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Not-So-Joyful News for Employers: The NLRB Paves the Way for Union Recognition Without an Election and Shortens Election Timelines

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On Thursday, August 24, and Friday, August 25, 2023, the National Labor Relations Board (NLRB or the Board) delivered a one-two punch to nonunion employers. Most significantly, the Board has paved the way for unions to gain recognition *without* an election, making it far more likely that unions may successfully gain recognition simply by having collected signed authorization cards from employees, without an election. To make matters more difficult, for elections that go to a vote, the Board has reverted to its Obama-era election rules, which were issued by regulation in 2014 and became effective in 2015, and which the Board partially rolled back in 2019. Now, when a representation petition is filed with the Board, an election will be held much more quickly than under the more employer-friendly 2019 rules. These two Board actions mean that employers are now at much greater risk of becoming unionized. This article discusses these new developments, what they mean for your business, and tips for mitigating risks.

Recognition Without an Election

On August 25, 2023, the Board issued its decision in *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130. That decision revives, at least in part, a 1940s NLRB decision, *Joy Silk Mills, Inc.*, 85 NLRB 1263 (1949). In *Joy Silk*, the Board held that an employer could only decline to recognize a union based on signed cards if it had a "good faith" doubt that the union actually had the support of a majority of employees. Under this standard, the NLRB looked for unfair labor practices to demonstrate that the employer declined to grant recognition, not because it actually had a doubt as to the union's majority support, but to "gain time to undermine the union's support" by virtue of a campaign against unionization. If the employer committed unfair labor practices suggesting that the employer had asked for an election, not out of a good faith belief that the union lacked majority support but to defeat unionization, the NLRB would not run a second election. Instead, the Board would issue a "bargaining order," requiring the employer to recognize the union. In 1971, the Board overturned *Joy Silk* in *Linden Lumber Division, Summer & Co.*, 190 NLRB 718, holding that an employer had the right, regardless of any good faith doubt, to insist on a secret ballot election before the Board would certify a union.

In last week's *Cemex* decision, the Board has largely resurrected the *Joy Silk* rule. Now, if a union approaches an employer with cards signed by a majority of employees in the proposed bargaining unit, the burden is on the *employer* to file a petition with the NLRB for an election. The employer must file the petition "promptly," which the Board has defined as two weeks in most cases. If the petition is not promptly filed, no election will be held, and the employer will be ordered to recognize the union on the basis of signed cards alone.

However, the Board has gone a step further than simply resurrecting *Joy Silk*;it has also abandoned the "good faith doubt" standard. Under *Cemex*, if an employer commits unfair labor practices while there is an election pending, which previously would have warranted holding a second election, the Board will instead issue a bargaining order. Just a few examples of conduct that has been found in the past to warrant the running of a second election include the following: (1) unlawful handbook rules that were maintained but not enforced, (2) unlawful threatening or coercive remarks made by managers and supervisors (even if inadvertently made), and (3) surveilling employees' union activities, or giving the impression that those activities are under surveillance.

Under this new standard, as the dissent in *Cemex* noted, *just one* such unfair labor practice during the critical period apparently will result in circumvention of the secret ballot election process and allow for union recognition based solely on authorization cards.

The impact of *Cemex* on employers is significant. First, the Board has historically viewed authorization cards with suspicion, because the cards are not collected in a controlled "laboratory" environment; indeed, they may have been signed due to coercion or intimidation, or even accompanied by misrepresentation about the purpose of the card. For that reason, the NLRB has opined for decades that a secret ballot election is the preferred method of gauging employee sentiment. With *Cemex*, the Board has reversed course and declared that where an employer commits an unfair labor practice, the secret ballot election process should be forfeited, and recognition should be granted based solely upon cards.

Second, many nonunion employers are not familiar with the NLRB's processes. When approached by a union asking for recognition, an employer typically declines. But under *Cemex*, the *employer* must file the petition (not the union, as has historically been the case), and if it does not do so within two weeks, the right to an election terminates. *Cemex* penalizes employers that do not understand the Board's often arcane rules (at the same time, this holding punishes their employees by eliminating the election process for something that is outside of their control).

