Updates
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National Labor Relations Board Announces New Requirements for Union Representation Cases

The U.S. National Labor Relations Board (the Board) issued a decision in *Cemex Construction Materials Pacific, LLC* on August 25, 2023, upending decades of precedent regarding the representation election process.

[1] Per the decision, "an employer violates Section 8(a)(5) and (1) [of the National Labor Relations Act (the Act)] by refusing to recognize, upon request, a union that has been designated as Section 9(a) representative by a majority of employees in an appropriate unit unless the employer promptly files a petition pursuant to Section 9(c)(1)(B) of the Act (an RM petition) to test the union's majority status or the appropriateness of the unit, assuming that the union has not already filed a petition pursuant to Section 9(c)(1)(A)."

Under the Board's new standard, an employer "confronted with a demand for recognition may, instead of agreeing to recognize the union, and without committing an 8(a)(5) violation, promptly file a petition pursuant to Section 9(c)(1)(B) to test the union's majority support and/or challenge the appropriateness of the unit or may await the processing of a petition previously filed by the union." However, "if the employer commits an unfair labor practice that requires 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 remedial bargaining order." The analysis of whether a bargaining order is warranted does not turn "on speculation about the impact of an employer's conduct on an election held at some future date, but rather on whether the employer has rendered a current election (normally the preferred method for ascertaining employees' representational preferences) less reliable than a current alternative nonelection showing."

By implementing this new process, the Board discarded its practice of allowing employers to insist on a Board-conducted election as a precondition to an enforceable statutory bargaining obligation. It also explicitly overruled its *Linden Lumber* decision, which held that an employer does not violate Section 8(a)(5) "solely upon the basis of its refusal to accept evidence of majority status other than the results of a Board election."[2] The Board did not, however, reinstate the *Joy Silk* doctrine, under which an employer would violate Section 8(a)(5) and (1) by refusing to bargain upon request with a union that had majority support, absent a showing that the

employer had good faith doubt as to the union's majority status.

In a Board press release following the decision, Chairman Lauren McFerran commented, "The *Cemex* decision reaffirms that elections are not the only appropriate path for seeking union representation, while also ensuring that, when elections take place, they occur in a fair election environment. Under *Cemex*, an employer is free to use the Board's election procedure, but is never free to abuse it—it's as simple as that." In *Cemex*, the Board concluded that the employer committed more than 20 acts of unlawful misconduct during the critical period between the filing of a petition and an election. Further, the employer was subject to a bargaining order under both the U.S. Supreme Court's decision in *NLRB v. Gissel Packing Co.* and its new standard governing cases involving a demand for recognition.

This decision underscores the need for employers to proactively develop labor response strategies so that they can respond promptly to any demands for recognition. It also emphasizes the need for quality supervisor training on lawful responses to organizing activity to ensure that employers do not inadvertently commit any unfair labor practices during the critical period. Those with questions about the Board's decision should contact experienced counsel.

Endnotes

[1] *Cemex Construction Materials, LLC*, 372 NLRB No. 130 (2023).

[2] See *Linden Lumber Division, Summer & Co.*, 190 NLRB 718 (1971), revd. Sub nom *Truck Drivers Union Local No.* 413, 487 F.2d 1099 (D.C. Cir. 1973), affd. 419 U.S. 301 (1974).

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