LABOR AND EMPLOYMENT LAW

CALIFORNIA LAWYERS ASSOCIATION

presents

40th Annual Meeting of the Labor and Employment Law Section

Board But Not Boring – The NLRB Affects Your Workplace In Unexpected Ways

Friday, July 19, 2024
10:45 a.m. – 12:00 p.m.

Speakers:

Lisl Soto

Tom Lenz

Danielle Pierce

Conference Reference Materials

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Board But Not Boring – The NLRB Affects Your Workplace in Unexpected Ways

Danielle Pierce, National Labor Relations Board, Region 31
Lisl Soto, Weinberg, Roger, and Rosenfeld
Thomas A. Lenz, Atkinson, Andelson, Loya, Ruud & Romo

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Cemex Construction Materials Pacific, LLC, 372 NLRB No. 130 (2023)

"*Cemex Construction Materials:* Is the Future of Union Organizing in the Cards?", *California Labor & Employment Law Review*, Vol. 37, No. 6 (Nov. 2023).

The Board adopted a new standard to apply where a union **claims majority support** among a unit of employees and **demands that the employer recognize and bargain** with it as the exclusive collective-bargaining representative of those employees. In these circumstances, the employer has 14 days to file an election petition or recognize the union. If neither occurs, the union may file an unfair labor practice charge.

An employer violates the National Labor Relations Act (the Act) when it refuses to recognize a union that has made a demand for recognition and that enjoys majority support.

An employer may also be subject to a remedial bargaining order if it commits unfair labor practices that would invalidate an election, where the union has also made a demand for recognition.

Cemex Violations

Under *Cemex*, an employer may lawfully:

1. Agree to recognize a union that enjoys majority support;
2. Within two weeks, file an RM petition to test the union's majority support and/or challenge the appropriateness of the bargaining unit; or
3. Await the processing of a previously-filed RC petition.

If the employer neither recognizes the union, nor files an RM petition within two weeks, the union may file an unfair labor practice charge alleging a violation of Section 8(a)(5) of the NLRA.

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Cemex Bargaining Orders

Even if an election petition is timely filed, if an employer commits unfair labor practices during the critical period after the demand for recognition, it may result in the imposition of a remedial bargaining order under *Cemex.*

A bargaining order is appropriate when the ULPs committed would invalidate an election and require it to be set aside.

The Board will rely on the prior designations of representative by a majority of employees (i.e. authorization cards or similar designations) to establish majority support and will issue an order requiring the employer to recognize and bargain with the union from the date the union demanded recognition. Any pending petition(s) will be dismissed.

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Post-*Cemex* Decisions and Clarification

General Counsel Memorandum 24-01 (Revised), *Guidance in Response to Inquiries about the Board's Decision in Cemex Construction Materials Pacific, LLC*

Provides the GC's position on various procedural and substantive issues raised by the Board's decision.

***Spike Enterprise, Inc.*, 373 NLRB No. 41 (April 10, 2024)**

Board clarified that it will only consider a *Cemex* bargaining order if a violation of Section 8(a)(5) of the Act is alleged.

***Auto-Chlor System of Washington, Inc.*, 373 NLRB No. 63 (May 16, 2024)**

Board held that Regional Director erred in revoking a certification of results and dismissing a petition pursuant to a complaint seeking a *Cemex* bargaining order. Board reinstated the petition and certification, pending litigation of the *Cemex* allegation.

***NP Red Rock LLC d/b/a Red Rock Casino Resort Spa*, 373 NLRB No. 67 (June 17, 2024)**

Board imposed a *Cemex* bargaining order, in addition to a more traditional *Gissel* bargaining order, where the employer violated the Act during the critical period by promising, announcing or granting benefits to employees, threatening to withhold or withdraw benefits, making statements of futility, threatening employees with job loss, interrogating an employee about their union sympathies, posting employee photographs on an antiunion website without consent, issuing discriminatory disciplines and work assignments to union supporters, and failing to recall an employee from layoff because of their union activity.

Who is an Employee under the NLRA?

In *The Atlanta Opera, Inc.*, 372 NLRB No. 95 (2023), the Board found that makeup artists, wig artists, and hairstylists were employees under the Act, and revised its standard for determining when workers are independent contractors not covered by the Act.

Overruled *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019) and reinstated *FedEx Home Delivery*, 361 NLRB 610 (2014).

Independent Contractor Status

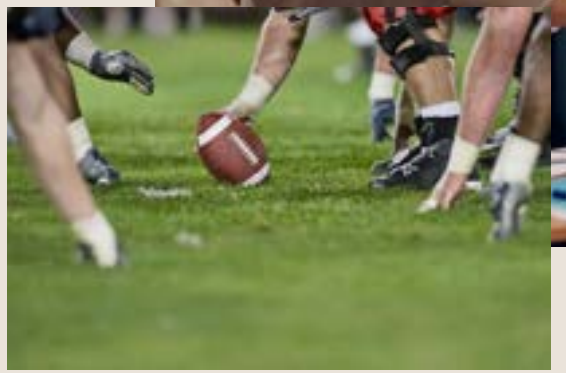
The Board continues to apply common-law agency principles, to consider the factors identified in the Restatement (Second) of Agency, and to consider whether putative contractors possess "significant entrepreneurial opportunity for gain or loss", e.g. whether they can work for other companies, hire their own employees, or have a proprietary interest in their work.

