# LABOR LAW UPDATE

## THE NLRB ALTERS UNION ORGANIZING LANDSCAPE

On August 25, 2023, the National Labor Relations Board (the "Board") issued a landmark decision in *CEMEX Construction Materials Pacific, LLC*, 372 NLRB No. 130 ("*CEMEX*"), reversing a half-century of established legal precedent and fundamentally altering the procedure through which private sector workers can form labor unions. Traditionally, employers had the right to decline union demands for voluntary recognition, instead requiring unions to file a petition for an election. However, the *CEMEX* decision has introduced new obligations and potential liabilities for employers facing union recognition demands. Our recommendations for responding to the Board's ruling are at the end of this Update.

### ***Key Changes***

- **Lowered Evidentiary Standard for *Gissel* Bargaining Orders:**[1] Prior to *CEMEX*, the Board would usually order a "rerun election" if unfair labor practices occurred during the critical period while an election was pending. Based on the Supreme Court's *Gissel Packing Co.* decision in 1969, "bargaining orders" (mandating that an employer recognize the union and engage in collective bargaining without an election) were reserved for situations where the employer's conduct was so egregious that it seemed impossible to rectify its effects and ensure a fair election. The *CEMEX* decision, however, allows the Board to issue a bargaining order based on a single unlawful statement or action following a union's demand for recognition.

- **Continued Unfair Practices:** The Board also determined that the cumulative impact of unfair labor practices (ULPs), even after the election, could effectively obstruct the possibility of a fair election, necessitating the issuance of a bargaining order. Additionally, making unilateral changes to employees' terms and conditions of employment following a recognition demand can lead to further liability. The Board's newfound willingness to issue bargaining orders based on a broader range of employer actions means that unions now have an incentive to scrutinize every statement or action by an employer after its receipt of a recognition demand.

- **New Framework:** The Board further issued a new "framework" for determining an employer's obligation to avoid a finding of an unlawful refusal to recognize and

1 *Gissel* bargaining orders compel employers to recognize and negotiate with a union as if the union had triumphed in a representation election.

bargain with a union when it claims to have majority support of the employer's employees. Employers have three options when faced with a union demand:

1. **Grant Voluntary Recognition:** Employers can choose to recognize the union without the need for a Board-administered secret ballot election. This option presumes that the union's claims of majority support are an accurate measure of employee sentiment, essentially creating a presumption in favor of union recognition.

2. **File an RM Petition for Election:** Employers (or unions) can file a petition promptly (*i.e.*, within 2 weeks of the union's recognition demand) with the Board for an election (referred to as an RM petition) to test the union's majority support or the appropriateness of the bargaining unit. It is worth noting that RM petitions filed by the employer must specify the precise bargaining unit, whereas a union demand for recognition may lack this specificity.

3. **Take No Action:** Employers may do nothing in response to a union's recognition demand, but this choice also comes with risks. For instance, if an employer rejects the union's demand and fails to file a timely RM petition, the union can file an unfair labor practice charge (ULP) alleging that the employer unlawfully refused to bargain. The Board may find a violation and issue a remedial bargaining order. With that bargaining order would likely come a requirement that the employer "undo" any unilateral changes it made after the union demanded recognition and make employees whole for any lost wages and benefits resulting from those changes

- **New Rule Expedites Union Election Timelines:** In addition to the *CEMEX* decision, the Board finalized and adopted a Final Rule, effective December 26, 2023, which accelerates union elections and limits the time employers have to contest them. This newly adopted rule upends many of the changes made by the Trump-era Board and, essentially, restores election rules from the Obama-era Board to: (i) start pre-election hearings sooner, (ii) get election information to employees faster; (iii) make pre- and post-election hearings more streamlined; and (iv) ensure quicker union elections.

## ***Anticipated Questions***

### *1. Is it likely that the Board's ruling will be challenged?*

The *CEMEX* decision will likely face legal challenges with questions about the Board's rationale for departing from prior standards and potential conflicts with the Supreme Court's decisions in *NLRB v. Gissel Packing Co.*, and *Lincoln Lumber Div. Summer &Co v. NLRB*, 419 U.S. 301 (1974).

***2. How should an employer respond to a request to bargain from a union?***

An employer faced with a demand to bargain from a union should immediately seek experienced counsel to evaluate the options discussed above. In most circumstances, filing an RM petition will be the best course of action to forestall or defeat a union's organizing attempt. Filing an RM petition has the added advantage of allowing the employer to define the unit, and, under NLRB caselaw, a petitioned-for unit is presumptively appropriate.

Alternatively, in some circumstances, an employer may be better served drawing out the process through an unfair labor practice (ULP) hearing, which typically takes months or years until a final decision. However, any unilateral changes in the employees' terms and conditions of employment (*e.g.*, wages and benefits), could be subject to reversal if the employer is ultimately unsuccessful at the hearing.

## ***Action Items for Employers***

The Board's decision places employers at a significant disadvantage in the context of union organizing campaigns. Thus, it is crucial for employers to understand these developments and adapt their strategies accordingly. For instance, employers who may be facing organizing activity should:

- Consider in advance how they will respond to a union demand for recognition, given the limited time frame for filing an RM petition under the *CEMEX* decision and the Board's new rules expediting the election process.
- If filing an RM petition or rejecting union recognition demands, be vigilant to avoid even minor unfair labor practices, as the Board's new standard for bargaining orders is much less forgiving.
- Evaluate current policies that address union-organizing activities such as off-duty access and the use of the employer's facilities for communicating with employees during working time.
- Review handbooks and policies to ensure that they comply with current NLRB standards, as the maintenance and enforcement of an unlawful work rule on matters such as the use of social media or employer email systems may result in unfair labor practice charges that ultimately trigger a bargaining order.
- Train supervisory personnel to recognize union organizing activities and how to legally respond to such activities is especially critical now that the Board has lowered the bar for what may constitute an unfair labor practice.

## *More Questions on Union Issues?*
***Our Labor Lawyers are here to help.***

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## *Questions about employee benefits?*
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