



IRI ALERT

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Employers Must Prepare Now to Avoid Card Check Recognition and Bargaining Orders in New Sweeping National Labor Relations Board Changes

Summary of New Rules

Key Points: *Cemex Decision*

- Unions can try to use a “card check” process to side-step NLRB secret ballot elections
- A union can claim it has support for unionization from a simple majority (50% + 1) of a proposed bargaining unit and demand employer recognition. Employers have three options:
 1. Recognize the union and begin the bargaining process
 2. File within **two weeks** an RM petition for an election
 3. Ignore the union demand and risk a bargaining order without a secret ballot election
- If an employer files a petition opting for an NLRB election for its employees and commits any unfair labor practice (ULP), the NLRB could dismiss the RM petition (or overturn an election a union has lost) and require the employer to voluntarily recognize the union and begin bargaining

ACT NOW: Three Immediate Employer Actions

- 1 Labor Training for Leaders** – Managers and supervisors must be fully trained on labor organizing fundamentals, know the law, and be prepared to quickly act. Whether new or refresher training, leaders must know the new rules and focus on compliance.
- 2 Union Vulnerability Assessment (UVA)** – It is imperative that employers know their vulnerabilities and be prepared for new organizing tactics by labor unions. UVAs give leaders a better insight on what to expect.
- 3 Labor Relations Readiness Assessment** – Organizations must understand their current state of labor readiness. This assessment will provide recommendations to develop a road map for prioritizing and taking expedited, appropriate action to minimize identified risks.

The National Labor Relations Board (NLRB) recently changed the Board's election process and reinstated expedited or "quickie" elections. The Board also overturned decades of federal labor law precedent with its decision in *Cemex Construction Materials Pacific, Inc.*, which restored a modified version of the *Joy Silk* standards (see sidebar) making card recognition and bargaining order procedures a way to unionize employees. While the new expedited election rules won't take effect until December 26, 2023, the *Cemex* decision is in effect now and being applied retroactively. These changes mean that employers have less time to train managers, educate employees, and take legal action before an election is ordered.

It is possible the *Cemex* decision will be challenged in federal court, but that process and a resolution could take years and judges often defer to federal agencies' rulemaking and decisions except under certain circumstances, making it difficult to reverse the Board's new initiatives. In the meantime, unions have already begun leveraging the decision. Within days of the *Cemex* decision, Trader Joe's United, which lost an election last April, asked the NLRB to issue a bargaining order in that case under *Cemex*.

For the foreseeable future, employers should focus on short- and long-term measures to protect their organizations by educating employees, training managers, and addressing issues. The most effective approach to minimize a union's success in organizing an employer's workforce is ensuring employees have the facts, promoting an engagement mindset to address employee concerns and questions, and prepare your workforce to ask union organizers the details about claims they make in the organizing process. Below are steps employers should take in the short-term (the next 90 days) as well as over the next six (6) to 12 months to prepare for the post-*Cemex* environment.

Summary of New Rules

Key Points: 2023 Final Rule Regarding Speeding Up Representation Elections

- Effective for petitions filed on or after December 26, 2023
- Quickens the petition-to-election timeframe by requiring NLRB Regional Directors to schedule elections as soon as practically possible and reducing and/or eliminating process steps (e.g., removes the 20-business day waiting period between the issuance of a decision and direction of election and the election)
- Notices of Petition must be posted within two (2) business days
- If parties do not agree on the petitioned-for bargaining unit, the NLRB's Regional Office will conduct a pre-election hearing to determine whether an election should be conducted
- The non-petitioning party must submit a Statement of Position ~3 days sooner than under the 2019 rule
- Hearings will be conducted ~10 days sooner than under the 2019 election timeline
- Petitioners [unions] will respond only to the non-petitioning party's Statement of Position at the start of the pre-election hearing
- Written pre- and post-Election Hearing Briefs will be allowed only if the Regional Director or hearing officer determines they are necessary
- Voter eligibility and inclusion issues and other objections would be heard after the election unless they are determined to be moot

Below are short and long-term strategies for employers to consider.



Short-Term Steps

- » Develop a written philosophy statement regarding your organization's position on unions and distribute in new hire orientation, employee handbooks, newsletters, and websites, etc.
- » Prepare a playbook in the event a request for recognition is made by a union. Prepare an expedited campaign plan and sample themes and messages for a multi-phase campaign that can be shortened or lengthened for the allotted election period.
- » Conduct a supervisory status analysis to determine which individuals, managers, and supervisors are under the National Labor Relations Board's definitions so your organization does not inadvertently violate the NLRA when it conducts training or asks managers and supervisors to help educate employees about your position on unions and their legal rights.
- » Train managers and supervisors and role-play how to recognize early warning signs of union activity and to whom to report the activity as well as how to engage in legal, effective conversations with employees about unions.
- » Educate employees about union organizing tactics and promises unions may use to try to convince employees to sign physically or electronically a union authorization card or petition for representation and the importance of protecting their signature and other personal information.
- » Require every manager and supervisor to develop and practice their personal statement regarding unionization.
- » Develop a process to be alerted of NLRB election petitions being filed near your location.
- » Develop a robust digital media intelligence plan to be informed of union organizing tactics and employee unrest in your industry and area.
- » Train security staff on how to legally enforce employer property rights.
- » Review all policies and procedures to ensure they will not be construed to violate employees' NLRA Section 7 rights and trigger unfair labor practice charges.



Long-Term Steps

- » Conduct employee opinion surveys twice a year along with pulse surveys throughout the year to be aware of low employee satisfaction areas/locations.
- » Measure employee satisfaction and tie it to individual managers for promotional consideration.
- » Up skill corporate communication staff on how to effectively and legally communicate within the nuances of labor relation laws.
- » Develop a readiness response team who can support local management and respond quickly when early warning signs are reported.
- » Develop a Statement of Position regarding supervisor status and preferred bargaining unit so you are prepared for expedited election rules.
- » Develop accurate voter eligibility lists per NLRB requirements.
- » Conduct regular market analysis on compensation and benefits to support job evaluation and pay structures.
- » Keep management labor skills sharp with regular updates (at least quarterly) and to provide labor and NLRB updates.

Reach Out to Discuss Your Concerns:

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