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Authors:

Catherine F. Burgett
Richard S. Cleary
John T. Lovett
Jeffrey S. Shoskin

NLRB Gives Historic Boost to Union Organizing

- ***The NLRB will force more employers to bargain with unions based upon signed union cards rather than secret ballot election results.***
- ***"Ambush election" rules return – giving employers little time to respond before a union vote.***

Like an early Labor Day present, the National Labor Relations Board (NLRB) last week upended settled labor law to tilt union organizing rules dramatically in the unions' favor. Under the NLRB's *Cemex Construction Materials* decision, employers must now walk a legal tightrope to protect their employees' right to a secret ballot vote. At the same time, the NLRB issued a Final Rule, scheduled to take effect on December 26, 2023, returning to the Obama-era process of forcing quick NLRB elections ("Ambush Elections"). Consequently, employees are left with little time to learn the full truth about unions.

The specifics of last week's NLRB changes are summarized below. Readers with broad experience responding to union organizing will quickly grasp their significance. Others, however, will benefit from understanding how these changes fit within the dynamics of a union organizing campaign. The impact of last week's "one-two" punch is explained in more detail below. Our detailed explanation addresses how these changes reshape the challenge of remaining union-free and how employers can best face this new challenge.

The Possibility of an Election

Before: Prior to recognizing a union, employers could insist the union win an NLRB supervised secret ballot election to prove a majority of employees want union representation.

Now: Employers must recognize and bargain with a union based upon the union obtaining signed union cards from a majority of employees ("Card Check") **unless** the employer files an "RM" petition with the NLRB asking for a secret ballot election within 14

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days of the union's demand for recognition.

Timeframes for Elections

Before: NLRB election procedures resulted in scheduling elections within about 30 to 40 days after a union (RC) or employer (RM) petition for an election.

Now: NLRB election procedures are truncated to permit elections within as few as 20 days after a union (RC) or employer (RM) petition for an election.

Impact of Election Conduct

Before: If the NLRB finds an employer committed unfair labor practices ("ULPs") placing the fairness of an election in doubt, the NLRB will schedule a new election, as long as a fair re-run election can be held. Only if a fair re-run election cannot be held will the NLRB order the employer to bargain with the union based upon union cards.

Now: If the NLRB finds an employer committed ULPs placing the fairness of an election in doubt, the NLRB will *automatically* order the employer to recognize and bargain with the union, without an election, *based solely upon signed union cards from a majority of employees*.

Understanding the Impact of these Changes

The NLRB's *Cemex* decision and return to Ambush Election rules will fundamentally change the dynamics of union organizing for three reasons:

1. Unions can obtain employee signatures on union cards far easier than votes in a secret ballot election. Unions secure most employee signatures on union cards when the union "sales pitch" is the employee's only source of information about unions. Unions work hard to keep union card solicitations secret from the employer. While the employer remains ignorant of union organizing, union organizers are busy asking their prospects questions like: "What would you most like to change about where you work? Would

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you be willing to sign a union card to get that change?" Employees are ***not*** told the union cannot guarantee positive change or about the burdens of union dues, risk of union strikes, loss of employees' voice to the union, etc. And few employees imagine that by signing a union card they are doing more than expressing a causal interest in the union.

2. Employer efforts to obey the law offer no guarantee against the NLRB setting aside employees' votes in favor of union cards. Most employers work hard to avoid committing unfair labor practices ("ULPs") for both legal and practical reasons. ULPs do much harm to union avoidance efforts, whereas legal compliance always benefits the employer! Nevertheless, responsible employer efforts to comply with the law do not always satisfy the NLRB that a union election loss was "fair" – especially if the union lost by a narrow margin.

Several factors make surviving a union challenge to the "fairness" of an election difficult. The first is the NLRB's legal standard. The NLRB asks whether all the employer's campaign communications and actions met "laboratory conditions" for determining employee preferences. This NLRB test requires "conditions as nearly ideal as possible." The NLRB, however, applies no similar test to union solicitations of union cards.

