Post-Labor Day Hangover Hits Businesses Hard: NLRB Issues Rules and Decisions Dramatically Affecting Elections; More Trump-era Reversals, and a Few Surprises

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The NLRB gave unions an early set of Labor Day presents last week in one of the most prodigiously productive weeks of the year. The Board, in a span of 7 days, issued six (6) published decisions and adopted one (1) Final Rule. The impacts on employers are predictably, great and small. There's much to unpack, so here's a quick overview.

August 24, 2023: Adoption of Final Rule amending procedures for representation elections; restoring 2014 "quickie" election schedule. See below for detail.

August 25, 2023: *Cemex Construction Materials Pacific LLC* announced a new framework for determining when employers are required to bargain with unions without an election. See below for detail.

August 28, 2023: *Intertape Polymer Corp* decision "clarifies" that either direct or circumstantial evidence can support a finding of non-union "animus", and that there is no requirement that the animus be directed toward the employee's protected activity or toward the employee him or herself.

August 30, 2023: In *Wendt Corporation* and *Tecnocap, LLC*, companion decisions overruled a 2017 Board decision in *Raytheon Network Centric Systems* and limited an employer's ability to make unilateral changes to terms and conditions of employment during a contractual hiatus or during negotiations of an initial contract.

August 31, 2023: *Miller Plastic Products, Inc.* overruled *Alstate Maintenance, LLC* (2019), and reinstated the *Meyers Industries* (1986) "totality of circumstances" test over a "factors list" test to determine concerted and protected activity.

August 31, 2023: *American Federation for Children, Inc.* reversed *Amnesty International* (2019) and returned to prior precedent that found "concerted activity" by statutory employees on behalf of non-employees is protected when it can benefit the statutory employees.

The week's activity can be described as "predictable" as it relates to the Board's decisions on August 28 through the 31, continuing its transparent trend of reversing Trump-era Board decisions in favor of Obama and earlier standards. The Board delivered its biggest Labor Day gifts to unions in the form of the tandem Final Rule and Board decisions issued on August 24 and 25 respectively. It is these decisions that mean the most to employers and for which the balance of this alert will focus:

The Final Rule Reinstating the Ambush Election Schedule

The Board uses the "direct" rulemaking process (no notice and comment period) to reinstate the Obama era "ambush" or "quickie" election scheduling mechanisms that shorten employer response times and limit the ability to secure extensions for required submissions. The bottom line is the changes go into effect on December 26, 2023, so employers will need to be ready. The changes are summarized below:

Click here to view a larger version of the chart.

Employer Takeaway: Employers need to know that an RC Petition will now operate on an extremely compressed schedule and they will need to be prepared to be very agile if presented with an RC Petition. Supervisors should be immediately trained on the NLRB election process in order to detect organizing activity and respond appropriately.

Cemex Construction Materials Pacific LLC

The Board established a new framework for issuing Remedial Bargaining Orders. In accordance with Board precedent since 1971, employers were permitted to refuse to bargain with a union that presented what appeared to be evidence of majority status, unless and until a secret ballot election was held. *See, Linden Lumber Division Summer & Co*. 190 NLRB 718 (1971). Remedial Bargaining Orders, since *NLRB v. Gissel Packaging Co*. 395 U.S. 575 (1969), were an extremely rare remedy which required the union to show that an employer engaged in "outrageous" and "pervasive" unfair labor practices ("ULPs") that decreased employee support for the union and impeded the election process.

In *Cemex*, the Board's specific holding was that any ULP by the employer during the "critical period" between the filing of the RC Petition and the election is sufficient to set aside the election and result in a Remedial Bargaining Order. The Board went further, however, and effectively flipped the burden of the election onto the employer. The Board reasoned that when presented with evidence of majority status, the employer now has three (really, two) options:

- Recognize the union; or
- File its own petition requesting an election which must be held within two (2) weeks of the union's demand for recognition in order to test the majority status/appropriateness of the bargaining unit; or
- Neither of the above and defend a ULP for refusing to bargain in good faith and face the potential remedy of (i) a Remedial Bargaining Order; (ii) which applies retroactively to date of demand for recognition.

Employer Takeaway: Union organizers will likely not bother with their own RC Petitions and resume the practice of collecting signature cards to present to the employer in the Demand for Recognition, thereby putting the employer in the position to act very quickly to file an RM Petition to seek an even quicker election. Consequently, employers need to be ever more vigilant about detecting union-organizing activity. The Labor Law Practice Team at Barley Snyder provides a "Rapid Response" Training Module to employers in order to be prepared for a union election campaign. Please contact Partner Kevin Moore or any member of Barley Snyder's Labor Law Practice Team for further information.

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