

## Alert | Labor & Employment



September 2023

### NLRB Creates New Election Standard

Overturning five decades of precedent, the National Labor Relations Board (NLRB or the Board) in *Cemex Construction Materials Pacific* (372 NLRB No. 130) adopted a new election standard on two key fronts: (1) how may an employer respond to a union’s claim of majority support; and (2) when are employers subject to a bargaining order if an unfair labor practice occurs after a petition is filed but before an election?

Prior to *Cemex*, the rule under Supreme Court precedent was simple: an employer does not violate the National Labor Relations Act (the Act) by refusing to recognize a union simply based on the union’s claim to represent a majority of workers. Presented with only a claim of majority support, an employer could recognize the union, or choose to do nothing—in which case the union could seek an election through the NLRB-supervised process.

Between the filing of an election petition and the vote, historically an employer would have the right to educate employees about what it means to be in a union, consistent with the Act’s “free speech” provisions. During that period, if the union or the employer engaged in unlawful conduct, the NLRB could order a re-run election. However, in cases where the employer was found to have committed egregious unfair labor practices such that a fair election was no longer viable (and provided that the union had also demonstrated majority support of employees), the NLRB could issue a “bargaining order” without a re-run election.

In *Cemex*, the Board tossed out longstanding precedent and ruled that an employer has two options when confronted with a union's claim of majority status: (1) recognize and bargain with the union; or (2) promptly file a petition with the Board seeking an election among employees (an "RM" petition). If the employer fails to act, then it has committed an unfair labor practice. The Board also found that if an employer seeks an election and then subsequently commits a meritorious unfair labor practice that would normally justify setting aside the results of an election, the Board will now *order* the employer to recognize and bargain with the union without even conducting a secret ballot vote.

The *Cemex* decision is at odds with scores of prior decisions over decades expressing the Board's preference for secret ballot elections, and raises more questions than it answers. For example, if an employer exercises its rights under *Cemex* and files an election petition, does the longstanding rule, that a petitioner's unit need only be "an appropriate unit," apply? If the employer seeks a speedy election to minimize the potential for inadvertent violations and the union opposes that timeline, how will the Board respond? Will unions be required to describe the precise scope of the unit they claim to have majority support in and disclose the percentage of such support in order to enable employers to make fully informed decisions regarding union recognition and to account for employees who have not expressed a desire for union representation?

Moreover, the number of bargaining orders—until recently reserved for only the most extreme cases (such as the firing of vocal union organizers) may increase significantly. Employers may well be ordered to recognize a union without an election, potentially against their employees' wishes, based on technical or inadvertent labor law violations. For example, the recent *Stericycle* decision may have made many employer handbooks unlawful overnight. See [August 2023 GT Alert](#). An employer still in the process of updating its policies likely would be at risk of a bargaining order given the body of Board law stating that an unlawful handbook rule is *per se* grounds for setting aside an otherwise fair election, *even where the rule is not shown to have affected the results*.

While the NLRB's new standard is expected to be challenged in the Courts of Appeals, employers may see increased union organizing—including in non-traditional settings such as office and corporate workplaces—and increased utilization of the once-rare bargaining order remedy by the Board. Employers should review work rules, policies, and union awareness practices to ensure compliance with recent Board guidance and be prepared to lawfully and strategically respond to a demand for recognition.

## Authors

This GT Alert was prepared by:

- [Ellen M. Bronchetti](#) | +1 415.655.1300 | [Ellen.Bronchetti@gtlaw.com](mailto:Ellen.Bronchetti@gtlaw.com)
- [Ronald J. Holland](#) | +1 415.655.1300 | [Ron.Holland@gtlaw.com](mailto:Ron.Holland@gtlaw.com)
- [Justin F. Keith](#) | +1 617.310.6230 | [Justin.Keith@gtlaw.com](mailto:Justin.Keith@gtlaw.com)

Albany. Amsterdam. Atlanta. Austin. Berlin.<sup>7</sup> Boston. Charlotte. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Houston. Las Vegas. London.<sup>8</sup> Long Island. Los Angeles. Mexico City.<sup>9</sup> Miami. Milan.<sup>9</sup> Minneapolis. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Portland. Sacramento. Salt Lake City. San Diego. San Francisco. Seoul.<sup>9</sup> Shanghai. Silicon Valley. Singapore.<sup>7</sup> Tallahassee. Tampa. Tel Aviv.<sup>9</sup> Tokyo.<sup>9</sup> Warsaw.<sup>7</sup> Washington, D.C.. West Palm Beach. Westchester County.

*This Greenberg Traurig Alert is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding*

*the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer's legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. ↯Greenberg Traurig's Berlin office is operated by Greenberg Traurig Germany, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. \*Operates as a separate UK registered legal entity. +Greenberg Traurig's Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. »Greenberg Traurig's Milan office is operated by Greenberg Traurig Santa Maria, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ∞Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. ™Greenberg Traurig's Singapore office is operated by Greenberg Traurig Singapore LLP which is licensed as a foreign law practice in Singapore. ^Greenberg Traurig's Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. ☞Greenberg Traurig's Tokyo Office is operated by GT Tokyo Horitsu Jimusho and Greenberg Traurig Gaikokuhojimubengoshi Jimusho, affiliates of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ~Greenberg Traurig's Warsaw office is operated by GREENBERG TRAUIG Nowakowska-Zimoch Wysokiński sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in GREENBERG TRAUIG Nowakowska-Zimoch Wysokiński sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2023 Greenberg Traurig, LLP. All rights reserved.*