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Blog Post

Cemex Construction NLRB Decision

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It's a cruel summer for employers as the National Labor Relations Board (the Board) issued both new election rules, and a landmark decision that upended decades of precedent and lowered the threshold for the Board to issue a bargaining order without holding an election. As a result, employers must be ready to act quickly in the event of a union's demand for recognition and subsequent union election.

Cemex Decision

In *Cemex Construction Materials Pacific (Cemex)*, NLRB Case No. 28-CA-230115, the employer was alleged to have committed a plethora of unfair labor practices in violation of the National Labor Relations Act (the Act) before, during, and after the union's election campaign, including by: threatening employees with plant closures, job loss, other reprisals if they selected the union; surveilling employees and interrogating them about their union activity; disciplining a lead union activist for talking with organizers on company time; and suspending a union organizer after the election, and ultimately discharging her because of her union activity. The Board determined that the impact of these unfair labor practices committed by the employer warranted the remedy of a bargaining order rather than an election re-run because the practices prevented a full and fair election, and simply requiring the employer to refrain from future threats and other coercive acts would not in the Board's view "be sufficient to dispel the coercive atmosphere" the employer cultivated. The Board

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highlighted the fact that the employer's unfair labor practices continued even after the election as another reason for it's decision to issue a bargaining order.

In it's decision the Board also made several significant changes to it's previously long standing standards for issuing bargaining orders, of which all employers should take note.

The Board determined that once a union presents the employer with a demand for recognition, and presents authorization cards signed by a majority of employees, the employer must either recognize the union as the bargaining representative or, if the union has not already filed an election petition, file an RM petition for an election to test the union's majority status or the appropriateness of the proposed bargaining unit within two (2) weeks of the union's demand for recognition. This is a significant change from a 52-year precedent, and represents a move to a standard that is much closer to the *Joy Silk* doctrine. However the Board did not revive *Joy Silk* in it's entirety. *Joy Silk* required an employer's "good faith doubt" of a union's majority to file an RM petition. Now, the employer can file the RM petition without a "good faith" doubt of the union's continued majority status. If the employer commits any violations of the Act during the election's critical period, the Board may throw out the election results and issue a bargaining order requiring the employer to bargain with the union.

As such, employers now have only two (2) weeks after the demand for recognition to file an RM petition. If they refuse to recognize and bargain with the union, and also fail to file an RM petition within the two (2) week period, the union may file a ULP and, as a result, a bargaining order will be issued, whether or not other ULPs were committed.

Additionally, a union can now demand recognition based on only a *claim* of majority support and the only avenues for an employer to avoid a bargaining

order once the union demands recognition is for the employer to prove either (1) that the union did in fact lack employee majority support, (2) that the union's claimed bargaining unit was inappropriate, or (3) file a RM petition.

Further, the standard for issuing a bargaining order is much lower. Going forward, and pursuant to *Cemex,* to determine whether a bargaining order is appropriate the Board will consider the number and severity of unfair labor practices committed by the employer, the proximity of those practices to the election, the number of employees who were subjected to the unfair labor practices, the size of the bargaining unit, and the margin of the elections results. Whether or not the bargaining order is given will depend on the Board's findings regarding "the possibility of erasing the effects of past practices and of ensuring a fair election." Should the Board determine that it would be difficult to erase the effects of the unfair labor practices, a bargaining order will be issued. Based on *Cemex* the bar for determining that a bargaining order is necessary is much lower that previous precedent set forth – and it appears that essentially any unlawful employer conduct will result in immediate recognition and a bargaining order, rather than a re-run election.

The new standards set forth in *Cemex* will also be retroactive, so employers must prepare for unions to seek bargaining orders retroactively where the employer has already won the election.

Election Rules

Just one day before the decision in *Cemex*, on August 24, 2023, the Board also adopted a Final Rule (the Rule) amending its procedures governing representation elections to take effect on December 26, 2023. The Rule reverses many of the amendments previously made by the Board in 2019, which introduced delays in the election process. Now, the Board has returned election procedures, specifically those that address the speed of elections,

to the expedited processes put in place by a 2014 rule ("quickie" election). As a result, employers must be prepared to act fast. The chart at the end of this article summarizes critical distinctions between the 2019 rules, and the new 2023 rules.