Third, the risk of a bargaining order is now substantially higher than it was in the past. One unfair labor practice will be sufficient to warrant the dismissal of a petition and recognition based solely on cards. Indeed, *Cemex* follows the Board's decision in *Stericycle, Inc*., 372 NLRB No. 113 (2023), which makes it highly likely that at least one provision in an employer's handbook will be found to violate the National Labor Relations Act (NLRA). Under *Cemex*, that could be enough for the Board to dispense with the election process. Moreover, the Board is expected soon to outlaw "captive audience" speeches by employers (mandatory meetings in which management gives its views on unionization – an important component of most employers' campaigns). If and when that happens, these developments will be tantamount to the NLRB mandating neutrality and voluntary recognition by "card check" upon employers. In this context, a union that collects cards from a majority of employees would likely gain recognition without an election.

NLRB Election Procedure Changes

For the third time in nine years, the NLRB has changed its election procedures. In 2014, the Board issued regulations mandating that elections be held on a much shorter timeline and that any litigation (if necessary) be deferred until after an election. In 2019, the Trump-era Board eliminated some of the 2014 regulations. A federal court struck portions of the 2019 regulations, but some remained, including an extension of the timeline for a hearing from eight calendar days to 14 business days (with a regional director being given more discretion to postpone the hearing), a mandate that an election not be held less than 20 days from the issuance of a decision and direction of election (DDE), and the restoration of the right of parties to file a post-hearing brief. All of these changes bought employers crucial time to develop legal strategies and plan and roll out a campaign.

The new regulations announced on August 24, 2023, effectively return to the 2014 election rules. The key provisions include the following:

- Hearings will be held eight days after a petition is filed. Any issues not raised in the employer's statement of position (due the day before the hearing opens) are waived and the employer loses its right to raise them. "Special" or "extraordinary" circumstances must be present in order for a party to gain a two- or three-day extension of the hearing date;

- A hearing will only be held if a question exists as to whether an election should be held. Most issues will be deferred, and no hearing will be held, so that an election can be held as soon as practicable; and
- Elections will again be ordered at "the earliest practicable date" after the DDE; in other words, the 2019 rules' waiting period of 20 days after the DDE is issued has been eliminated. Elections may be held ten days after the DDE, and in some cases sooner.

The end result here is that many elections will be held as soon as three weeks after a petition is filed. This significantly shortens the campaign period for an employer and gives them little time to communicate their views regarding unionization to their employees. In turn, the union is much more likely to score an election victory. And if the employer wins, it still must contend with *Cemex* and might become unionized anyway.

Key Takeaways for Employers

These groundbreaking developments from the NLRB come at a time when union organizing is at historic highs. With these new developments, an employer whose employees decide to sign union authorization cards is highly likely to become unionized, because an employer's ability to effectively operate a campaign will be substantially limited. Therefore, it is critical that employers enact proactive measures to ensure that their employees work in an environment in which they do not feel the need to sign union cards. A carefully designed assessment program developed along with labor counsel to gauge employees' morale and connection to the employer's mission, and to identify key strengths and areas that need improvement is an effective method of determining risk. Employers should ensure that a plan is in place to promptly address employee concerns and provide avenues for employee engagement to improve employee satisfaction. Finally, employers should review and consider flexibility in policies and improved employee benefits, which can go a long way to improving employee satisfaction and may eliminate the employee's belief that they need a union to speak for them.

It is critically important that employers train managers and supervisors on NLRA compliance so that they do not inadvertently violate the law in the midst of union organizing or otherwise, which can result in the union being granted recognition without a secret ballot election. Under *Cemex*, an employer faces a grave risk stemming from a supervisor making a statement or taking an action that violates the NLRA. The employer no longer faces a "rerun" election, but instead a bargaining order.

Baker Donelson will continue to monitor these developments, and other anticipated developments, at the NLRB. If you have questions about these recent developments, contact Donna M. Glover, Reba Letsa, or any member of Baker Donelson's Labor & Employment Team.