However, in *The Atlanta Opera*, the Board held **that entrepreneurial opportunity is not afforded any greater weight or emphasis over the common-law factors**, and that the Board will only give weight to evidence of actual—not theoretical—entrepreneurial opportunity, while also evaluating any constraints placed by a company on the individual's ability to pursue such opportunity.

Student Workers and the NLRA

For the last several years the Board has held that students who also perform work for private colleges and universities may be considered employees under the Act.

The Board has found student assistants, including both graduate and undergraduate students, to be employees. This could apply to other classifications of student workers, including those who work for non-profit, private educational institutions.



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**[A] graduate student may be both a student *and* an employee;
a university may be both the student’s educator *and* employer.”**

***The Trustees of Columbia University*,**
364 NLRB 1080, 1086 (2016)

Players at Academic Institutions

***Northwestern University*, 362 1350 (2015)**
The Board avoided the issue of whether Northwestern University's football players who receive grant-in-aid scholarships are employees within the meaning of the Act, by declining to assert jurisdiction, based on the facts at that time.

***Trustees of Dartmouth College*, Case 01-RC-325633 (Feb. 5, 2024)**
Regional Director issued a Decision and Direction of Election finding that men's varsity basketball players at Dartmouth College are employees under the meaning of Section 2(3) of the Act, and that it is appropriate for the Board to assert jurisdiction. The Regional Director found that Dartmouth had the right to control the work performed by the players and that the players performed that work in exchange for compensation.

The players voted 13-2 in favor of union representation.

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Players at Academic Institutions

General Counsel Memorandum, 21-08*, Statutory Rights of Players at Academic Institutions (Student-Athletes) Under the National Labor Relations Act*

- The GC does not use the term "student-athletes," as that term has been historically used to deny players their workplace rights.
- Reinstates an earlier memo GC Memo 17-01, issued in response to the Board's decision in *Northwestern University.*
- The conclusion that players at academic institutions are employees is supported by the statute, by the Board's expansive interpretation of the definition of employee in *Columbia University* and *Boston Medical Center*, and common law agency rules.
- Misclassification of players as "student-athletes" and leading them to believe they are not protected by the Act has a chilling effect on Section 7 activity and violates Section 8(a)(1) of the Act.
- This is currently being litigated before an ALJ.

Protected, Concerted Activity (PCA)

Why does it matter who is or isn't covered by the Act?

With or without a union, employees protected by the Act are afforded the right under Section 7 to engage in, "other concerted activities for the purpose of collective bargaining or other mutual aid or protection…"

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Examples of Protected, Concerted Activity

- Employees discussing wages with coworkers.
- An employee raising safety concerns with management on behalf of a group of employees.
- Employees circulating a petition asking for bettering working conditions, or for improved working conditions for non-employees, e.g. unpaid interns.
- Raising work-related group complaints directly with the employer or with a government agency, e.g. OSHA.
- Engaging in a group work stoppage to protest unsafe working conditions.

Employee Misconduct while Engaged in PCA

In *Lion Elastomers, LLC,* 372 NLRB No. 83 (2023), the Board returned to setting-specific standards to apply where employees are disciplined or discharged for misconduct that occurs while engaged in protected activity.

- *Atlantic Steel Co.,* 245 NLRB 814 (1979) – governs employees' conduct toward management in the workplace.
- Totality-of-circumstances, see e.g. *Pier Sixty LLC*, 362 NLRB 505 (2015)– governs social media posts and most conversations between employees in the workplace.
- *Clear Pine Mouldings, 268 NLRB 1044, 1046 (1984), enfd. 765 F.2d 148 (9th Cir. 1985), cert. denied 474 U.S. 1105 (1986)* – governs picket-line misconduct.

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Home Depot USA, Inc., 373 NLRB No. 25 (2024)

- Employee wore a Black Lives Matter ("BLM") marking on their apron/uniform.
- This occurred in the context of that employee and their coworkers engaging in several instances of PCA protesting racial discrimination in the workplace.
- Employee was told to remove the BLM marking or be sent home, because it violated the company's dress code.
- The employee refused, and subsequently resigned.

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Home Depot USA, Inc., 373 NLRB No. 25 (2024)

Home Depot USA, Inc., 272 NLRB No. 25 (2024)

- The Board held that the employee's insistence on wearing the BLM markings was PCA because it was a **logical outgrowth** of earlier concerted complaints about racial discrimination and it was for the **purpose of mutual aid and protection** in that context.
- The Board noted that wearing the BLM phrase at the workplace, alone, could be protected, but did not reach that issue.
- The Board also found that the Employer's facially lawful dress code was **unlawfully applied to restrict Section 7 activity**, and that the employee was unlawfully **constructively discharged**.
- The Board rejected the Employer's defenses that there were special circumstances to justify the prohibition on BLM markings, and that requiring the Employer to permit the display of BLM markings violates the First Amendment.

Employee Handbooks

A work rule or policy is presumptively unlawful if an employee could **reasonably interpret it to restrict or prohibit Section 7 activity**.

An employer may rebut the presumption by proving that the rule advances a **legitimate and substantial business interest**, which cannot be advanced under a more **narrowly tailored** rule.

Stericycle, Inc., 372 NLRB No. 113 (2023)

Non-compete and severance agreements

***McLaren Macomb*, 372 NLRB No. 58 (2023)**

- Severance agreements are unlawful if they contain a **waiver or forfeiture of statutory rights** as a condition of receiving severance benefits.
- Even the mere proffer of the agreement is unlawful.
- In *McLaren Macomb*, the severance agreement contained **overly broad non-disparagement and confidentiality provisions**.

The GC has taken the position that non-compete, no solicitation, and no poaching provisions, among others, may interfere with employees' exercise of Section 7 rights (See **General Counsel Memorandum, 23-08, "Guidance in Response to Inquiries about the McLaren Macomb Decision"**).

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Non-compete and severance agreements

General Counsel Memorandum 23-08, "Non-Compete Agreements that Violate the National Labor Relations Board

The GC announced her position that the **proffer, maintenance, and enforcement** of non-compete agreements can violate the Act.

The GC will view a non-compete agreement as overbroad if the provisions could reasonably be construed by employees to deny them the ability to quit or change jobs by cutting off their access to other employment opportunities for which they are qualified, unless the provision is narrowly tailored to special circumstances justifying the infringement on employee rights.

Non-compete and severance agreements

Many common reasons why an employer might require employees to enter into non-compete agreements are unlikely to constitute special circumstances justifying the infringement on employee rights. For example:

- A desire to avoid competition from former employees
- A goal of retaining employees or protecting training investments
- Protection of proprietary information or trade secrets

Although the Board has not considered this issue since the issuance of GC 23-08, an ALJ recently found a non-compete clause in an employment agreement to be unlawful under *Stericycle*. *J.O. Mory, Inc.*, ALJD, Case No. 25-CA-309577.

Unilateral Changes

***Wendt Corporation*, 372 NLRB No. 135 (2023)**

- Overruled *Raytheon* holding that employers are privileged to make unilateral changes to terms and conditions of employment that involve some amount of discretion, as long as the changes are similar in kind and degree to the Employer's past practice.
- In *Wendt*, the Board returned to the pre-*Raytheon* standard prohibiting discretionary unilateral changes.
- An employer may make unilateral changes during bargaining only when it can demonstrate a regular and consistent past practice that is not informed by a large measure of discretion.
- Reaffirmed holding that an employer cannot defend a unilateral change by invoking a past practice that existed prior to representation.

***Tecnocap LLC*, 372 NLRB No. 136 (2023)**

- An employer cannot defend a unilateral change in bargaining by relying on unilateral authority granted under a management-rights or similar clause in an expired CBA.

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MCLE SELF-STUDY

CEMEX CONSTRUCTION MATERIALS: IS THE FUTURE OF UNION ORGANIZING IN THE CARDS?

On August 25, 2023, the National Labor Relations Board (NLRB) issued its decision in *Cemex Construction Materials Pacific, LLC*,[1] adopting a new framework for imposing a bargaining obligation on an employer *without* a union prevailing in a Board-conducted secret ballot election. Under *Cemex*, if a union with majority support demands recognition, an employer must grant it or, within two weeks, file an election petition to test the appropriateness of the unit or the union's majority support, or run the risk of violating its bargaining obligation under the National Labor Relations Act (NLRA).

While bargaining orders had always been a possible remedy for an employer's unlawful conduct during the critical election period (the time between filing the petition and the election),[2] they were so rarely issued that in all but the most extreme and egregious cases, a rerun election would be ordered. Now under *Cemex*, an employer may be ordered to recognize and bargain with a union where the union has majority support of an appropriate bargaining unit and the employer's unlawful conduct during the critical election period prevents a free, fair, and timely election, effectively eliminating the rerun election remedy in many cases. With *Cemex*, the calculus has significantly changed for employers in responding to their employees' unionization efforts.

FACTS

In December 2018, the International Brotherhood of Teamsters (IBT) filed a petition with NLRB Region 28 seeking an election in a unit of all ready-mix drivers and second batchmen (who also work as ready-mix drivers) throughout Southern California and Southern Nevada. This unit consisted of 366 drivers at 24 batch plans. At hearing, the parties stipulated that IBT asserted it had majority support and that the employer refused to recognize IBT as the drivers' exclusive representative.

During the critical period, Cemex engaged in a massive anti-union campaign that, according to public filings, cost more than $1,000,000 and involved six consultants who were onsite at the various batch plants for months. Cemex held mandatory meetings to convey its anti-union position and had its supervisory staff and paid consultants engage in one-on-one discussions with drivers about why they should not unionize.

During its campaign, Cemex engaged in a score of pre-election violations, including surveillance of employees' union activities, illegal rules regarding union stickers, and misrepresentation of the rights of striking employees. It also threatened to close individual plants, shut down the entire arm of the employer's business, deny access to supervisors, and remove benefits. These violations, by multiple levels of management, occurred at multiple locations.

> THE SIGNIFICANCE OF *CEMEX* LIES IN THE REMEDIES FOR AN EMPLOYER'S VIOLATIONS DURING THE CRITICAL ELECTION PERIOD.

The election was held on March 7, 2019. IBT lost 166 to 179. A very public union supporter was also written up and discharged in the months immediately following the election.

PROCEDURAL HISTORY

During and after Cemex's anti-union campaign, IBT filed numerous unfair labor practice (ULP) charges with the NLRB.[3] IBT filed objections to the election, many of which tracked the unfair acts described in the ULP charges. In keeping with NLRB procedure, the hearing on the objections was postponed until after the ULP charge investigations were complete so all allegations could be consolidated into a single hearing. The investigation took more than a year.

The hearing opened in November 2020 and continued through February 2021. More than 40 witnesses were called, and dozens of exhibits were filed, which included the authorization cards IBT had provided the NLRB as the showing of interest for the election. This was a necessary component, as the NLRB General Counsel explicitly sought a *Gissel*[4] bargaining order as the remedy for Cemex's violations of the NLRA.

The ALJ issued his decision on December 16, 2021. Though he found multiple egregious violations of the Act and objectionable conduct sufficient to overturn the election, he did not order a *Gissel* bargaining order. Instead, he ordered a set of remedies intended to provide IBT with access to Cemex's drivers for two years or until a new election was held—at a time IBT proposed. These remedies included access to Cemex's breakrooms and bulletin boards, equal time to speak if Cemex decided to talk to the drivers about unionization, and updated lists of contact information for the drivers.[5] The ALJ also ordered Cemex to return the discharged activist to work with full backpay.

All parties filed exceptions to the ALJ's decision, which is the method for seeking NLRB review. Cemex argued that it did not violate the law and the remedies were too severe. The General Counsel argued the sanctions were not severe enough—not only that a *Gissel* order should have issued, but the NLRB should return to the *Joy Silk* [6] doctrine. The General Counsel further argued that the NLRB should review employer speech standards to find captive audience meetings and employer statements of loss of access to management that violated the NLRA.[7] IBT joined in the briefing of the General Counsel and argued for additional violations of the NLRA to be found.

THE RULING

On August 25, 2023, the NLRB issued its decision. All members agreed with the ALJ that Cemex had repeatedly violated the NLRA and the violations impeded employee free choice during the election. The significance of the decision lies in the remedies for an employer's violations during the critical election period.

The majority weighed the various factors associated with issuing a *Gissel* bargaining order and determined an order was warranted. Generally, a *Gissel* order is appropriate if "the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, through present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order."[8] In doing so, the NLRB noted that Cemex's acts were part of a "carefully crafted corporate strategy designed to skirt as closely as possible the fine line between lawful persuasion and unlawful coercion."[9]

After determining a *Gissel* order was appropriate, the NLRB announced a new framework for bargaining orders, applicable to all pending and future cases. First, it tracked the history of the relevant statutory language. Section 9(a) of the NLRA states: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment."[10] The statutory language contemplates that employees will choose their union representative by designation or selection. This has been interpreted to mean that a union can come into place either by means of an election or by voluntary recognition.[11] An amendment was contemplated in 1947 to provide for recognition only by means of an election, but that language was not added to the Act.

The Board then looked at the intervening case law—in particular, *Joy Silk* and *Linden Lumber*.[12] In *Joy Silk*, the NLRB held "an employer unlawfully refuses to recognize a union that presents authorization cards signed by a majority of employees in a prospective unit if it insists on an election motivated 'not by any *bona fide* doubt as to the union's majority, but rather by a rejection of the collective bargaining principle or by a desire to gain time within which to undermine the union.'"[13] Under the *Joy Silk* standard, if the employer did not doubt majority support and instead was using the election process to buy time to reduce union support, a bargaining order would issue. The standard was criticized as difficult to apply because it turned on the employer's subjective motivation for denying voluntary recognition. Subsequently, during oral argument before the U.S. Supreme Court in *Gissel*, the NLRB abandoned the *Joy Silk* doctrine.

This abandonment was formalized in *Linden Lumber*, where the NLRB held that an employer does not violate the NLRA "solely upon the basis of its refusal to accept evidence of majority status other than the results of a Board election."[14] This resulted in the absence of a remedy when an employer refused to bargain with a union without an NLRB certified election, even if it did not doubt the union's majority support.

In *Cemex*, the NLRB explicitly overruled *Linden Lumber* and announced a new standard that provides unions and employees the right to voluntary recognition without the pitfalls of the subjective good faith doubt test. Under the new framework, an employer violates section 8(a)(1) and (5)[15] if it refuses to recognize, upon request, a union that the majority of its employees have designated as their representative unless the employer files a petition with the NLRB to test majority support or to determine the appropriateness of the unit.[16] Further, if a petition is filed, by either the union or the employer, regarding the unit in which the union claims majority support, and the employer engages in a ULP that "requires setting aside the election," the "petition will be dismissed, and the employer will be subject to a remedial bargaining order."[17]

As a result, "this accommodation of the section 9(c) election right with the section 8(a)(5) duty to recognize and bargain with the designated majority representative will only be honored as long as the employer does not frustrate the election process by its unlawful conduct." Recognizing that "[r]epresentation delayed is often representation denied," the *Cemex* framework is intended to decrease the amount of litigation and time before the chosen representative of the employees is at the table to bargain with the employer. It is also intended to disincentivize employers from engaging in unfair practices in response to a union organizing campaign.[18]

UNION/EMPLOYER TAKEAWAYS

Union perspective: This is a huge victory. Although unions currently win the vast majority of elections, they regularly withdraw election petitions if support has dropped in response to an employer's unlawful anti-union campaign. And given the lack of resources at the NLRB for representation elections and related proceedings to be resolved in a prompt manner, *Cemex* orders are anticipated to reduce the amount of time between majority support and contract negotiations, both by increasing the frequency of voluntary recognition and decreasing employer unlawful acts.

Employer perspective: *Cemex* radically departs from established NLRB law by shifting the burden for filing an election petition from the union to the employer and creating a "zero tolerance" remedial standard for pre-election ULPs, where any serious ULPs committed in the critical pre-election period will result in a dismissal of the election petition and a mandatory bargaining order. The *Cemex* Board presumes authorization cards and card checks are equally valid methods of creating a bargaining obligation, and indeed potentially superior to secret ballot elections. This stands to impede access to a secret ballot election, presumed for decades to be the critical test of employees' support for union representation.

UNION ANALYSIS

The *Cemex* decision is the most recent step by the Biden-appointed Board to create and enforce meaningful remedies for NLRA violations. Practitioners regularly see violations of the Act during organizing campaigns, and the standard remedy has been a rerun election in all but the most egregious circumstances. When a *Gissel* bargaining order is issued, the parties are engaged in years of litigation over the propriety of the order, and federal courts have generally been hostile to enforcing *Gissel* bargaining orders. As such, even when the union "wins" the legal argument, the result is simply more delay before employees can experience the benefit of their unions.

WHY WAS *CEMEX* NEEDED?

In the world of union organizing, delay works in the employer's favor: employees tire over long campaigns and multiple rerun elections; employee turnover and employer hiring practices allow an employer to change the composition of a bargaining unit; employers blame the union for employees not receiving wage increases or other improvements while a question of representation is pending. Employees relying on the NLRA to support the right to organize face years of legal battles before they even get to the bargaining table.

Cemex is a step toward remedying employers' long-standing abuse of the Act. By providing a clear, direct, and enforceable mechanism for voluntary recognition coupled with a meaningful remedy of a bargaining order, employees' trust in the NLRA can begin to be restored. The rationale behind the decision is that an employer who violates the law should not be entitled to continue to benefit from that violation.

HOW DOES *CEMEX* SUPPORT THE NLRA'S PURPOSE?

The purpose of the NLRA, as stated in the preamble, is to protect the flow of commerce by protecting the right to organize and requiring employers to recognize employees' rights under the Act.[19]

Arguably, employers have been required, since the NLRA was passed in 1935, to recognize the representative of their employees' choosing without an election. Employers are simply no longer allowed to violate the law with near impunity in an effort to avoid the will of the majority of their employees to engage in the legally protected act of organizing.

While employers have reacted to *Cemex* by decrying the loss of the secret ballot election as noted earlier, these criticisms ignore the statutory language and history of the Act and misapprehend the holding of *Cemex*. Under *Cemex*, employers can insist on a secret ballot election by filing an RM petition; they simply must refrain from committing unfair labor practices during the critical election period.

HOW DOES A UNION OBTAIN A CEMEX ORDER?

The *Cemex* bargaining order only comes into play if the employer violates the Act, thereby destroying the union's majority support. When a union informs an employer that a majority of a bargaining unit—which could be the employer unit, craft unit, plant unit, or a subdivision[20] has selected an exclusive representative, the employer is faced with choices.

It can:

1. Recognize the union as designated by the employees;
2. File an RM petition[21] within two weeks, or;
3. Do nothing.

Under option 1, the employer is obligated to bargain with the union.[22] Under option 2, there is no bargaining order unless the employer violates the Act while the petition is pending. Under option 3, a remedial bargaining order is issued regardless of any other ULPs because the failure to recognize and bargain with the union are independent violations of the Act. Thus, it is the employer's actions that create a bargaining order. An employer that adheres to the law is entitled to the full process of a Board-certified election. An employer that violates the law, thus destroying majority support for the union, is subjected to a bargaining order.

Continued on page 28.

CALIFORNIA EMPLOYMENT LAW NOTES

AUTHOR*

Anthony J. Oncidi

NO DUTY OF CARE OWED TO PREVENT SPREAD OF COVID TO EMPLOYEES' HOUSEHOLD

***Kuciemba v. Victory Woodworks, Inc.*, 14 Cal. 5th 993 (2023)**

The California Supreme Court unanimously ruled that employers are not liable to nonemployees who contract COVID-19 from employees who bring the virus home, reasoning that: "An employer does not owe a duty of care under California law to prevent the spread of COVID-19 to employees' household members."

The Ninth Circuit had certified two questions to the California Supreme Court:

1. If an employee contracts COVID-19 at the workplace and brings the virus home to a spouse, does the California Workers' Compensation Act (WCA)[1] bar the spouse's negligence claim against the employer?; and

2. Does an employer owe a duty of care under California law to prevent the spread of COVID-19 to employees' household members?

The court answered the first question in the plaintiff's favor, concluding "take home" COVID-19 claims do not fall under the workers' compensation regime and therefore are not barred by the exclusivity provisions of the WCA. However, as a practical matter, the court's ruling on the second question—that employers owe no such duty of care—bars negligence claims for COVID-19 infection by members of an employee's household.

Among other considerations, public policy concerns seemed to drive the court's analysis. It noted:

> Imposing on employers a tort duty to each employee's household members to prevent the spread of this highly transmissible virus would throw open the courthouse doors to a deluge of lawsuits that would be both hard to prove and difficult to cull early in the proceedings. Although it is foreseeable that employees infected at work will carry the virus home and infect their loved ones, the dramatic expansion of liability plaintiffs' suit envisions has the potential to destroy businesses and curtail, if not outright end, the provision of essential public services. These are the type of 'policy considerations [that] dictate a cause of action should not be sanctioned no matter how foreseeable the risk.'[2]

NO VIOLATION BY EMPLOYER REQUIRING COVID VACCINATION/ WEEKLY TESTING

***Rossi v. Sequoia Union Elementary School*, 2023 WL 5498732 (Cal. Ct. App. 5th Dist. 2023)**

Pursuant to the State Public Health Officer Order of August 11, 2021, K-12 schools were required to verify the COVID-19 vaccination status of all school workers and to require proof of vaccination or weekly diagnostic screen testing.

Plaintiff Gloria Elizabeth Rossi, a school district employee, refused to disclose her vaccination status or undergo weekly testing, and would not consent to the school district's obtaining or disclosing her confidential medical information. Rossi was offered the option to work remotely, but she refused to do so, claiming she could not fulfill her job duties remotely. Ultimately, Rossi's employment was terminated for her refusal to comply with the district's vaccinate-or-test requirement.

Rossi sued the district under the Confidentiality of Medical Information Act[3] for alleged discrimination based on her refusal to authorize a release of her confidential

medical information and for unauthorized use of her medical information.

The trial court sustained the district's demurrer without leave to amend, and the California Court of Appeal for the Fifth Circuit affirmed dismissal on the ground that the statutory necessity exception[4]—in this case, complying with a lawful order of the State Public Health Officer—shielded defendants from liability as a matter of law.

EMPLOYER MUST PROVE RELIGIOUS ACCOMMODATION WOULD REQUIRE 'SUBSTANTIAL INCREASED COSTS'

***Groff v. DeJoy*, 600 U.S. 447 (2023)**

Gerald Groff, an Evangelical Christian, took a mail delivery job with the USPS at a time when postal service employees were not required to work on Sundays. However, when the USPS began facilitating Sunday deliveries for Amazon, Groff was called upon to work Sundays, which ultimately resulted in his resignation after he was subjected to progressive discipline for refusing to work on that day.

Groff sued the USPS for violation of Title VII, alleging the postal service could have accommodated his Sunday Sabbath practice "without undue hardship on the conduct of [its] business."

The district court and the Court of Appeal for the Third Circuit ruled in favor of the USPS, holding that requiring an employer "to bear more than a de minimis cost to provide a religious accommodation is an undue hardship." The lower courts held that exempting Groff from Sunday work had "imposed on his coworkers, disrupted the workplace and workflow, and diminished employee morale."

In this unanimous decision, the U.S. Supreme Court clarified earlier precedent[5] and vacated the lower court's opinion, holding that an employer can show "undue hardship" when the burden of granting a religious accommodation would result in substantial increased costs in relation to the conduct of its particular business.

EMPLOYEE TERMINATED FOR MISCONDUCT, NOT BECAUSE OF HIS RELIGION

***Hittle v. City of Stockton*, 76 F.4th 877 (9th Cir. 2023)**

Ronald Hittle served as Stockton's fire chief before he was fired, following an investigation by an outside investigator, because he lacked effectiveness and judgment in his ongoing leadership of the fire department; used city time and a city vehicle to attend a religious event and approved on-duty attendance of other fire department managers; failed to properly report his time off; engaged in potential favoritism of certain employees; endorsed a private consultant's business in violation of city policy; and had potentially conflicting loyalties in his management role and responsibilities.

Hittle sued the city of Stockton under Title VII and the California Fair Employment and Housing Act (FEHA), alleging his termination was "based upon his religion." Hittle pointed to what he characterized as "direct evidence of discriminatory animus" based on a comment made by Deputy City Manager Laurie Montes that he was part of a "Christian coalition" and a "church clique" in the fire department. However, the evidence showed that Montes was repeating what was written in anonymous letters sent to the city and that the comment did not originate with her.

The court noted that such remarks were "more akin to 'stray remarks' that have been held insufficient to establish discrimination." Further, based on the investigation, it also held that defendants' legitimate non-discriminatory reasons for firing Hittle were not mere pretext for religious discrimination.[6]

COURT AFFIRMS $7.1 MILLION WHISTLEBLOWER VERDICT

***Zirpel v. Alki David Prods., Inc.*, 93 Cal. App. 5th 563 (2023)**

Karl Zirpel worked as the vice president of operations for Alki David Productions (ADP) before the company's principal, Alki David, fired him for allegedly disclosing information that Zirpel reasonably believed evidenced a violation of safety standards and for disclosing information about ADP's working conditions. The jury returned a special verdict in Zirpel's favor, finding ADP had violated state whistleblower statutes,[7] and awarded him $369,000 in economic damages; $700,000 in emotional distress damages; and $6 million in punitive damages.

The court of appeal affirmed the judgment, holding that substantial evidence supported the jury's finding that Zirpel reasonably believed he had disclosed to ADP and city inspectors unsafe working conditions and code violations at the location in question. Further, ADP did not argue in its post-trial motions that it had sustained its burden under California Labor Code section 1102.6 to demonstrate by clear and convincing evidence that Zirpel was fired for reasons other than his disclosures concerning the absence of a construction permit and the city inspectors' disapproval of the work that had been completed on the project.

The court also affirmed the punitive damages award on the basis that there was sufficient evidence of reprehensible conduct—including David's verbal abuse of Zirpel, which was "laced with obscenities and homophobic epithets"—that justified a 6:1 ratio of punitive to compensatory damages.

BUSINESS ENTITY AGENTS SHARE POTENTIAL FEHA LIABILITY

***Raines v. U.S. Healthworks Medical. Group*, 2023 WL 5341067 (Cal. S. Ct. 2023)**

The Ninth Circuit certified to the California Supreme Court the question of whether FEHA's definition of "employer" extends to corporate agents of the employer such as a company that conducts preemployment medical screenings.

In this putative class action, plaintiffs alleged their employment offers were conditioned upon completing pre-employment medical tests conducted by U.S. Healthworks Medical Group (USHW). They further claimed that during the screenings, USHW asked intrusive and illegal questions unrelated to the applicants' ability to work—including whether they had cancer, mental illnesses, HIV, and problems with menstrual periods. The applicants asserted other FEHA claims against the prospective employers that used USHW to conduct the medical screenings and USHW itself as an "agent" of the employers.

In this opinion, the California Supreme Court examined the FEHA's definition of "employer" and concluded it encompasses third-party corporate agents such as USHW.

COVID EMERGENCY ORDER EXTENDING STATUTE OF LIMITATIONS FOR PAGA CASES UPHELD

***LaCour v. Marshalls of California., LLC*, 2023 WL 5543622 (Cal. Ct. App. 1st Dist. 2023)**

Plaintiff Robert LaCour, a former loss prevention specialist for the department store Marshalls, appealed from a judgment in favor of his former employer and certain affiliated entities. Marshalls filed a demurrer, arguing that because LaCour's employment with Marshalls ended in May 2019, he had only a year and 65 days to bring a claim under the Private Attorneys General Act (PAGA), and having missed that deadline, his action was untimely. Marshalls also filed a motion to strike. The trial court overruled Marshalls' demurrer and granted its motion to strike in part. Marshalls later filed a motion for judgment on the pleadings, which was granted.

Marshalls argued that since LaCour's employment ended in May 2019, he had up to a year and 65 days to file his civil complaint—August 2020 at the latest—taking into account the 65-day tolling period. However, in response to the COVID-19 pandemic, the PAGA statute of limitations was tolled from April 6, 2020 through October 30, 2020, which extended the deadline to file a notice of a PAGA claim with the California Labor & Workforce Development Agency (LWDA) until November 24, 2020. Marshalls claimed the emergency rule was "unconstitutional and prohibited by statute," but the appellate court rejected that argument, concluding the state had the authority to toll the statutes of limitation for civil cases, including PAGA.

In addition, the trial court had granted the defendants' motion for judgment on the pleadings because it found that a previous PAGA judgment based upon a settlement agreement had a preclusive effect.

However, the appellate court also rejected that argument and reversed the previous judgment. It held that in the earlier case, the initial LWDA notice dealt narrowly with a complaint regarding paying employees for off-the-clock work at the end of their shifts. However, the settlement release encompassed a wide swath of Labor Code violations not mentioned in the initial notice, unfairly limiting LaCour from pursuing his claims, which were broader.

NOTE: *This case is also summarized in the discussion of wage and hour issues, beginning on page 10.*

THOSE WITH OVERLAPPING PAGA CLAIMS MAY 'PERMISSIBLY INTERVENE' IN RELATED ACTIONS

***Accurso v. In-N-Out Burgers*, 2023 WL 5543525 (Cal. Ct. App. 1st Dist. 2023)**

Plaintiffs Tom Piplack and Brianna Marie Taylor filed PAGA actions in Orange and Los Angeles Counties against respondent In-N-Out Burgers. After they learned about settlement negotiations in a later, overlapping PAGA action brought by Ryan Accurso against In-N-Out in Sonoma County, Piplack and Taylor filed a proposed complaint to intervene in the Sonoma County action and moved to intervene for a stay.[8] They requested a stay of proceedings in Accurso's case based on the doctrine of exclusive concurrent jurisdiction, arguing that matter should be stayed as a later-filed action.

The trial court concluded that Piplack and Taylor lacked standing to intervene, and on that basis denied the motions to intervene and to stay the case. It emphasized: "The court finds that neither [Piplack nor Taylor] has a personal interest in the PAGA claims being prosecuted by Accurso, but rather the interest lies with the State, as the real party in interest, and thus [Piplack and Taylor] do not have standing to intervene." And "likewise," the court ruled, they "do not have standing to request a stay."

In this opinion, the appellate court vacated the order and remanded for reconsideration. It agreed that Piplack and Taylor did not have the ability to "intervene as of right," but concluded it was possible they could permissively intervene. The trial court rejected Piplack and Taylor's ability to intervene out-of-hand, but the appellate court held that the trial court must weigh arguments the plaintiffs make in favor of staying the case, fully or partially, against any arguments Accurso and In-N-Out wish to offer as to why the motion should not be heard or should be denied.

NOTE: *This case is also summarized in the discussion of wage and hour issues, beginning on page 10.*

DISABILITY LEAVE NOT 'COMPENSATION' UNDER STATE WORKERS' COMP LAW

***California Department of Corrections & Rehabilitation v. Workers' Compensation Appeals Board*, 2023 WL 5198517 (Cal. Ct. App. 5th Dist. 2023)**

Under the Workers' Compensation Act, a worker who is injured because of an employer's serious and willful misconduct is entitled to receive compensation increased by one-half. The statute defining "compensation" limits the term to benefits or payments provided by the California Labor Code.[9] In this case, the court held that compensation does not include industrial disability leave, which is provided by the California Government Code, and therefore is not subject to being increased by one-half in cases of serious and willful employer misconduct.

While working as a correctional officer at the Lancaster State Prison in August 2002, respondent Michael Ayala was severely injured in a preplanned attack by inmates. He filed a workers' compensation claim, alleging the injury was caused by the serious and willful misconduct of his employer, petitioner California Department of Corrections and Rehabilitation (CDCR).

California Labor Code section 4553 provides: "The amount of compensation otherwise recoverable shall be increased one-half . . . where the employee is injured by reason of serious and willful misconduct" by the employer. Ayala and CDCR agreed that the injury caused Ayala 85% permanent disability, but they could not agree about whether CDCR engaged in serious and willful misconduct.

The workers' compensation judge agreed with CDCR and found that the base compensation was what Ayala would have been paid in temporary disability.

On reconsideration, the Board again rescinded and reversed the workers' compensation judge's decision—this time finding that the base compensation was what Ayala was paid on industrial disability leave and enhanced industrial disability leave.

However, the appellate court held in this case that industrial disability leave and enhanced industrial disability leave are not "compensation" as that term is used in section 4553, and thus are not subject to a 50 percent increase.

EMPLOYEE MAY PROCEED WITH CLASS CERTIFICATION ON WAGE CLAIM

***Woodworth v. Loma Linda University Medical Center*, 93 Cal. App. 5th 1038 (2023)**

Nicole Woodworth was a registered nurse at Loma Linda University Medical Center from December 2011 to June 2014. In June 2014, she filed a putative class action against Loma Linda—alleging various wage and hour claims on behalf of herself and other employees. She later amended her complaint to add a PAGA cause of action. After several years of litigation, only her individual PAGA claim for failure to provide rest periods remained.

The court of appeal reversed many of the previous orders in the litigation, including, in part, the order denying class certification. The appellate court determined that the trial court erred with respect to Woodworth's proposed stand-alone wage statement class, which consisted of employees who received allegedly inaccurate wage statements and remanded for reconsideration of certification of the class.

Woodworth alleged that prior to June 2018, the medical center issued wage statements that did not include a line showing total hours that employees worked. The trial court held that common questions did not predominate among the putative class members because the wage statements of different workers at the medical center were too varied, and determining liability would require an individualized review of the wage statements.

However, the appellate court noted that a theory of liability would require different "samples" to prove liability, but it

would not require a review of each wage statement. The appellate court also held that trial courts may not strike or dismiss PAGA claims for a lack of manageability; instead, when facing "unwieldy" PAGA claims, trial courts may limit the scope of the claims or the evidence presented at trial.

***NOTE:** This case is also summarized in the discussion of wage and hour issues, beginning on page 10.*

ENDNOTES

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1. Cal. Lab. Code, §§ 3200-6002.
2. Citing to *Ellden v. Sheldon*, 46 Cal.3d 267, 274 (1988).
3. Cal. Civ. