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Employers, Beware: Recent NLRB Decision Makes it Significantly Easier for Employees to Achieve Union Representation Without an Election

As union organizing is on the rise, the legal landscape for union avoidance is drastically changing. Indeed, on Friday, August 25, 2023, the National Labor Relations Board (NLRB or the "Board") handed down a landmark decision in *Cemex Construction Materials Pacific LLC*, 372 NLRB No. 130, that will more easily allow unions to represent workers without a secret ballot election.

In April 2022, NLRB General Counsel Jennifer Abruzzo asked the NLRB to revive a legal standard from the 1949 ruling in *Joy Silk Mills*. Under *Joy Silk Mills* employers could only insist upon elections where they had "good faith doubts" (based on, for instance, a card check) that the union truly had majority support. On Friday, Abruzzo got her wish (in part) as the NLRB revived a majority of the standard from the Board's ruling in *Joy Silk Mills* .

In *Cemex*, the democratic majority of the NLRB announced a new framework for determining when an employer has unlawfully refused to recognize and bargain with the designated majority representative of its employees, *i.e.*, a union designated through the collection of signed authorization cards.

For the last 50 years, an employer confronted with a demand for recognition from a union could insist that the union seek a Board-conducted secret ballot election as a precondition to an enforceable statutory bargaining obligation. Now, according to the NLRB in *Cemex*, when a union seeks recognition based on a majority of workers signing authorization cards, an employer will be in violation of the National Labor Relations Act (NLRA) unless it either recognizes the union or "promptly" files for an election (assuming that the union has not already filed a petition). **According to the NLRB, "promptly" means that the petition must be filed within 2 weeks of the request for recognition from the union**.

Under *Cemex*, if an employer neither recognizes the union nor promptly files a petition, the union may file a Sec. 8(a)(5) charge against the employer, and, if majority support in an appropriate unit is proven (by a showing of signed cards), the Board will find that the employer violated Sec. 8(a)(5) by failing and refusing to recognize and bargain with the union as employees' designated collective-bargaining representative. Upon such a finding, the Board will issue an order requiring the employer to recognize and bargain with the union. In other words, if the employer does not quickly file a petition, the employer may have a legal obligation to bargain with a union without the employees hearing the employer's opinion on whether a union is a good thing for the employees and the company.

All that said, the most significant change from the *Cemex* decision is what happens after an election petition is filed. Now, if the employer commits any unfair labor practices that require setting aside the election, the petition (whether filed by the employer or the union) will be dismissed, and the employer will be subject to a bargaining order. In other words, once a union requests recognition from an employer, the employer is faced with the difficult decision of either recognizing the union without challenge or entering into an election process that can be doomed by any acts in violation of federal labor law. A single slip-up during the "critical period" between the filing of the petition and the election will likely not lead to a second election. Instead, the employer will simply be ordered to recognize and bargain with the union. According to the Board, "conducting a *new* election – after the employer's unfair labor practices have been litigated and fully adjudicated – can never be an adequate remedy." Thus, under *Cemex*, employers will now be forced to bargain.

This represents a major shift in the law. Traditionally, the Board imposed bargaining orders only when serious unfair labor practices threatened a future fair election, a remedy that the U.S. Supreme Court endorsed in its 1969 decision in *NLRB v. Gissel Packing Co*. "This [new] standard disincentivizes unlawful employer conduct during an election campaign because such conduct would be counterproductive for the employer," the NLRB said. "[The employer's] misconduct ensures that it will be subject to a Board order requiring good-faith bargaining with the union."

The decision in Cemex is not the only change that the Board is making to union election rules under the NLRA. The Board also recently adopted new election rules that will go into effect in December 2023, returning the election process to that of the former Obama-era regulations. Under those rules, pre-election hearings, elections, and post-election hearings will be expedited. Consequently, employers will have less time to present their case to employees as to why the employees do not want a union to represent them.

When faced with organizing activity, employers must invoke creative and lawful approaches to expressing their views, arguments, and opinions on the question of representation. Considering the decision in *Cemex*, employers would be wise to not wait until they receive a request for recognition or a petition before engaging in countermeasures to organizing. In light of this decision, employers need to re-think how and when they engage in union avoidance both before and after a petition is filed.

We will continue to provide updates as more information becomes available in future Board decisions. If you have questions about how to approach and avoid union organizing in your facility, please feel free to call or e-mail your regular contact at Thompson Coburn.

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