meeting with the employer, the primary purpose of which is to communicate the employer's opinion concerning religious or political matters; or
    - Listen to speech or view communications, including electronic communications, the primary purpose of which is to communicate the employer's opinion concerning religious or political matters.
  - Aligns with Memorandum from NLRB General Counsel

# New WA Statute Prohibiting Mandatory Meetings re. Unions



2024 Employment Law Seminar

- Political matters
  - “Political matters” includes “matters relating to elections for political office, political parties, proposals to change legislation, proposals to change regulations, and **the decision to join or support any political party or political, civic, community, fraternal, or labor association or organization.**”
  - Preemption likely (especially with the NLRB shift)
    - Also employer 1<sup>st</sup> Amendment concerns
  - No court has yet applied this law
    - No clarification of what it means to “**require**” attendance
  - Does not apply to meeting necessary for the performance of job duties

# Statute Prohibiting Mandatory Meetings

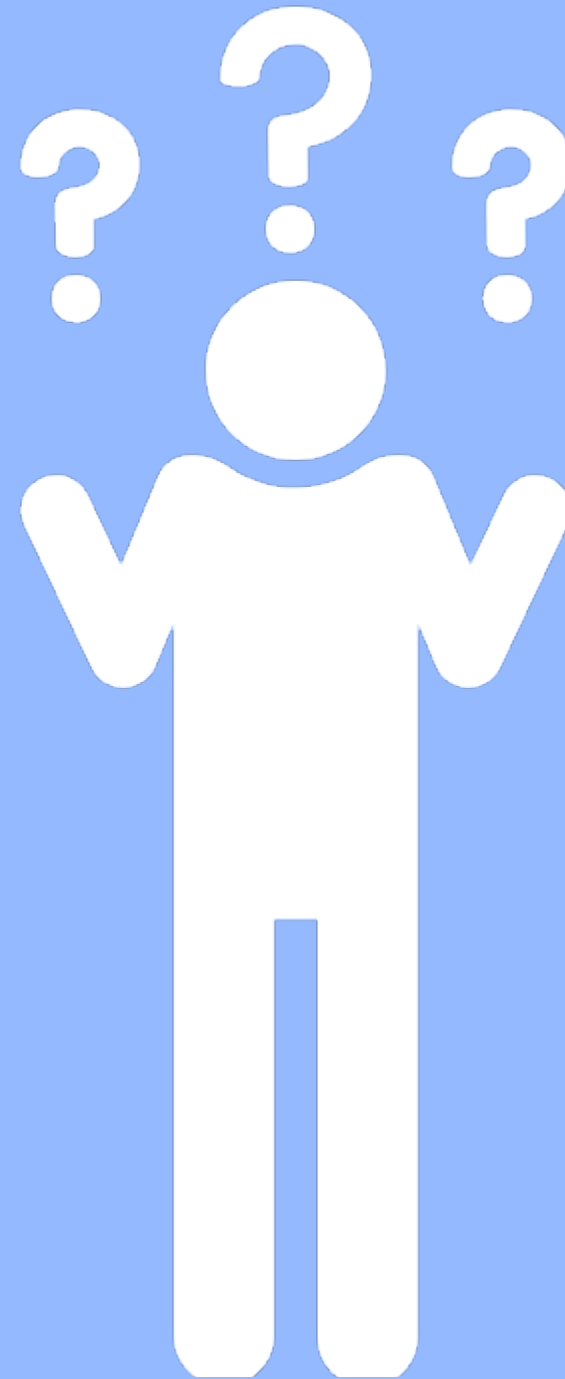


2024 Employment Law Seminar

- Oregon has similar statute in effect. Oregon Revised Statutes 659.780-785
  - Has **dodged** numerous legal challenges since enactment
- Very strong likelihood of preemption, but other risks exist
- Mandatory meetings with anti-union message may be argued as otherwise infringing on NLRA-protected rights
  - E.g., implicit threats of retaliation/reprisal, promises, etc.
- Even if (when) these laws are found to be preempted, employers should be cautious of their anti-union messaging during organization campaigns
  - Unions seem to have free reign on their messaging, employers not so much



# What Comes Next?





2024 Employment Law Seminar

# THANK YOU



**JESS OSBORNE, PARTNER**  
503.205.2578  
JESS.OSBORNE@MILLERNASH.COM



**JOHN STELLWAGEN, PARTNER**  
503.205.2605  
JOHN.STELLWAGEN@MILLERNASH.COM



**DAVID WORLEY, SPECIAL COUNSEL**  
206.777.7461  
DAVID.WORLEY@MILLERNASH.COM



**EDEN VASQUEZ, ASSOCIATE**  
503.205.2516  
EDEN.VASQUEZ@MILLERNASH.COM