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Red Rock and a Hard Place: NLRB Issues First Post-Cemex Bargaining Order

Labor Relations Update on **June 20, 2024**

On June 17, 2024, the National Labor Relations Board ("NLRB" or "Board") issued its first mandatory bargaining order to an employer after its momentous decision in *Cemex Construction Materials Pacific, LLC* last year. The NLRB ordered Red Rock Casino Resort Spa to bargain with Unite Here, the union which began organizing employees at the casino in 2018 and 2019, after finding that Red Rock committed unfair labor practices in the run-up to the union's 2019 election.

Cemex Decision

As we previously discussed, in August 2023, the NLRB decided *Cemex*, rewriting the rules by which a union can establish exclusive representation of bargaining unit employees, shortening the timeframe for representation elections, and putting greater pressure on employers when faced with union organizing.

As the Board held in *Cemex*:

"an employer violates Section 8(a)(5) and (1) by refusing to recognize, upon request, a union that has been designated as Section 9(a) representative by the majority of employees in an appropriate unit unless the employer promptly files a petition pursuant to Section 9(c)(1)(B) of the Act (an RM petition) to test the union's majority status or the appropriateness of the unit, assuming that the union has not already filed a petition pursuant to Section 9(c)(1)(A)."

Importantly, after a petition is filed, if an employer subsequently "commits an unfair labor practice that requires setting aside the election, the petition (whether filed by the employer or the union) will be dismissed, and the employer will be subject to a remedial bargaining order."

Prior to *Cemex*, under the standard established in *NLRB v. Gissel Packing Co.*, the Board could implement a bargaining order without an election where a union has achieved majority support ***and*** an employer engages in unfair labor practices which " have the tendency to undermine majority strength and impede the election processes." As NLRB General Counsel Abruzzo clarified in her memorandum following the *Cemex* decision, a "*Cemex* order" differs from a "*Gissel* order," which is issued when the election atmosphere has been tainted by an employer to a point where a fair rerun election is unlikely.

Now, under *Cemex*, the Board will focus on the employer's conduct prior to the filing of an election petition and in the period immediately preceding the election, and the Board is empowered to aggressively issue bargaining orders based on the employer's conduct prior to the election.

***Red Rock* Decision**

In *Red Rock*, the Board found that the casino's extensive anti-union campaign involved both threats and the promise of new benefits—both of which violated the National Labor Relations Act ("NLRA" or "Act"). Not only was a *Gissel* bargaining order warranted, but the Board also applied a *Cemex* bargaining order, the first under the new standard.

The Board concluded that (1) Red Rock refused the union's request to bargain; (2) at a time when the union had been designated representative by a majority of employees; (3) in an appropriate unit; and then (4) committed unfair labor practices requiring the election to be set aside.

Takeaways

Cemex is currently under challenge and awaiting oral argument in the U.S. Court of Appeals for the Ninth Circuit. However, although the Circuit Court—and potentially even the U.S. Supreme Court—may alter or vacate the *Cemex* decision, *Red Rock* makes clear that the force of the new *Cemex* standard is fully in play. Employer conduct is under intense scrutiny, both before and after an election petition may be filed, as unfair labor practices are more likely to result in a Board-imposed bargaining order should an employer violate the Act during this critical period.

We will continue to provide updates on this important topic as developments occur.

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Related Professionals

- **Joshua S. Fox**
  Partner