Labor and Employment Alert | The National Labor Relations Board ("NLRB") Makes it Easier to Unionize

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Attention businesses with non-union employees. The National Labor Relations Board ("NLRB") recently and dramatically changed when it will require you to recognize and bargain with a labor union. Previously, a business had to recognize a union either only after losing a NLRB-conducted election or voluntarily agreeing to a card count and losing the count or after assuming operations as a successor business and hiring a majority of the predecessor's workforce. These basic rules had been in place for at least the past fifty years.

In Cemex Construction Materials Pacific LLC, ("Cemex") the NLRB changed the rules to now provide that if a union claims that a majority of employees in an appropriate bargaining unit desire to be represented by the union, an employer has three choices: It can agree to recognize the union; within two weeks of the union demand it can ask the NLRB to conduct an election; or it can do nothing.

Let's unpack the consequences of each choice, starting with the do-nothing option. (A failure to timely request an election is tantamount to do-nothing.) The business will be required immediately by law to recognize and bargain with the union. The business can refuse to bargain, the union will most likely file an unfair labor practice ("ULP") charge, and the business will have to rebut the ULP charge by demonstrating in an administrative hearing that the union lacked majority support at the time of its demand. In addition to the risk of not being able to prove who actually supported the union, a business takes on the additional risk of committing additional ULPs by changing the terms and conditions of employment following the union's demand.

There are also risks if the business requests the NLRB to conduct an election. If, during the period from election request to election, the business commits any ULP "that make a fair election unlikely," the election results will not be binding and the NLRB

will instead order the business to recognize the union. Cemex did not elaborate on the type or extent of ULPs that would result in such an order, and businesses therefore bear the risk of uncertainty. Just within the past year, the NLRB has found ULPs where a business included non-disparagement, non-disclosure and confidentiality provisions in a separation agreement; has held that standard employee handbook provisions pertaining to personal conduct, conflicts of interest, and confidentiality of harassment complaints will constitute ULPs if they restrict an employee's right to engage in concerted conduct; and has made it easier to prove that disciplining an employee is a ULP, which takes on special significance when the discipline is meted out while an election is pending.

Finally, voluntarily recognizing the union also carries risks. The scope of employees to be represented may be unworkable or include supervisors, and the NLRB does not offer businesses an easy-to-access divorce process.

Overlaying the uncertainty for businesses is the fate of Cemex. Within days after the decision, the employer sought federal appellate review of the decision and more recently the NLRB declined to reconsider its decision. Given the dramatic change in the law, an appellate court may refuse to enforce Cemex or may order the NLRB to provide a better justification for the change.

In sum, it is incumbent on businesses to plan for union recognition demands before they are made and to stay on top of this fast changing area of the law.

For questions regarding this alert, or with any other labor and employment issue, please contact:

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