A second hurdle for employers is the NLRB's approach to the evidence. NLRB fact finders tend to discredit management witnesses as biased. Yet, they consider union witnesses as more credible just because they are willing to testify against their employer.

Third, the NLRB often inaccurately treats honest communications about the negative aspects of union representation as unfair labor practices. To the NLRB, factual information about a union's strike history becomes an employer "threat" to force a strike. Discipline of a union supporter for violating company rules becomes "unlawful retaliation." A footnote in *Cemex* even suggests that employer statements about the inevitable change to the direct employer-employee relationship that comes with third-party representation may now be off-limits. At best, *Cemex* weaponizes rules designed to ensure a "fair" election into a means to forfeit employees'

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opportunity to have their votes count in a secret ballot election. And, in practice, the only way for an employer to know for certain the NLRB will consider an election "fair" may be for the union to win it.

3. *Cemex* combines with the Ambush Election rules to trap employers. Last week's NLRB reinstatement of the Ambush Election rules will act together with the *Cemex* decision to trap unwary employers. For decades, employers could ignore union bargaining demands unless and until the union won an NLRB election. Now, an employer that fails to file an RM petition within 14 days will be legally obligated to bargain with the union without any election. The only way of escape will be to prove the union lacked majority support *at the time of the union's bargaining demand*. And unions will not make bargaining demands unless they have signed union cards to back up the demand. Signed union cards are too easy to get, as described in the first paragraph above.

Nevertheless, unions will rarely wait 14 days to see if their targeted employer files an RM petition. Rather, unions will file their own RC petition in order to set the election date as early as possible. The unions' strategy will be to stampede employers into a quick union vote. Under this time pressure, employers are more likely to make mistakes. Some employers may fail to communicate the disadvantages of unions effectively, resulting in a union election victory. Other employers may make mistakes exposing them to charges of unfair labor practices – mistakes that will give the union an opportunity under *Cemex* to secure an NLRB bargaining order despite the union's loss at the ballot box.

What Should Employers Do?

Forewarned must be forearmed. Employers desiring to maintain union-free status should quickly adjust to last week's new legal reality. In addition to learning the new "rules of the game," employers should consider the following steps:

1. Maintain employees' trust. This is basic, but it must not be forgotten. If an employer loses the trust of a majority of employees, even the best arguments against unionization become useless.

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Employees will not believe them. Maintaining a culture of mutual respect and fair treatment has always been the foundation of union avoidance. Yet, this principle is especially important in the current legal environment where it will be hard for an employer to earn a "second chance" if workers lose confidence their company cares about them.

2. Protect against union cards. *Cemex* and the Ambush Election rules only increase union risk if a majority of employees, in the group the union seeks to unionize, sign union cards. Educating employees not to sign union cards is a primary line of defense. Workers need to understand a union card is a legal document and signing this document may, now more than ever, lead to the transfer of their individual rights to a union. Employees also need to understand what they have to lose under union representation. And the best time to teach these truths is usually *before* their employer observes signs of union activity. Waiting until the employer *sees* signs of union activity will often mean waiting until it is *too late*.

3. Do not be intimidated. Granted, *Cemex* creates a new risk that the NLRB will order an employer to bargain with a union in response to unfair labor practices charges. Yet, the NLRB will *certainly* order an employer to bargain with a union in response to the union winning an NLRB election! Employers cannot permit *Cemex* to stop their efforts to properly communicate the full truth about unions to employees facing an NLRB election.

More steps can, and should, be taken to protect against false allegations of unfair labor practices. Good labor law advice has become more important than ever. Legal compliance always *helps,* not hurts, union avoidance.

Nothing in the National Labor Relations Act, however, restricts employers to a timid response to union organizing. Employees have the right to know the truth, and Section 8(c) gives employers the right to tell them the truth about unions. Employers must clearly and effectively communicate the truth about unions to their employees, or they will lose the many advantages of a direct relationship between employees and the managers who work with them.

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