Proskauer

New GC Memo Providing Guidance on Cemex Decision

Labor Relations Update on **November 9, 2023**

As recently discussed, the National Labor Relations Board ("NLRB") issued a major decision this summer in *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130 (2023). The decision gave labor unions the upper hand in the organizing process by requiring employers to take union demands for recognition much more seriously. It also raised the stakes for employers prior to an election, by seemingly lowering the once very high bar for the NLRB to issue a bargaining order.

In its aftermath, the *Cemex* decision left unresolved a number of issues, which NLRB General Counsel, Jennifer Abruzzo, sought to clarify in her November 2, 2023 Memorandum, entitled "Guidance in Response to Inquiries about the Board's Decision in *Cemex Construction Materials Pacific, LLC*". In it, Abruzzo states that the Memorandum's purpose is to assist with the goal of eliminating delays in effectuating employees' expressed free choice of bargaining representative. While the Memorandum does not have the effect of law, it reflects the General Counsel's prosecutorial objectives and foreshadows how we believe the Board's Regional offices will respond in the post-*Cemex* environment.

According to the General Counsel:

- **The *Cemex* standard will apply retroactively without consideration to a claim of a legitimate reliance interest.** While the *Cemex* Board made clear that the decision had retroactive application, the Memorandum highlighted that the standard would retroactively apply to any stage of a case. Additionally, Abruzzo stated that the Board would no longer accept any claim to a legitimate reliance interest by an employer based on an expectation of being able to engage in some degree of unlawful conduct without triggering a bargaining order.
- **The new "*Cemex* order" differs from *Gissel* orders.** The Memorandum reiterated that the current Board will no longer look to a *Gissel* bargaining order (an order issued when the atmosphere has been tainted by an employer to a point where a fair rerun election is unlikely) when determining whether an unfair labor practice during an election period will result in an order to bargain. Now, the focus

is on the employer's conduct prior to the filing of an election petition and in the run-up to the election, and the NLRB is empowered to aggressively issue bargaining orders based on the employer's conduct prior to the election.

- ***Gissel* orders may still be useful to unions.** Abruzzo asserts that there may be other appropriate situations where Regions should seek a *Gissel* bargaining order. For instance, where there was no demand for recognition or an insufficient demand but there was majority status, an RC petition, and an unfair labor practice.
- **There is no obligation to share evidence.** Abruzzo argues that although an employer may ask for evidence of majority support, a union is not obligated to show it. Instead, a third party can be engaged to review evidence or conduct a card-check procedure, but that will not toll the employer's two-week timeline to file an RM petition after receiving a request for voluntary recognition.
- **A demand for voluntary recognition can be made to <u>any</u> agent of the employer.** Notably, the Memorandum emphasizes that a verbal or written demand for recognition can be made to any person "acting as an agent of the employer."
- **If a union withdraws an RC petition before an election, the union can still communicate a demand of recognition to the employer.** The Memorandum explains that even if a union withdraws an RC petition that was the basis of its demand, if the union still wants to be recognized, it can communicate to the employer that it continues to demand recognition. Once communicated, the employer may then promptly file an RM petition to challenge whether there is majority support, or other appropriateness of the unit.
- **Section 10(j) injunctions are encouraged.** Abruzzo directs Regions to continue to seek 10(j) injunctive relief to both restore the status quo following unfair labor practices and prevent remedial failure of a Board order, even though they now have the tool of remedial bargaining orders under the *Cemex* standard.

Remaining Questions Post-*Cemex*? Abruzzo also recognizes that *Cemex* does not address cases where an employer waived its ability to seek a Board-conducted election by 1) reneging on a previous agreement to recognize and bargain with a unit or 2) where an employer has knowledge of the union's majority support. As a result, the Memorandum encourages that these cases be submitted to the Division of Advice.

This new Memorandum is consistent with what we have seen during Abruzzo's tenure. Employers should continue to be aware of the strict enforcement associated with the *Cemex* standard and evaluate any potential issues that can arise during the representation election process.

View original.

Related Professionals

- **Joshua S. Fox**
  Partner