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NLRB Announces a New Standard for Requiring Employers to Recognize and Bargain with Unions

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On August 25, 2023, the National Labor Relations Board (NLRB or Board) adopted a standard that will change the way unions seek to represent a non-unionized workforce. In response to NLRB General Counsel Jennifer Abruzzo's request that it restore the long-abandoned *Joy Silk* doctrine, the Board issued its decision in *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130, which makes it easier for the NLRB to require employers to recognize and bargain with a union without even affording its employees an opportunity to participate in a secret-ballot election. Under this new framework, an employer will be required to recognize and bargain with a union that has signed authorization cards from a majority of employees being targeted for representation unless the employer (1) "promptly" files a petition with the NLRB for a secret-ballot election and (2) refrains from doing or saying anything that the NLRB deems to be an unfair labor practice.

At the end of this alert, we share practical takeaways for what unionized and non-unionized employers should be doing right now in response to this dramatic shift in labor law.

CEMEX CONSTRUCTION MATERIALS PACIFIC, LLC

In *Cemex*, the International Brotherhood of Teamsters sought to organize a unit of the employer's ready-mix drivers and driver trainers. The union gathered authorization cards from approximately 57% of the proposed bargaining unit, stating the employees wanted the union to represent them. As is typical, the union then filed a representation petition, known as an RC petition, with the NLRB for a secret-ballot election so the employees could vote in private and with anonymity on the question of whether to unionize.

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In a close election, the union lost by a vote of 179 to 166. However, the employer was found to have committed unfair labor practices (ULPs) in violation of the National Labor Relations Act (NLRA) during the "critical period" between the filing of the RC petition and the date of the election—a period of time when the Board requires an employer to maintain "laboratory conditions" to ensure a free and fair election. Specifically, the employer was found to have threatened employees with plant closures and job losses; surveilled and interrogated employees about their union activity; prohibited employees from wearing union insignia or speaking with union organizers during "Company time"; and hired security guards to intimidate employees immediately before the election.

An NLRB administrative law judge (ALJ) found that the employer's conduct warranted setting aside the election. However, the ALJ did not issue a bargaining order under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), which requires an employer to recognize and bargain with a union where the employer's ULPs were so serious that they make a fair representation election impossible. When reviewing the ALJ's decision, NLRB disagreed with the "do over" election remedy on appeal and found instead that the employer's misconduct was so egregious that a bargaining order was warranted. But instead of stopping there, the Board announced a new, bold legal standard.

THE BOARD'S NEW STANDARD FOR ISSUING BARGAINING ORDERS

In fashioning its new standard, the Board revisited the doctrine set forth in *Joy Silk Mills, Inc.*, 85 NLRB 1263 (1949), which had been abandoned for more than 50 years. In *Joy Silk*, the Board determined that if a union produced signed authorization cards from a majority of a bargaining unit it was targeting for representation, no secret-ballot election was required, and the employer had to recognize and bargain with the union unless the employer established it had a "good-faith doubt" as to the union's majority status necessitating an election. In determining whether the employer had a "good-faith doubt," the NLRB evaluated "all relevant facts in the case, including any unlawful conduct of the employer, the sequence of events, and the time lapse between the refusal [to recognize and bargain with the union] and the unlawful conduct."

The Board formally abandoned the *Joy Silk* doctrine in *Linden Lumber Division, Summer & Co.*, 190 NLRB 718 (1971) and held that an employer does not violate the NLRA "solely upon the basis of its refusal to accept evidence of majority status other than the results of a Board election."

For more than half a century, employers have been able to insist on having a Board-conducted secret-ballot election as a precondition to being obligated under the NLRA to bargain with a union. That is no longer the case.

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In *Cemex*, the Board explicitly overruled *Linden Lumber* and set forth the following framework it is now using to determine "when an employer has unlawfully refused to recognize and bargain with a designated majority representative of its employees."

- Upon request, an employer must voluntarily recognize and bargain with a union that has been designated by a majority of its employees in an appropriate bargaining unit unless the employer "promptly" files a petition, known as an RM petition, with the NLRB to test the union's majority status or the appropriateness of the unit. An employer must normally file an RM petition within two weeks of the union's demand for recognition for it to be "prompt."
- If the union has already filed an RC petition, then the employer does not have to file an RM petition and also does not have to voluntarily recognize the union. It can wait for the RC petition to be processed by the NLRB.
- If during the "critical period" between the RC or RM petition being filed and the date of the election the employer commits a ULP that requires setting aside the election, then the petition will be dismissed and the employer will be required to recognize and bargain with the union.
- If the employer neither voluntarily recognizes the union nor promptly files an RM petition, the union can file a ULP charge and, if the union's majority support in an appropriate unit is proven, the employer will be required to recognize and bargain with the union.

In sum, "once a majority of employees has designated a union as their bargaining representative, the employer has a duty to bargain under Section 8(a)(5) [of the NLRA], subject to its right to file an election petition."

The Board also announced in *Cemex* that it will no longer apply the decades of precedent under *Gissel*, which focuses on the nature of alleged ULPs committed by an employer to determine if a draconian bargaining order will be issued. Rather, if an employer commits a ULP that, in the Board's eyes, frustrates a free, fair, and timely election, the Board will dismiss the petition and issue a bargaining order without any secret-ballot election. The Board will not consider whether the employer had a "good-faith doubt" of the union's majority status as it did under *Joy Silk*. If a ULP is sufficient to require the election to be set aside, then the employer will be ordered to bargain with the union.

WHAT SHOULD COMPANIES DO NOW?

In the face of this watershed change that strips away the right of an employer to a secret-ballot election as the means by which employee free choice will be determined, it is critical that employers take proactive steps in multiple ways. First, it is more important than ever for employers to proactively identify and acknowledge workplace challenges and ensure their employees are well-informed, involved and recognized for their efforts if there is a desire for employees to choose for themselves to be unrepresented and not pay

union dues. Second, it is critical that employers assess policies and practices for NLRA-compliance and train managers and supervisors regarding the same given the heightened stakes of the commission of a ULP.

Accomplishing these lofty goals is not easy, but it can be done. Stinson regularly advises companies on these issues. Our services range from attorney-client privileged comprehensive positive employee relations audits, to supervisor/manager legal compliance training, to legal support in organizing campaigns.

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