

NLRB Reverses 50-Year Precedent and Lessens Standard for a Bargaining Order Without a Secret Ballot Election

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The National Labor Relations Board (NLRB) reversed over fifty years of established precedent on August 25, 2023, when it decided to overrule its 1971 decision in *Linden Lumber* and reinstate a modified version of its 1949 *Joy Silk* doctrine. The practical impact of the NLRB's decision in *Cemex Construction Materials Pacific, LLC* is that recourse to a private ballot election to test a union's claim of majority support may decline. This decision also likely will limit the right of employees to a private ballot election free of coercion as they decide whether to support a union as their exclusive bargaining representative.

Background

Unions have been pressing for years for a law change that would require employers to accept authorization cards as evidence of majority support, thus triggering a bargaining obligation on the employers without an election. Those legislative initiatives have been unsuccessful, but now, the current union-friendly NLRB has taken an important step to advance labor's goal. Coupled with other rule changes that limit the period between petitioning for an election and the election itself, and recent holdings making it easier to establish an unfair labor practice based on facially neutral policies, the right of employees to make informed decisions about representation as well as the secret ballot election likely will be compromised.

The NLRB now will place the obligation on the employer to promptly file a petition for an election under section 9(c)(1)(B) of the National Labor Relations Act if the employer wants to test the union's claim of majority support. There is a suggestion that "promptly" means fourteen days after an employer is presented with authorization cards suggesting a majority support for the union. However, suppose the employer commits an unfair labor practice that requires *setting aside the election*. In that case, the employer's petition for an election will be dismissed, and the employer will be subject to a remedial bargaining order. That means a union will be the

exclusive bargaining representative of the employees in a unit designated by the union without the benefit of a secret ballot election.

Significant Departure from Established Precedent

While that new policy pronouncement may appear reasonable at first glance, it is a significant departure from established precedent. Under *NLRB v. Gissel Packing Co.*, 395 U.S. 575, the Supreme Court in 1969 said a remedial bargaining order (and without an election) is appropriate when an employer commits egregious unfair labor practices which undermine the union's majority status and makes the holding of a fair re-run election unlikely. *Gissel* bargaining orders have been relatively rare and reserved for situations where the unfair labor practices are extreme or pervasive, and the union's majority status is compromised to the extent that a re-run election will not be an indicator of employee choice.

The NLRB expressly has stated it will retreat from certain aspects of *Gissel*, and the Board's own language in *Cemex* suggests it may be employing a more relaxed standard. The NLRB said that it will consider whether the employer's conduct has rendered a recent or pending election a less reliable factor of employee sentiment. What that means is anyone's guess, and only time will tell whether bargaining orders will remain relatively rare and whether the NLRB will adhere to *Gissel*-based precedent.

Experienced practitioners know that it is common for unions to file unfair labor practice charges while an election is pending, and these blocking charges often cause a delay in an election. Often, these charges do not rise to the level of a *Gissel* violation or trigger a remedial bargaining obligation.

What Does This Mean for Employers?

As a result of *Cemex*, **employers can expect more pre-election charges to be filed, often as a tactical maneuver**, as unions will press for the dismissal of a petition for an election filed by an employer.

Another casualty of *Cemex* will be a **hampered ability of employers to provide employees with the information necessary to make an informed decision**. Unions often conduct organizing activities for months and sometimes for significant periods of time before the employer is aware of the activity. The shortened time between petition and an election means employers will have even less time to provide meaningful information to employees. The undercurrent in the Board position is that the current majority views employer information-sharing efforts more likely to be coercive, which infringe on employee free choice and should be limited. That position actually frustrates employee free choice. **In addition, employers will have to be more guarded in communicating information to employees at the risk of drawing unfair labor practice charges, which could lead to a bargaining order.** A likely consequence is that the conversation on the benefits and disadvantages of union representation will be less robust.

This Cemex decision will have retroactive effect and will apply to all pending cases in whatever stage unless retroactive application would work a manifest injustice. Employers must understand the new landscape, recognize the environment in which decisions will be made on re-run elections, and anticipate that remedial bargaining orders will be more common. The clear winners in Cemex are unions, who will have an easier pathway to certification, and the clear losers are employers. It is left for future decisions of the NLRB to see how often private ballot elections will be denied and how this decision ultimately will affect employees' rights to uncoerced free choice.

To demonstrate the significance of the decision, consider the results of the Starbucks election involving its flagship roastery on Michigan Avenue in Chicago. Starbucks' employees, in a secret ballot election, rejected Workers United, which is part of the Service Employees International Union. In votes counted on August 26, 2023, the union lost 119 to 90. That election and elections like it may be vulnerable under the new Cemex standard. The union filed multiple unfair labor practices against Starbucks across the country, and the Board has found merit in many of them. Under the new relaxed standard, could the Board nullify employee choice, overturn the election, and then issue a bargaining order? In theory, yes, if the Board concludes that Starbucks' alleged unfair labor practices make the authorization cards a more reliable indicator of employee choice.

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Topics

National Labor Relations Board (NLRB), Collective Bargaining Agreements, Collective Bargaining, Secret Ballot