The Rule will reduce the time it takes to get from petition to election in contested elections by allowing pre-election hearings to begin more quickly, ensuring that election information is disseminated to employees more quickly, making pre-election and post-election hearings more efficient, and ensuring that elections are held more quickly. As a result, post-election litigation will also be limited and expedited.

Under the Rule, the procedures for pre-election hearings and for postponements related to the same will take place on a much faster track. For example, pre-election hearings will take place eight (8) *calendar* days from the service of the Notice of Hearing, instead of the fourteen (14) *business* day requirement set by the 2019 rule. Pre-election hearings can be postponed by regional directors for two (2) *business* days upon a showing of special circumstances, or for more than two (2) business days upon a showing of extraordinary circumstances. Thus, regional directors will have less discretion to postpone pre-election hearings going forward. Further, employers now must post and distribute the notice of petition for election two (2) days after service of the Notice of Hearing instead of the previous five (5) day requirement. Moreover, regional directors will specify the details of election when they distribute the notice of election, instead of the previous rule that the directors *may* specify the details.

Additionally, a non-petitioning party's statement of position will be due seven (7) *calendar* days after service rather than the previous eight (8) *business* days allotted in the 2019 rule. A regional directors discretion to allow postponements of due dates for a statement of position will also be reduced.

Like pre-election hearings, due dates for statements of position can be postponed by regional directors for two (2) *business* days upon a showing of special circumstances, or for more than two (2) business days upon a showing of extraordinary circumstances. Instead of a petitioning party responding to the non-petitioning party's statement of position in writing prior to the pre-election hearing, petitioning parties will now respond to the non-petitioning party's statement of position orally at the start of the pre-election hearing.

Further, both parties will have the chance to make an oral argument before the close of a representation hearing and written brief will be permitted only if the regional director or hearing officer finds them to be necessary. Previously, the parties were able to file briefs several days after the close of hearings.

Finally, the Rule removes the waiting period for the issuance of a decision directing an election and the scheduled election. Now, regional directors are instructed to schedule an election for the earliest date practicable after the issuance of a decision. The Rule also provides that any dispute regarding eligibility to vote, or eligibility with respect to the bargaining unit, does not have to be resolved before the election begins. Instead, parties will be allowed to present evidence regarding the existence of a question of representation. As a result an employer may be limited in it's campaign and may have experience an increase of objections. Employers must be very careful not to engage in unfair labor practices in light of this change.

Notably, the Board did not seek public comment before adopting the Rule and therefore employers can anticipate legal challenges in the future.

Employers need to be prepared *before* union organizing starts. Akerman can assist with such preparation by providing supervisor training, union vulnerability audits, and other counseling. For further information or specific guidance regarding

pre-organizing strategies and union elections, contact your Akerman labor and employment attorney.

Topic	2019 Rule	Rule post- *Cemex*
Pre-Election Hearings	Take place within 14 business days.	Take place within 8 calendar days. Regional director may postpone for 2 business days for special circumstances, or more than 2 business days for extraordinary circumstances.
Notice of Petition for Election	Must be posted within 5 days. Regional directors *may* specify details of the election.	Must be posted within 2 days. Regional directors *will* specify the details of the election.
Non-Petitioning Party's Statement of Position	Due 8 business days after service.	Due 7 calendar days after service. Regional director may postpone for 2 business days for special circumstances, or more than 2 business days for extraordinary circumstances.
Petitioning Party's Response to Non-Petitioning Party's Statement of Position	Petitioning party responds in writing prior to the pre-election hearing.	Petition party responds orally at the start of the pre-election hearing.
Final Arguments	The parties able to file briefs several days after the close of hearings.	The parties will have the chance to make an oral argument before the close of a representation hearing, and written brief will be permitted only if the regional director or hearing officer finds them to be necessary.
Issuance of a Decision & Starting an Election	Regional directors will schedule the election for the earliest date practicable, but—absent waiver by the parties—normally will not schedule an election before the 20th business day after the date of the direction of election.	Regional directors are instructed to schedule an election for the earliest date practicable after the issuance of a decision. Any dispute regarding eligibility to vote, or eligibility with respect to the bargaining unit, does not have to be resolved before the election begins.
