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That Was Fast: Judge Orders Cannabis Company to Recognize and Bargain with Union Under "Cemex"

Labor Relations Update on **September 28, 2023**

As we recently discussed, the National Labor Relation Board's ("NLRB") monumental ruling in *Cemex Construction Materials Pacific, LLC*, 327 NLRB No. 130 (2023), is going to have a significant impact on the manner in which employers may respond to union organizing efforts. As the Board held in *Cemex*, if a union demands voluntary recognition based on a showing of majority support, the employer has two choices, which it must exercise within two weeks: Recognize and bargain with the union, or file a RM-Petition, which initiating the NLRB conducting a secret ballot election. If the employer chooses the latter, and commits an unfair labor practice during the election period, the NLRB likely will require the employer to recognize and bargain with the union.

On September 21, 2023, an administrative law judge based in Massachusetts ordered a Massachusetts company that operates several cannabis companies to immediately recognize and bargain with a union composed of employees at one of its locations. The order appears to be the first time that an administrative law judge has used the National Labor Relation Board's ("NLRB") ruling in *Cemex Construction Materials Pacific, LLC*, 327 NLRB No. 130 (2023), to require an employer to recognize and bargain with a union, after the employer was found to have committed unfair labor practices in the run-up to an election.

As we previously reported, on August 29, 2023, the Board's decision in *Cemex* overturned years of precedent, and made it easier for unions to establish representation. In *Cemex*,the Board noted that if union shows majority support and sends a demand letter for representation, employers have two weeks only to file a petition to test if the union has majority status. However, if the union establishes that unfair labor practices occurred that require the results of the election to be set aside, then the Board may issue a remedial bargaining order to require an employer to recognize and bargain with a union. Furthermore, the NLRB held that *Cemex* applies retroactively.

In this case, I.N.S.A. Inc., the cannabis company received a letter signed by 20 out of the 28 employees at one of the company's stores, demanding that the company recognize and bargain with the union. The union then petitioned for an election, which it lost. However, the employer was accused of a number of unfair labor practices during the run-up to the election. Upon investigation, a Regional Director determined that the alleged conduct could constitute grounds for overturning the election's result, and set a hearing date. After the hearing, but before a decision was issued, the NLRB issued *Cemex*. In response, the ALJ ordered for supplemental briefing to occur in light of *Cemex*.

The ALJ held that overturning the results of the election, and issuing a remedial bargaining order were appropriate in this case because the following factors were present: (1) the employer refused the union's request to bargain; (2) at a time when the union had in fact been designated as representative by a majority of employees; (3) in an appropriate unit; and (4) the employer committed unfair labor practices requiring the election to be set aside.

Specifically, the cannabis company discharged both the lead union organizer and a vocal union supporter for minor disciplinary violations, shortly after the union presented the company with its demand letter. The ALJ held that this conduct "clearly was intended to send a message to the other Unit employees who supported or were contemplating supporting the Union that such support could result in their discipline or discharge" and "irreparably harm[ed] the organizing effort and undermine[d] the integrity of the election process."

Thus, according to the ALJ, the appropriate result under *Cemex* was to overturn the results of the election and issue a remedial bargaining order.

Takeaways

The order in *I.N.S.A. Inc.* illustrates one aspect of the *Cemex* ruling that might be overlooked. In addition to the quick decision that employers must now make when presented with a demand for recognition—i.e., deciding whether to voluntarily recognize or file an election petition—employers who choose the latter must act cautiously during this election period. The holding and rationale in *Cemex* appear to broaden the types of unfair labor practices and employer conduct that could lead to setting aside employer victories during the election and issuing *Gissel* bargaining orders. Indeed, while such orders had rarely been issued before, that may not be the case under *Cemex* going forward.

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  Partner
- **Joshua S. Fox**
  Partner