



Employment Law Note

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NLRB Ruling Facilitates Union Recognition



By **Matthew Coughlan**, mcoughlan@sbj.law

On August 25, 2023, the National Labor Relations Board (“NLRB” or “Board”) issued a landmark ruling, *Cemex Construction Materials Pacific* (“*Cemex*”), overruling 50 years of precedent regarding union recognition, elections, and bargaining orders.

Background

Cemex involved a campaign by the Teamsters Union to organize ready-mix cement drivers employed by Cemex. An election was held in which the employer prevailed. Following the election, the Teamsters filed objections claiming Cemex committed over 20 separate unfair labor practices (“ULPs”) during the critical period of an election campaign – the time between when the election petition is filed and when the election is held. The Teamsters claimed Cemex’s various ULPs included threatening employees with discipline for displaying their support for the Union, telling employees they could be discharged for supporting the Union, and firing an employee who was instrumental in leading the organizing effort.

After upholding the Union’s claims that Cemex committed numerous ULPs, a re-run election was ordered. On appeal, the Board held that a rerun was not the appropriate remedy and instead issued an order mandating Cemex bargain with the Union. In so doing, the Board announced a new framework for determining when employers are required to bargain with unions without a representation election.

Changes under *Cemex*

Prior to *Cemex*, when an employer was presented with a demand for recognition by a union, the

employer had no obligation to recognize the union, but could instead demand that the union seek representation through a secret ballot election. Under the new *Cemex* framework, if a union presents an employer with a demand for recognition and authorization cards signed by a majority of employees, an employer must either:

1. Recognize the union and begin the bargaining process; or
2. If not already filed by the union, file a Representation Petition (“RM Petition”) to determine the union’s majority status within two weeks of the union’s demand for recognition.

Additionally, if the employer commits a ULP during the critical period, the Board will no longer require a re-run election but instead will issue a bargaining order.

This is a significant change from Board practice where previously the Board handed down such bargaining orders only if the ULP was so severe that a free and fair election would be impossible.

Effects on Employee Free Choice

The *Cemex* decision has reduced the need for unions to conduct elections to achieve recognition and undermined the rights of employees to vote in a secret ballot election. Moreover, the decision opens the door for union recognition in instances where the Board determines an employer committed a ULP even if the RM Petition raised valid issues with the card authorization process or whether majority employee support existed.

Effect with Related NLRB Rulings

Cemex is not the only recent NLRB development that restricts employers' ability to contest union recognition or places them at a disadvantage in the recognition process. Two other developments this August could further exacerbate the effects of *Cemex*. On August 24, 2023, the NLRB announced a new final rule that revived an Obama-era policy, allowing for "ambush elections" which shorten the time from when employees file a petition for certification ("RC Petition") to when an election is held. The rule imposes harsher deadlines on employers to prepare for pre-election hearings and limits post-election briefing. According to the NLRB, the new rule aims to do the following: 1) hasten when pre-election hearings begin; 2) make sure important election information is disseminated to employees more quickly; 3) ensure pre-election and post-election hearings are conducted more efficiently; and 4) ensure elections are held more quickly. The effect of the August final rule is to reduce employers' ability to respond to RC Petitions and gather relevant evidence and testimony.

On August 2, 2023, in its *Stericycle, Inc.*, decision, the Board expanded when overly broad workplace rules and policies constitute a ULP. The decision extinguishes the previous categorical approach the Board followed and adopts a stricter standard where the Board will find an unfair labor practice occurred when the challenged rule has a "reasonable tendency" to chill employees from exercising their NLRA rights. In short, not only can even minor prohibited labor practice result in automatic union recognition, but the NLRB has also significantly lowered the bar for what constitutes a ULP.

What Employers Need to Know

The NLRB's decision in *Cemex* will be felt immediately. The decision applies retroactively unless doing so would result in a "manifest injustice." Employers must react swiftly (and carefully) if they reasonably believe union support among employees is not sufficient or other procedural defects exist. *Cemex* and other recent NLRB decisions will likely face appellate scrutiny, but for now employers should aim to comply with the decision by doing the following:

1. Ensure employee handbooks and other workplace policies do not contradict or run afoul of employees' rights under the NLRA.
2. Submit an RM Petition **within two weeks** of receiving notice of majority employee support for union recognition (usually through presentation of union authorization cards).
3. Refrain from any activities the Board would perceive as an unfair labor practice.

During the past 50 years, U.S. workforce union membership has declined, plunging to an all-time low of 10.1% in 2022. The Board's decision in *Cemex* could reverse this trend. *Cemex* and other recent NLRB decisions likely highlight a new aggressive NLRB approach aimed to weaken or eliminate barriers to union recognition and limit employers' ability to contest recognition efforts.

Employers with questions about the recent NLRB decisions and rule changes are encouraged to call Matt Coughlan at 425-460-2292 or email him at mcoughlan@sbj.law.

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contact us at 425-454-4233

