This summer, the National Labor Relations Board (the Board or NLRB) issued a decision in *Cemex Construction Materials Pacific, LLC* that upended decades of precedent regarding the representation election process.

[1] A more detailed explanation of the decision can be found in our previous Update. The decision changed how employers must respond to union demands for recognition by discarding the Board's practice of allowing employers to insist on a Board-conducted election as a precondition to an enforceable statutory bargaining obligation.

On November 2, 2023, NLRB General Counsel (GC) Jennifer Abruzzo issued Memorandum GC 24-01 (the Memo) to "assist all in comporting with the goals of the Board's Cemex decision to eliminate delays in effectuating employees' expressed free choice of bargaining representative." The Memo illuminates the general

counsel's prosecutorial goals under *Cemex*.

First, the Memo explained the Board's reasoning for overruling *Linden Lumber* in *Cemex*, stating that the Board "found that the scheme under that case for remedying unlawful failures to recognize and bargain with employees' designated representatives was inadequate to safeguard the fundamental statutory right to organize and bargain collectively." According to GC Abruzzo, the "twin coequal aims" the U.S. Supreme Court previously identified in the *Gissel* decision (effectuating ascertainable employee free choice and deterring employer misbehavior) were not fulfilled by the "prior focus on the potential impact of an employer's unfair labor practices upon a future election." Seeking to get rid of "perverse incentives" to delay or disrupt the election process and the obligation to bargain, the Board instead shifted the focus to the time between card solicitation and the initial election. This, the Board posited, creates safeguards against unfair labor practices both before and after the filing of the election petition. In a footnote, GC Abruzzo noted *Gissel* bargaining orders may still be appropriate where a union's demand for recognition may be at issue, and the employer's unfair labor practices caused a loss of majority support.[2]

Second, GC Abruzzo noted that upon a presentation of a demand for recognition, an employer may ask to see evidence of majority support, but a union is not obligated to show it. Instead—and without tolling the employer's two-week deadline for a petition for filing an RM petition—the parties can engage a neutral third party to review the evidence.

Third, GC Abruzzo wrote that a demand for recognition may be made to any agent of the employer. The representative or agent need not be any particular officer or registered agent of an employer as long as it is a person "acting as an agent of an employer" under Sections 2(2) and 2(13) of the Act, as defined by the Board. Further, per GC Abruzzo, the demand for recognition can be verbal or written and can "take many forms, including the filing of an RC petition as long as the union checks the request for recognition box on line 7a of the NLRB petition form and notes in section 7a of the form that the petition serves as its demand."

According to GC Abruzzo, when an employer is presented with a demand for recognition by a union that is claiming majority support, the employer may: "1) agree to recognize a union that enjoys majority support; 2) promptly file an RM petition to test the union's majority support and/or challenge the appropriateness of the unit; or 3) await the processing of an RC petition previously filed."

GC Abruzzo also noted that if the employer neither recognizes the union upon demand nor files an RM petition within two weeks of that demand, and there is no other petition for a Board-conducted election being processed by the Region, the union may file an unfair labor practice charge against the employer pursuant to Section 8(a)(5). The Memo acknowledges that an "employer will be permitted to challenge the basis for its bargaining obligation during the investigation of the unfair labor practice case[,]" but "Regions should not be investigating the employer's challenge to the validity of the union's showing of majority support and/or the appropriateness of the union's claimed unit that was already raised and resolved in the representation case context." If majority support is demonstrated by the GC, a complaint will be issued and, if the Board agrees, it will make a finding that the employer violated the Act by failing and refusing to recognize and bargain with the union as the employees' designated collective-bargaining representative and will issue a remedial bargaining order directing the employer to bargain with the union. "Employers act at their own peril" if they refuse to bargain and make unilateral changes in employees' terms and conditions of employment after a demand for recognition is made.

Lastly, the Memo notes that if an employer commits an unfair labor practice during the critical period[3] that "renders a recent or pending election a less reliable indicator of current employee sentiment than a current alternative nonelection showing," the pending petition for an election will be dismissed, and the employer will be issued a remedial bargaining order. Thus, "if an employer's unfair labor practice(s) invalidated the election process such that an uncoerced choice of its employees cannot be reflected, the Board will rely upon the prior

designation of a representative by a majority of employees by nonelection means such as valid union authorization cards," which GC Abruzzo states are "the best present objective evidence of current employees' representational preference."

Other notable points in the Memo include:

- The *Cemex* standard is retroactive, applied to all pending cases at any stage, and the Board "would not recognize any claim to a legitimate reliance interest by an employer under the old standard based on an expectation of being able to engage in some degree of unlawful conduct without triggering a bargaining order."
- GC Abruzzo clarified that section 10(j) injunctive relief should still be sought "in appropriate cases in order to restore the status quo ante following serious unfair labor practices and to prevent the remedial failure of a Board order issued in due course."
- The Division of Advice should be consulted for questions not covered in the Memo, such as where an employer may have forfeited or waived its ability to seek a Board-conducted election by (1) reneging on a previous agreement to recognize and bargain with a union based upon a showing of majority support or (2) where an employer has independent knowledge of the union's majority support and still refuses to recognize or bargain with the union.

Takeaway

This guidance stresses the strict enforcement expected for the *Cemex* standard by the Board's general counsel. It further emphasizes the need for quality supervisor training on lawful responses to organizing activity, including in the lead up to a demand, to ensure that employers do not inadvertently commit any unfair labor practices during the critical period that would irreparably harm the election process. Those with questions about the Board's decision should contact experienced counsel.

Endnotes

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

[2] Such as when there is no (or insufficient) demand, but there was majority status, an RC petition, and an unfair labor practice (ULP) that would interfere with the election.

[3] The "critical period" is the time between when a demand for recognition is made and the date of the election.

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