CLIENT ALERTS & INSIGHTS

Concerns Over Cemex Bargaining Orders

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On August 25, 2023, the National Labor Relations Board ("NLRB") decided Cemex Construction Materials Pacific, LLC, which lowered the threshold for the Board to issue a bargaining order rather than re-run an election when it finds the employer committed unfair labor practices ("ULPs") during the critical period of the election. Previously, bargaining orders were an extraordinary remedy reserved for cases where an employer committed egregious, or "hallmark" violations, such as firing union organizers and threatening job loss or plant closures, that made a free and fair election impossible. As we described in our previous alert regarding the Cemex decision, the Board overruled its previous decision in Linden Lumber. The Board concluded that so-called Gissel bargaining orders, which focused only on the impact an employer's conduct may have on a future election, rather than whether it affected a past election, were insufficient to protect employee rights. Thus, under Cemex, companies could be ordered to bargain if they fail to recognize a union or commit an unfair labor practice after a demand is made and election petition filed.

The NLRB has now released a memo which suggests employers should expect increased litigation as unions seek bargaining orders under the new, lower standard issued in the *Cemex* decision.

The Office of the General Counsel's guidance stated that the *Cemex* Board advised that its new standard would likely result in finding an unlawful refusal to recognize and bargain based on fewer (even one) and less serious (non-"hallmark") ULP violations of Section 8(a)(1) and (3) of the Act, unless the violations are so minimal or isolated that it is virtually impossible to conclude the misconduct could have impacted the election results. General Counsel Abruzzo warned "the Board will consider all relevant factors, including the number of violations, their severity, the extent of dissemination, the size of the unit, the closeness of the election (if one is held), the proximity of the misconduct to the election date, and the number of unit employees affected" in determining whether bargaining orders are appropriate. *Cemex* also requires employers to recognize a new union upon a showing of majority support or file a petition for an election within two weeks of a union asking for recognition. Failure to meet that deadline will result in an order to recognize and bargain with the union.

The General Counsel's reinforcement of the theory that a single ULP may be enough to trigger a bargaining order if proven is likely to provide unions incentive to file more unfair labor practice charges, even over smaller issues, in the hopes of obtaining a bargaining order. Since prior *Gissel* bargaining orders were only issued for serious "hallmark" ULPs such as firing union organizers, unions were less likely to litigate over actions that would not rise to the *Gissel* level.

The concerns over increased litigation are legitimate as NLRB administrative law judges have issued *Cemex*

bargaining orders in two cases, although both were for more "serious" alleged violations, including one case involving a company firing union organizers and another where the order was issued as part of a settlement to resolve dozens of unfair labor practice charges.

To prepare, companies should train managers and supervisors on how to respond to employees who raise questions about unions and voluntary recognition and what to do during a campaign prior to an election. Specifically, management should be re-trained in what may qualify as interrogation or surveillance since *Cemex* could allow for a bargaining order based on these types of violations. A common charge filed by unions during campaigns involves solicitation and distribution of pro-union materials. Companies need to be ready to address these issues in a lawful way. Although it is not clear if the Board will order (or courts will uphold) bargaining orders for lesser, incidental violations, the new standard is much lower than the previously-required "numerous hallmark violations" that was required to impose a bargaining order and employers need to be increasingly cautious to ensure their supervisors are complying with the Act.

To learn how these developments can affect your business, contact a member of Benesch's Labor & Employment Practice Group.

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