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NLRB Dramatically Resets The Union Election Process With Traps For The Unwary

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Highlights

The National Labor Relations Board is dramatically changing the union election process with its decision in *Cemex Construction Materials*, requiring employers presented with a union demand for recognition to file a representation petition

The *Cemex* decision also contains potential land mines for employers that lack significant HR, employee relations and legal support that may result in employers having unions foisted on them

Combined with the "quickie" election regulations reinstated recently, the union representation process will now happen on an accelerated time schedule as was done during the Obama years

For decades, if a union demanded recognition based on signed union authorization cards, the employer could simply decline recognition, and the union would be required to file a representation election (RC) petition with the National Labor Relations Board (NLRB) requesting an election. Only if the union won the election and was certified as bargaining representative would the employer be obligated to bargain with the union. Under the NLRB's *Cemex Construction Materials* decision issued Aug. 25, the NLRB is dramatically changing that process.

Combined with the recent "quickie" election regulations reinstated by the NLRB, the union representation process will now happen on an accelerated time schedule as was done during the Obama years. Most importantly, the *Cemex* decision also contains potential land mines for employers that lack significant human resources, employee relations and legal support that may result in small employers having unions foisted on them by the NLRB.

The Return of “Quickie” Elections

Earlier in the week, the NLRB reinstated the Obama-era “quickie” election rules that accelerate the union election timetable. Under the “quickie” election regulations, the average election was generally held 24-25 days after a union representation petition was filed. Most of those accelerated timetables were rescinded or lengthened by the NLRB under former President Trump. As a result, for the past few years, most union elections are held approximately six to seven weeks after a union representation petition is filed.

Although there was a lot of handwringing in the employer community when the “quickie” election rules were initially announced, generally speaking, most employers still had adequate time to effectively campaign against union representation efforts if they were inclined to do so. With the “quickie” election timetables reinstated, most union elections are likely to be held approximately 24 days after a union representation petition is filed.

As the timeframe for responding to a union representation petition will be significantly shorter, this places a premium on quickly identifying issues and effectively communicating with employees – but the employer community has shown this can be done in the shorter time period.

NLRB’s Holding in *Cemex* is a Game-Changer

The NLRB significantly altered the union representation process with its decision in *Cemex*. Based on that decision, the onus will be on the employer to essentially “challenge” the union’s majority status through the representation process and there are some landmines if the employer violates the National Labor Relations Act during the ensuing union campaign. In a nutshell, under *Cemex*:

- An employer violates Sections 8(a)(5) and (1) by refusing to recognize, upon request, a union that has been designated as Section 9(a) representative by the majority of employees in an appropriate unit unless the employer promptly files a petition pursuant to Section 9(c)(1)(B) of the Act (an RM petition) to test the union’s majority status or the appropriateness of the unit, assuming that the union has not already filed a petition pursuant to Section 9(c)(1)(A). The union’s majority status is typically demonstrated simply by having a majority of employees sign union authorization cards.
    - Thus, an employer confronted with a demand for recognition based on union authorization cards signed by a majority of employees MUST **promptly** file an RM petition to test the union’s majority support and/or challenge the appropriateness of the unit or may await the processing of a petition previously filed by the union. If an RM petition is not filed (and assuming the union doesn’t file and RC petition) and the union does have majority support (as reflected by signed authorization cards) – the Employer will violate Section 8(a)(5) if it fails to recognize and bargain with the Union.
    - Section 9(c)(1)(B) of the NLRA grants employers an avenue for testing the union’s majority through a representation election if the Board, upon an investigation and hearing, finds that a question of representation exists.
- However, if the employer commits an unfair labor practice that requires the setting aside the election, the petition (whether filed by the employer or the union) will be dismissed, and the employer will be subject to a remedial bargaining order. This is a major change – a re-run election will NOT be ordered – the employer will simply be ordered to bargain with the Union

(assuming the union can demonstrate that it had majority support via signed authorization cards).

- Also – if the employer makes unilateral changes while the election is pending, and loses the election – the NLRB will find the employer violated Section 8(a)(5) by making those changes without bargaining with the union – because the employer failed to bargain with the union at the time it had majority status.

Procedurally, an RM petition would follow a similar path to an RC election (representation petition filed by a union); the NLRB is just putting the onus on the employer to file the petition – not the union. The NLRB does not require the employer to have a “good faith doubt” as the union’s majority status to file the RM petition.

Two big takeaways are 1) more than ever, early detection of card signing and countering union messaging in that regard will be critical, and 2) given the impact of potential unlawful conduct by managers or supervisors (i.e., a bargaining order recognizing the union), it’s more important than ever to make sure site management and front line supervisors know the “rules of the road” regarding what they can and cannot do and say during a union election campaign

The *Cemex* decision also creates a potential trap for smaller employers without significant HR or legal support if they delay requesting an RM election, or if their management team, perhaps unknowingly, violates the NLRA in communicating with employees about the union organizing efforts, or takes adverse action against employees. Instead of a re-run election due to violations of the NLRA, the NLRB says it is going to order that the employer recognize and bargain with the union (if the union had authorization cards signed by a majority of the employees).

The *Cemex* decision will undoubtedly be appealed to the federal circuit court of appeals and enforcement there is uncertain – particularly as several circuits have recently appeared hostile to federal agencies. However, the NLRB is clearly aware of this, as seems to have taken somewhat painstaking efforts to address Supreme Court, circuit court and previous NLRB jurisprudence surrounding these issues.

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