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One Year In, NLRB's Cemex Rule Lives Up To Its Billing

By **Tim Ryan**

Law360 (August 23, 2024, 7:31 PM EDT) -- A year of litigation under the National Labor Relations Board's eased standard for when it orders employers to bargain with unions over unfair labor practices has shown that the decision is every bit the consequential shift in labor law that experts predicted it would be.

After a year of litigation under the National Labor Relations Board's eased standard for when it orders employers to bargain with unions, some say the Cemex standard has delivered on the goal of discouraging employers from committing labor law violations. (Photo by Sean Gallup/Getty Images)

The NLRB's Aug. 25, 2023, decision in Cemex Construction Materials Pacific LLC **loosened the standard** for when it will issue bargaining orders after finding an employer violated workers' rights leading up to a union representation election, and also altered the process for seeking elections. At the time, experts said the decision marked a major departure from decades of board precedent and **predicted it would make employers** more cautious in responding to unionization campaigns.

Allyson Belovin, a partner at Levy Ratner PC who represents unions, said the new standard so far has delivered on the goal of more strongly discouraging employers from committing labor law violations during union representation elections than prior board law.

"That was the whole point of the decision, which was to make it so that there's a disincentive for employers to engage in unfair labor practices during an election campaign because they might wind up with a bargaining order," Belovin said. "So I think employers are being more careful."

The board's decision in Cemex came in response to NLRB general counsel Jennifer Abruzzo's **bid to revive** a long-dormant labor law doctrine known as Joy Silk Mills. That doctrine, which was board law from 1949 until 1969, held that an employer that refused to recognize a union voluntarily could be ordered to bargain if it did not have a good faith doubt that the union had majority support among the workers. The board would take any labor law violations that the employer committed after the union's recognition demand as evidence that it lacked such good faith doubt.

In Cemex, the NLRB stopped short of restoring the Joy Silk standard, moving away from the requirement that an employer have a good faith doubt as to the union's majority support before seeking an election. Instead, under Cemex an employer faced with a recognition demand must either recognize the union or file a petition for a union representation election, generally within two weeks.

If an employer goes on to commit labor law violations leading up to a union election that would warrant setting aside the vote, the board will order it to bargain with the union.

Steven Bernstein, co-chair of the labor relations group at the management-side firm Fisher Phillips LLP, said his initial impression of the decision was that it was a "sea change" that ranks among the most significant shifts in board precedent in his career. That holds true a year later, he maintains.

"While I recognize that the Joy Silk doctrine in its pure form is not what we're dealing with, a year later this is beginning to look a lot like it," Bernstein said.

Giving employers an obligation to file a petition for a union election is a departure from previous practice, when unions were overwhelmingly the party that filed for elections with the board. Employer-filed petitions have spiked in the wake of the Cemex decision, going from 62 in fiscal year 2023 to 281 in just the first half of fiscal year 2024, according to board data from April, though unions are still the most common filer.

David Rosenfeld, a shareholder at Weinberg Roger & Rosenfeld who represents unions, said that even with Cemex's emphasis on employers filing election petitions, it is still generally best practice for unions to file their own petitions rather than wait for the employer. An exception to that is if the employer has been cooperative and indicated it would agree to a quick election, Rosenfeld said.

The barrier for a bargaining order under Cemex appears to be significantly lighter than under the long-standing Gissel doctrine, which draws its name from a 1969 U.S. Supreme Court case called NLRB v. Gissel Packing Co. Under Gissel, the board will order an employer to bargain if it committed labor law violations during an election campaign severe enough to prevent a fair rerun from taking place.

The NLRB has so far only **issued one Cemex bargaining order**, in a June case involving Las Vegas casino operator NP Red Rock LLC. However, the board's analysis of the facts of the case as applied to Cemex was limited, and it also issued a Gissel bargaining order in the case, which attorneys have said limited its usefulness for clarifying the contours of the new standard.

In addition to the Red Rock decision, there have been three rulings from administrative law judges recommending bargaining orders under Cemex.

Rosenfeld said it has been a "slow process" for Cemex-related litigation to filter up to the board, made worse by the limited resources the board is operating under that have strained the regional offices that process cases.

Dan Altchek, a partner at Saul Ewing LLP who represents employers, said there are open questions about exactly how much more likely a bargaining order is under Cemex than it was under Gissel. He said more cases will be needed to show what severity of violation will trigger a Cemex order and how the board will treat cases with many instances of more minor violations.

"There's this big gap of how minor and or how many infractions would it take for an election to be set aside under Cemex," Altchek said.

But even without that clarity, attorneys said the decision is having a noticeable impact on election campaigns.

Belovin said the consequences of violations were relatively minor under pre-Cemex law, and so some employers were willing to take more risks knowing that they would likely only face a rerun election somewhere down the road.

"It's hard to know exactly what to attribute this to, but I think I'm seeing less brazen unfair labor practices," Belovin said. "Whereas before employers — and not all employers, but many employers — felt free to commit blatant unfair labor practices because the consequences were so small."

Altchek agreed that Cemex has had a deterrent effect, saying employers aware of the harder line Cemex draws are being less aggressive with some tactics they might have been comfortable using under an earlier standard. For example, employers that have a legitimate reason to fire a worker who was a vocal union supporter might hold off on doing so, mindful that it might put them at risk of a bargaining order under Cemex, Altchek said.

"It appears to set a lower bar for having an election set aside, and so there's been some heightened caution by employers in the way that they approach election campaigns to avoid the types of violations that could result in a Cemex order post-election," Altchek said.

Bernstein said he would characterize the effect of the decision as making employers act more proactively if they want to avoid bargaining orders, putting a greater emphasis on training supervisors and ensuring they are prepared

to respond lawfully to unionization efforts.

"Training supervisors has always been important in the field of labor relations," Bernstein said. "Perhaps its importance has never been greater than it is today."

The decision might pose a challenge, however, for smaller businesses that might not have the resources to take advantage of that training or keep up to date on the specifics of the legal shift, Bernstein said.

There are some uncertainties about the future of the Cemex decision, as the company has appealed the decision to the Ninth Circuit and oral arguments are scheduled for October. But even with the looming court fight, Altchek said it would be risky for employers to bank on a court decision disturbing the board's standard.

"I think most employers are not gambling on Cemex being overturned; there's too much uncertainty when it comes to that," Altchek said.

The coming presidential election might provide some uncertainty for the future of Cemex, and Rosenfeld said some employers were likely betting on a November win for former President Donald Trump and a quick shift in board makeup that could reverse the Cemex precedent. But Rosenfeld said recent polling swings in favor of Vice President Kamala Harris give some hope that Cemex will remain board law for the foreseeable future and the decision will have a larger deterrent effect if it becomes clear it won't be quickly reversed with a Trump win.

"I think it's fair to say Cemex will have more of an effect because the board is going to maintain it for another five, six years easily," Rosenfeld said.

--Editing by Bruce Goldman and Nick Petruncio.