Employers Still Need to Follow Tighter Standard When Unions Request Recognition: A Review of 2 Years of Post-Cemex Decisions

Insights
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Next month marks the second anniversary of a controversial National Labor Relations Board (NLRB) decision that overruled decades-old precedent and made it easier for unions to organize but harder for employers to counter unionization. The 2023 *Cemex* decision has been seen by some as the Biden-era NLRB's effort to pressure employers to voluntarily recognize unions and to open more opportunities for unions to "win" representation rights even after losing elections. While many employers are hoping that *Cemex* will be among the rulings rolled back by the current NLRB, it remains on the books for now – so you should ensure you are familiar with its contours. What does your business need to know about how this controversial decision is being applied by the NLRB's Administrative Law Judges?

Recap: What is *Cemex*?

As we've previously discussed, the Board's 2023 *Cemex* decision created a new framework applicable when a union requests to be recognized as the collective bargaining representative of a specified employee group.

No longer could employers simply refuse to recognize the union while assuring their employees of the opportunity for a secret ballot election. Rather, they now have three options:

- **Concede:** Recognize the union as exclusive bargaining representative based on a claim of majority status (usually based on signed authorization cards which employers do not have an opportunity to independently review).
- **Challenge:** Promptly file (within two weeks of the recognition demand) an "RM" petition for a secret-ballot election to resolve the union's claim of majority status through an election, and/or to challenge the appropriateness of the applicable bargaining unit. Of course, this latter option could still result in a secret-ballot vote if the employer's evidence and/or position on the unit are rejected.
- **Fight:** Defend a refusal to bargain unfair labor practice charge by presenting objective evidence establishing that the union never had a valid majority status to begin with, and potentially testing its certification through a protracted appeals process.

Moreover, *Cemex* set a new standard for remedying unfair labor practices when an employer refuses to bargain following a recognition demand or in connection with a union election. For decades prior to *Cemex*, the common remedy was a "re-run election." However, in *Cemex*, the Board announced that a bargaining order is appropriate when:

- the employer **refuses** the union's request to bargain;
- at a time when the union had in fact been **designated as representative** by a majority of employees;
- in an **appropriate unit**; and then
- the employer commits **unfair labor practices** requiring the election to be set aside.

When Will *Cemex* Be Jettisoned?

Many employers have been waiting for this Biden-era standard to be overturned now that the Administration has changed hands. However, employers should be mindful that at present, the NLRB can take no such action given that it presently lacks a quorum. Even once quorum is ultimately attained, it likely will take time for the Board to be presented with a case in which it could roll back *Cemex*. In sum: employers are stuck with *Cemex* for the foreseeable future and need to ensure they understand how it is being applied by Administrative Law Judges (ALJs).

Recent ALJ Decisions Applying *Cemex*

A survey of ALJ opinions throughout the nation applying *Cemex* reveal mixed results, as summarized below:

BARGAINING ORDER ISSUED

Case: *I.N.S.A., Inc.* (JD-60-23) (Sept. 21, 2023)

Location: Easthampton, MA

Summary: The ALJ concluded a **bargaining order was appropriate** under *Cemex* after finding that the employer refused to bargain with the union after the union demonstrated that 20 of 28 unit employees signed a recognition petition and authorization cards, and the employer committed unfair labor practices relating to discharging the lead employee organizer and disciplining and discharging a vocal union supporter, thereby "irreparably harm[ing] the organizing effort and undermin[ing] the integrity of the election process."

Case: *Big Green* (JD-(SF)-40-23) (Dec. 20, 2023)

Location: Broomfield, CO

Summary: The ALJ found that a **bargaining order under *Cemex* was warranted** "to protect the employees' majority selection of a bargaining representative… given the swiftness, severity and extensiveness of Respondent's unfair labor practices," which included interrogation, threats, and discipline and discharge of several employees who supported the union.

Case: *RCL Mechanical* (JD-40-25) (May 7, 2025)

Location: Raynham, MA

Summary: The ALJ concluded that **a *Cemex* bargaining order was warranted** after finding that a majority of employees signed authorization cards, and that the owners and controller of the company had committed "several unfair labor practices" in demonstrating opposition to the union organizing campaign. This included "interrogation and/or promises of benefits" to certain individuals as well as threats of layoffs and reprisals and creating the impression of surveillance to the entire bargaining unit.

BARGAINING ORDER NOT ISSUED

Case: *Garten Trucking LC* (JD-70-23) (Dec. 7, 2023)

Location: Covington, VA

Summary: The ALJ **declined to issue a bargaining order** under *Cemex* despite the employer's unlawful conduct (telling employees they would have already received a raise if it weren't for the union). The ALJ found that this one unlawful statement did not require setting aside the election results. Rather, the ALJ found that "the Board's standard notice remedy will suffice to address the violation at issue in this case."

Case: *Mattos Hospitality, LLC* (JD-36-25) (April 30, 2025)

Location: New York, NY

Summary: The ALJ **declined to issue a *Cemex* bargaining order** because the employer's violations during the critical period – creating the impression of surveillance, making statements about the ramifications of joining a union and union dues, and soliciting grievances by urging employees to "come forward" at a meeting – were not hallmark violations. The ALJ also declined to order a re-run election because "[i]t is virtually impossible to conclude that the two violations resulted in 'substantial interference' affecting the election results."

Case: *Yapp USA Automotive Systems, Inc.* (JD-52-25) (June 11, 2025)

Location: Detroit, MI

Summary: The ALJ **declined to issue a *Cemex* bargaining order** because the employer's violations (providing a catered lunch and a bowling event with food and beverages) were mitigated by the fact that the employer did not engage in other unlawful conduct, employees were allowed to grab their food and leave, attendance at the bowling event was voluntary, the violations did not involve other more egregious grants of benefits, and there was no evidence of decreased union support or other post-election unlawful conduct.

What Should Employers Do Now?

Unless and until *Cemex* is overturned, this tighter standard presents a very real risk for employers facing union organizing activity. Here are four steps you should take now:

1. Have a Response Plan Ready

If a union demands recognition, time is of the essence. Know in advance whether and how you'll respond and be prepared to file a timely RM petition if you choose not to recognize the union.

2. Train Supervisors and Managers

Most unfair labor practices in organizing campaigns stem from well-intentioned but unlawful comments or actions by frontline managers. Invest in practical, real-world training that helps supervisors understand what they can (and cannot) say or do.

3. Audit Your Current Policies

Review your disciplinary practices, handbook policies, and HR procedures to ensure consistency and avoid inadvertent violations that could support a bargaining order under *Cemex*.

4. Engage Counsel Early

The *Cemex* framework raises the stakes dramatically. Engaging experienced labor counsel at the first sign of union activity can help you avoid missteps that lead to unintended bargaining obligations.

Conclusion

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Related People

Steven M. Bernstein
Regional Managing Partner and Labor Relations Group Co-Chair
813.769.7513
Email

James A. Holt
Partner
412.822.6634
Email

Joshua D. Nadreau
Regional Managing Partner and Vice Chair, Labor Relations Group
617.722.0044
Email

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