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NLRB Drastically Alters Union Recognition & Election Process in *Cemex* Decision

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For over fifty years, the general process for determining employee support (or opposition) to collective bargaining remained fairly constant: the union gathers signed authorization cards to evidence a sufficient showing of interest in collective bargaining; the union seeks an election with the National Labor Relations Board (NLRB); and the NLRB election process then ensues. If a union believed the employer had unlawfully affected the results of a fair election, it could petition for a *Gissel* bargaining order to force the employer to recognize a union – even without winning an election by a majority of the vote; however, a *Gissel* order has been characterized as an "extreme remedy," requiring a "serious" or "egregious" unfair labor practice that undermined a union's majority support and fundamentally prevented a fair election going forward. They were reserved for rare occasions.

In its self-proclaimed "enlightenment gained through experience," the NLRB no longer believes the traditional process of union recognition (or lack of recognition) through an NLRB secret ballot election is adequate. Therefore, in one decision (*Cemex Construction Materials Pacific LLC*, National Labor Relations Board, No. 28–CA–230115), the NLRB has swung the pendulum toward union recognition without an election; based on a union's own representation, it has garnered majority support (typically through authorization cards)—seemingly ignoring employees' section 7 rights to determine for themselves whether they want to be represented by a union.

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Elections No Longer Required

The outcome of *Cemex* is clear. A union can now approach an employer and demand recognition upon its own pronouncement of majority support within an appropriate bargaining unit. The employer is then faced with essentially two options.

First, the employer can recognize the union as the collective representative of the proposed bargaining unit. However, even though not discussed by the NLRB, an employer should be aware bargaining with a union that does not hold majority support within the bargaining unit is also a violation of the National Labor Relations Act.

Second, the employer can promptly file an RM petition with the NLRB seeking an election or challenging the appropriateness of the proposed bargaining unit. For an employer to "promptly" file such a petition, the *Cemex* court noted the employer must file the petition within two weeks of the union's demand for recognition. If the employer does not promptly challenge the union's demand, the Board will force the employer to recognize the union as the bargaining representative for the proposed unit. Notably, the employer does not have to make any showing to file such a petition; rather, the employer can file a petition for election practically as a matter of course.

Minor Infractions May Force Union Recognition

Perhaps more notable than the practical elimination of the election requirement to show majority support (as discussed above), even if an employer files its RM petition requesting an election, employees may lose the ability to participate in an election upon an employer's misstep in complying with the strict "dos and don'ts" in opposing the union's demand. If an employer seeking a union election commits unfair labor practices that would require setting aside an election, the petition will be dismissed, and rather than re-running the election, the Board will order the employer to recognize and bargain with the union.

Since 1969, the standard for forcing union recognition without an election (referred to as a *Gissel* bargaining order) was threefold: (1) the union had majority support; (2) the employer committed a serious or egregious unfair labor practice; and (3) the unfair labor practice undermined the union majority, interfered with the election process, and precluded the subsequent holding of a fair election. It was a rare order for the most extreme cases.

In this decision, the NLRB has significantly increased the likelihood an employer can be forced to bargain with a union. In *Cemex*, the NLRB holds it will issue a forced bargaining order upon any unfair labor practice by the employer that invalidates an election. If an employer commits such an unfair labor practice after the union demands recognition, the Board will enter a bargaining order unless the unfair labor practice is found to be "so minimal or isolated" that it would be virtually impossible for the practice to affect an election. In other words, a bargaining order without an election has shifted from an extreme remedy to a likely result.

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What Next?

Plainly put, employers must diligently and carefully execute their response to a union representation petition after *Cemex*, particularly in light of other recent Board decisions, proposed rules, and General Counsel memoranda (1) expediting the election process, (2) easing the requirements for micro-bargaining units, (3) adopting a heightened standard for employers to justify work rules that could restrict employee rights, and (4) suggesting restrictions on permitted communications to employees. Employers facing a union's demand for recognition should consult their labor & employment legal counsel on how to best adopt practices to effectively respond to the *Cemex* requirements.

Given the Board's drastic shift in precedent, it is likely an appeal will ensue, and the federal courts (up to the Supreme Court) will speak to these issues. Until then, the Board has announced its decision in *Cemex* is retroactive.