

NLRB Adopts New Framework for Union Representation Proceedings

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Practice Area: Labor and Employment

The National Labor Relations Board (NLRB) has changed the dynamic in union organizing efforts by shifting responsibility to the employer to seek a representation election if the Union provides the employer with representation cards from a majority of the employees. In a recent decision, the Board created a new dynamic for organizing. Rather than requiring the Union to file for an election if the employer doubts the majority of the employees desire a union, now it is the responsibility of the employer which doubts the majority interest of employees in recognizing the union as their representative, to file a request for election with the NLRB. The decision will impact the steps employers must take when unions request recognition on the basis of a card check. If representation is challenged, and the employer commits an unfair labor practice that would normally result in the setting aside of the election, the employer's election petition will be dismissed and the employer will be obligated to bargain a contract with the union.

Background Facts

In 2019, 366 cement truck drivers and trainers from *Cemex Construction Materials Pacific LLC* voted against union representation by the International Brotherhood of Teamsters (the "Union"). Following the vote, the General Counsel and Union alleged that the truck drivers and trainers voted against the Union because *Cemex* had engaged in "extensive unlawful and otherwise coercive conduct before, during and after the election," and such conduct required remedial measures, including setting aside the election and ordering *Cemex* to bargain with the Union. After a NLRB hearing regarding the Union's allegations of unfair labor practices against *Cemex*, the judge found that *Cemex* had violated Section 8(a)(1) of the National Labor Relations Act ("the Act") more than 24 times by threatening employees with plant closures, job loss, and other reprisals if they voted for the Union. The judge also found that *Cemex* violated Section 8(a)(1) of the Act by surveilling and interrogating employees about their union activity, prohibiting employees from talking with the Union's organizers or displaying pro-union paraphernalia, and by hiring security guards to intimidate employees immediately before the election occurred. The judge also found that *Cemex's* discipline of a union activist employee for talking to the Union's organizers during "company time" violated Section 8(a)(1) of the Act. Finally, the judge recommended setting aside the election, and providing the Union with several special access remedies prior to re-running the election. Shortly thereafter, *Cemex*, the Union, and the General Counsel filed exceptions and supporting briefs with the NLRB raising concerns with portions of the judge's decision.

New Union Representation Framework Announced

On August 25, 2023, the NLRB issued its decision, *Cemex Construction Materials Pacific LLC and International Brotherhood of Teamsters*, 372 NLRB No. 130 (2023), in response to *Cemex's*, the Union's, and the General Counsel's exceptions. Ultimately, the *Cemex* decision announced a new framework that employers must consider when determining whether they must bargain with a union that has not yet had a representation election. Specifically, the *Cemex* decision holds that when a union requests recognition because it claims that it has authorization cards for a majority of employees in a bargaining unit, the employer must do one of two things:

1. recognize the union and bargain with the union
or
2. promptly file (promptly is defined as within 2 weeks of the union's demand for recognition) a petition for election (RM petition) seeking an election

The *Cemex* decision also warned that if an employer proceeds with option 2 above and promptly files a RM petition seeking an election, the employer must not commit any unfair labor practices during that time that would require setting aside the election. The *Cemex* decision further clarified that if an employer did engage in an unfair labor practice after filing its RM petition, the RM petition would be dismissed, and instead of a re-run of the election, the NLRB will order the employer to bargain with the Union.

Why Did the NLRB Issue This New Framework for Union Representation?

According to the NLRB, the revised framework represents "an effort to effectuate employees' right to bargain through their chosen representative, while acknowledging that employers have the option to invoke the statutory provisions allowing them to pursue a Board election."

Employer Takeaways

The *Cemex* decision will require employers to immediately re-examine their process on how to respond to union requests for recognition when the union claims that it has authorization cards for a majority of the employees in a "bargaining unit". Importantly, this new *Cemex* framework can be applied to cases that are currently in process before the NLRB.

Therefore, it is important for employers to evaluate how they will respond to organizing efforts when a card check arises. Employers may consider a range of options, depending on their risk tolerance and the employment setting, including:

- Know Your Options – Employers must be familiar with the two options available when a union requests recognition claiming it has authorization cards for a majority of employees in a bargaining unit.
 - Know the Time Limit – The *Cemex* decision requires employers to "promptly" file the RM petition after a union's demand for recognition, and states that "Allowing for unforeseen circumstances that may be presented in a particular case, **we will normally interpret "promptly" to require an employer to file its RM petition within 2 weeks of the union's demand for recognition.**"
 - Avoid Unfair Labor Practices Following Union's Demand for Recognition – Understand the behaviors which may give rise to the allegation of an unfair labor practice. Under the Board philosophy, the consequences for engaging in an unfair labor practice after a union requests recognition can be significant.
 - Supervisor Training – Supervisor training before the organizing effort begins is critical. Failure to understand the charges that can come from employer representative actions results in a greater likelihood for error and the need to bargain with the union without an election occurring.
 - Proactively Draft Strategies and Procedures – Become familiar with the *Cemex* decision and draft or revise any company policies and procedures used to respond to union requests for representations, including "union free" communications.
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