CLIENT ALERTS & INSIGHTS

NLRB Revives 1940's Precedent, Reducing Barriers to Representation

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On August 25, 2023, the National Labor Relations Board (NLRB) carried on with its pro-labor march by reviving elements of nearly eighty-year-old precedent. With its decision, Cemex Construction Materials Pacific, LLC, the NLRB has reduced barriers to union representation by reviving elements of, but did not fully reinstate, its 1949 ruling in Joy Silk Mills and overturning its 1971 ruling in Linden Lumber.

Under *Linden Lumber*, employers were able to reject evidence of majority support by way of authorization cards signed by the employees and, instead, could insist on an NLRB-run election. Generally, NLRB-run elections allow employers to campaign against the union drive and challenge the appropriateness of the bargaining unit.

Under the new *Cemex* framework, which is modeled on the 1949 *Joy Silk Mills* ruling, employers must either recognize a new union or file a petition for an election when the union asks for recognition based on a majority of workers showing support for such representation. In other words, employers can no longer reject evidence of majority support by way of authorization cards. The use of authorization cards is advantageous to labor unions, as it prevents employers from campaigning against the union.

The ruling also provides that, if an employer violates federal labor law in the course of an election, the NLRB will order the employer to recognize and bargain with the union rather than order a new election.

In a statement released on Friday, August 25, 2023, NLRB Chair Lauren McFerran said, "[t]he *Cemex* decisio reaffirms that elections are not the only appropriate path for seeking union representation, while also ensuring that, when elections take place, they occur in a fair election environment. Under *Cemex*, an employer is free to use the Board's election procedure, but it is never free to abuse it…" The *Cemex* decision follows NLRB General Counsel Jennifer Abruzzo's stated goal to overturn *Linden Lumber*.

The NLRB's *Cemex* decision serves as yet another example of the NLRB's pro-labor endeavors, this time by partially reviving nearly eighty-year-old precedent and significantly reducing the barriers to union representation.

The decision comes just days after the NLRB issued a final rule replacing Trump-era election rules with the Quickie Election procedures promulgated under the Obama administration (alert here). Taken together, the NLRB's actions this week continue to accelerate the election process and limit employers' ability to share their position with employees prior to a representation election.

To learn how this can affect your business, contact a member of Benesch's

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