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CLIENT ALERT: NLRB Decision Drastically Shifts Petition and Election Process in Unions' Favor

The National Labor Relations Board issued a landmark decision this week in *Cemex Construction Materials Pacific ("Cemex"),* NLRB Case No. 28-CA-230115, which will have immediate and drastic effects on employers facing union organizing campaigns. Until now, employers faced with a union demand to be recognized as the representative of an employee group based on signed authorization cards could refuse to voluntarily recognize the union and insist that the union file a petition for an election with the NLRB. This has been the state of the law since the Board's 1971 *Linden Lumber* decision. Employers now faced with a union demanding recognition based on a purported majority through signed authorization cards will have two options, either: (i) recognize and bargain with the union; or (ii) within two weeks, file a petition for an election ("RM petition") with the NLRB to test the union's majority status or the appropriateness of the proposed bargaining unit.

The Board further held that if an employer commits any unfair labor practices during the election's "critical period," the Board may dismiss the RM petition and issue a bargaining order, which would require the employer to recognize and bargain with the union. Under the Board's new standard, if an employer commits any violation during an election, no matter how minor, the employer may be forced to recognize the union based on its card-based majority. The decision will be applied retroactively, meaning that it will affect all employers in the midst of a union organizing campaign along with employers facing unionization efforts in the future. Employers currently facing a demand for union recognition who have not already filed an RM petition are at risk of an unfair labor practice finding and a bargaining order. Employers either in the midst of an organizing campaign or who may experience an organizing campaign in the future, if they do not wish to voluntarily recognize the union, will need to ensure that their campaign strictly complies with the National Labor Relation Act's requirements, or else the employer risks facing a bargaining order.

In short, the decision represents a monumental shift in power in favor of unions in organizing campaigns once the union obtains an authorization card-based majority. The decision can be expected to result in increased successful union organizing campaigns through increased bargaining orders and decreased elections, which are now more likely to favor unions.

Legal Background Before *Cemex*

Following Congress's passage of the Wagner Act in 1935, the Board exercised the power to certify a union when it determined by an election or "any other suitable method" that the union commanded majority support. However, after a 1939 Board decision and the passage of the Taft-Hartley amendments in 1947, the Board enforced employers' statutory bargaining obligations in unfair labor practice cases, even where the union had not won a Board election if it could prove that it represented a majority when it requested recognition. Further, in the 1949 *Joy Silk Mills, Inc.* decision, the Board held that an employer violates the Act if it does not recognize a union that presents authorization cards signed by a majority of employees in a prospective bargaining unit unless it has a

bona fide good faith doubt as to the union's majority.

In later cases, despite arguments that authorization cards were not reliable indicators of employees' preferences regarding unionization, the Board held that authorization cards that clearly state their purpose were valid. The Board ultimately abandoned the *Joy Silk* doctrine in its 1971 *Linden Lumber* decision, where it held that an employer does not violate the Act solely upon its refusal to accept evidence of majority status other than the results of a Board election. The *Linden Lumber* decision gave employers the right to test any card-based majority's purported majority in an election by filing an RM petition. More typically, *Linden Lumber* also allowed employers to remain idle after rejecting the union's contention that it represents a majority of employees in an appropriate unit, putting the burden on the union to file an RC petition.

Bargaining orders in the absence of an election have been rare over the years and have been reserved to cases where an employer has committed unfair labor practices that were so "outrageous" and "pervasive" such that a fair election would be impossible as the Supreme Court decided in its 1969 *NLRB v. Gissel Packing Co.* decision. Bargaining orders were also appropriate in "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process." Bargaining orders were approved here where *both*: (a) the union had majority support at one time; and (b) the possibility of erasing the effects of the past practices and ensuring a fair election (or rerun election) is "slight." The Court also referred to a third category of cases involving "minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, *will not sustain a bargaining order."*

The *Cemex* Decision

This week's *Cemex* decision changes the circumstances under which the Board might issue a bargaining order. Under the Board's new standard, an employer violates the Act if it does not recognize a union designated as the employees' authorized representative by the majority of employees in an appropriate unit unless the employer promptly files an RM petition to test the union's majority status or the appropriateness of the unit. *However,* if the employer commits any unfair labor practice that requires setting aside the election, the petition will be dismissed, and the employer will be subject to a bargaining order. Rather than ordering a rerun election, the Board will now rely on the union's purported majority through authorization cards and order the employer to recognize the union. This is a decidedly lower standard for the issuance of a bargaining order than has existed for decades.

The Board contends that its decision does not make a bargaining order "the first and only option" whenever an employer commits any unfair labor practice during the critical period prior to an election. Instead, the Board majority maintains that an election will only be set aside when "an employer's unlawful coercive misconduct has so undermined the reliability of an election as an indicator of employees' free choice that a prior nonelection showing becomes the more reliable indicator." The Board stated that to determine whether any unfair labor practice disrupts the election process, the Board must consider all relevant factors, including the number of violations, their severity, the extent of dissemination, the size of the unit, the closeness of the election (if one is held),

the proximity of the misconduct to the election date, and the number of unit employees affected.

The Future of Union Organizing

The Board's decision in *Cemex* is likely to be subjected to legal challenges. In the meantime, *Cemex* will control union organizing efforts both present and future. Any employer currently facing an organizing campaign will need to evaluate its actions to date to ensure it complies with the *Cemex* decision. This includes ensuring that any RM petition was timely filed, and that none of the employer's prior conduct during union organizing violates the Act, whether it was before, during, or after the election. All employers should closely examine their workplace rules to ensure avoidance of a technical violation of the Act that could invalidate an election, no matter how minor the violation is. Employers who face union organizing campaigns in the future who wish to contest a union's purported majority will need to exercise great caution and discretion in its campaign efforts to minimize the risk of any unfair labor practice.

MBJ will continue to monitor these developments. Any employers with questions about the *Cemex* decision or its effect on union organization should contact their MBJ attorney.

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