

ALERTS

The NLRB Sets Forth A New Standard for Recognition of Unions

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On Aug. 25, 2023, the National Labor Relations Board (“NLRB”) released its decision in *Cemex*, setting forth a new standard that shifts the burden of union recognition procedures from unions to employers. Under the new standard, when faced with a union demand for recognition based on a majority support of employee-signed cards, employers are obligated to either voluntarily recognize and bargain with the union, or promptly (generally, within two weeks) file a petition with the NLRB seeking an election. Under the new standard, if the employer commits any unfair labor practice(s) that would warrant setting aside the election, the petition will be dismissed and the employer will be subject to a remedial bargaining order. This order will require the employer to bargain with the union without an election verifying that a majority of the employees have designated the union as their bargaining representative. The NLRB stated that its focus is on a “free, fair, and timely representation election,” and that conducting a new election after an employer’s unfair labor practices have been fully adjudicated can never be a truly adequate remedy. “Simply put, an employer cannot have it both ways. It may not insist on an election by refusing to recognize and bargain with the designated majority representative, and then violate the Act in a way that prevents employees from exercising free choice in a timely way.”

In addition to the *Cemex* decision, the NLRB also announced a new Representation-Case Procedures rule that will fast-track the timeline for election procedures. This rule is set to take effect on Dec. 26, 2023.

The new *Cemex* standard will likely be subject to legal challenges. In his dissenting opinion, the only Republican member of the NLRB argued that the new standard conflicts with well-established Supreme Court precedent, and is non-binding because the employer in *Cemex* had committed such egregious unfair labor practices that the violation and remedy would have been the same under the prior standard. Employers will now be required to abide by the new standard and should be prepared for increased union organizing efforts.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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