NLRB Further Erodes Employer Rights and Promotes Unionization

The National Labor Relations Board (NLRB) continues to drastically change the law and tilt the playing field against employers and in favor of labor unions. Last week, the Biden NLRB issued new rules governing the unionization process that mark a return to the "quickie elections" from the Obama era. This week the NLRB issued a landmark decision in *Cemex Construction Materials Pacific* (372 NLRB No. 130) that seriously undermines both employer and employee rights by disfavoring secret ballot elections.

Under *Cemex*, unions can now more easily secure recognition from an employer based solely on signed union authorization cards, rather than garnering a majority of votes in a secret ballot election among the employer's employees. Union authorization cards are often an unreliable indicator of true employee sentiments because of the potential for signatures being obtained through pressure tactics, card signers having incomplete or inaccurate information, and the lack of a private expression of employee sentiments. The secret ballot election process, a cornerstone of a democratic system of government, is designed to cure this by affording each employee the opportunity to make a private decision about the kind of workplace that employee wants after an opportunity to consider arguments both for and against unionization.

The union organizing process in place for most of the last century has consisted of the following steps:

1. Union organizers solicit the employees to sign union authorization cards demonstrating their interest in potential unionization.
2. To invoke an NLRB election, the union needs signed cards from at least 30% of the employees in an appropriate bargaining unit.
3. A union that obtains signed cards from more than 50% of the employees in an appropriate unit can request the employer to automatically recognize the union as the exclusive bargaining representative rather than going through a formal voting process.
4. An employer has the right to decline a union's request for voluntary recognition, thus allowing the final outcome to be determined via a secret ballot election process conducted by neutral government officials from the NLRB.
5. Absent voluntary recognition, the union must file a petition for an election.
6. The petition initiates a review process to determine the proper scope and composition of the potential bargaining unit, along with the timing and mechanics for a secret ballot election among the employees.
7. During the weeks leading up to an election, both the union and the employer have the right to communicate with employees about the pros and cons of union representation.
8. The election results are determined by a majority of ballots actually cast in the election by the employees.
9. There is an appeal process if the losing party believes that the prevailing party engaged in any rules violations, potentially triggering a re-run election, or, in rare cases, a bargaining order remedy, based on severe violations by an employer, meaning the union is installed as the bargaining representative despite having failed to win the election.

In a split decision, along political party lines, in *Cemex*, the NLRB now holds that whenever a union requests recognition on the basis of signed union authorization cards or files an election petition, an employer faces a significant risk of a bargaining order from the NLRB without the union winning an election and, in some scenarios, without an election being held at all.

Under *Cemex*, after the union demands recognition (step 3, above), the employer must recognize and bargain with the union, or file an NLRB petition for an election within two weeks of the union's demand. If the employer does not file timely for an election (and assuming the union has not also commenced an election proceeding), the employer is at risk of a section 8(a)(5) unfair labor practice (ULP) for declining to recognize the union based solely on the request for recognition. Any defense related to a claim that the union lacks majority status or that the union's bargaining unit designation is inappropriate would be litigated in that ULP proceeding. The current Board law on both of these issues heavily favors the union. See blog post, NLRB NLRB Restores Obama-Era Bargaining Unit Test. Thus, the employer's failure to act promptly when a union demands recognition will eliminate the employees' fundamental right to choose their representative through a secret ballot election.

Moreover, after either party files an election petition, if the employer commits any unfair labor practice that would historically result in setting aside the election and conducting a second election after other remedial actions were implemented, now the election petition will be dismissed, and – rather than re-running the election – the Board intends to order the employer to recognize and bargain with the union. Thus, in any union organizing campaign, it appears that the presumptive remedy for even minor or isolated violations by the employer will be a bargaining order, rather than a re-run election, in cases in which the union obtained signed cards from a majority of employees, without regard to the circumstances under which those cards were obtained. Significantly, the unfair labor practices that could trigger Board-ordered union recognition are not necessarily related to the organizing campaign and could theoretically, for example, arise from the NLRB's recently expanded scrutiny of handbooks and other employment policies. See blog post, NLRB Adopts New Legal Standard for Evaluating Employer Work Rules.

The Board's decision in *Cemex* not only diminishes important employer rights, but it effectively disenfranchises employees by denying them the opportunity to make a personal decision in a private voting booth after considering all relevant information. *Cemex* drastically raises the stakes for any employer missteps when facing union organizing activity. Prior to *Cemex*, bargaining orders were only issued in cases of severe violations, but now such orders may be issued on less significant, or isolated alleged violations, such that a poorly phrased comment by a supervisor, or simply following through on a pre-existing practice and/or a decision made before the organizing activity, later deemed coercive, could result in the waiver of an election and automatic installation of the union.

While the legal path the NLRB has charted in *Cemex* will certainly be challenged in the courts, it may be years before the federal circuit courts, or the U.S. Supreme Court settles the issues. In the meantime, the Cemex principles will be applied by the NLRB to some pending cases, and to future NLRB proceedings. Employers facing union organizing drives – now or in the future – should consider consulting with trusted counsel and ensure they are strategic and proactive in their responses to the new legal landscape created by the NLRB's recent activism.

If you have any questions about the information presented in this blog post, please contact Ray Pascucci, Thomas Eron, any attorney in Bond's labor and employment practice or the Bond attorney with whom you are regularly in contact.

BOND SCHOENECK & KING ATTORNEYS