

Can my employees really unionize without an election?

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Following a landmark NLRB ruling last year, the answer is yes. For the last several decades, the process for union recognition of an employer's workforce was largely unchanged. In 1974, the United States Supreme Court decided

Linden Lumber Div., Summer & Co. v. NLRB, which provided the conditions under which employer had to recognize a union. Under the Court's decision in *Linden Lumber*, a majority of employees had to elect a union through an election, win which the employer could campaign, before the employer had to recognize and bargain with the union. Since it is an unlawful employment practice for an employer to refuse to bargain with a legitimate union representative, the Court's decision in *Linden Lumber* gave employers an important bright line for when their statutory obligation to recognize, and bargain with, a union kicked in.

However, in *Cemex Construction Materials Pacific*, the Board reversed course, and held that there are circumstances where an employer might be required to recognize a union, regardless of whether the Board has conducted a formal election of the union. Under *Cemex*, when an employer is presented with a demand for union recognition that the union claims is supported by a majority, the employer must do one of the following: (1) immediately recognize the designated union representative, or (2) file a petition to test the union's majority status, or the legitimacy of the unit used to measure the majority status. If an employer opts for the latter option, the employer can file a petition that states the grounds for their good-faith belief that the claimed union does not have majority support. After receiving an employer's petition, the Board will investigate the employer's claims and may require a Board election if it finds a genuine question of representation. In *Cemex*, the Board noted that this is a reversal of the typical process, which usually

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requires unions to petition the Board for certification of a union, not the other way around.

Employers that choose to file a petition with the Board should be aware that the Board's decision provides harsh punishments for employers that are charged with unlawful employment practices ("ULPs") in the run-up to an election. Historically, if a union purported to receive majority support, and a ULP charge is substantiated before the Board election, the remedy imposed by the Board was either a cease-and-desist order to stop the unlawful misconduct, or an order to re-run the election. As an extreme measure, the Board could issue a remedial bargaining order to force the employer to recognize the union, but only if it was proven that the employer's action likely precluded a future election from being fair. In practice, this was a heavy burden to satisfy, and the Board rarely issued remedial bargaining orders.

In *Cemex*, the Board overturned this standard, and held that an employer will be subject to a remedial bargaining order if the employer is found to have committed *any* ULP in the lead up to an election, so long as the violation would warrant the election being put aside. The Board reasoned that a delay in representation amounts to a lack of representation, and that the harsh new standard would better deter employers from committing unlawful employment practices that might prejudice an election. This standard is a pivotal departure from the Board's past decisions. As Board Member Kaplan noted in his dissent, if a ULP charge is ultimately substantiated after the filing of a petition, "the petition will be dismissed, employees will lose the right to vote in a secret-ballot election, and the employer will be found to have violated [federal law] and ordered to recognize and bargain with the union." Accordingly, employers that decide to test a union's majority by filing a petition should act quickly to review their policies and procedures, and train supervisory employees to ensure that no inadvertent practice occurs that could lead to a ULP in the run-up to an election. As practitioners in this area can confirm, during elections some unions intentionally file speculative ULPs as insurance in the event the union loses the election, so any conduct that could even potentially trigger a ULP should be discussed in-depth with counsel.

The Board's recent decision will certainly add to the pressure employers feel in trying to comply with federal labor laws, especially given the current labor market. Despite that, having a plan for potential workforce unionization can help mitigate the associated risks.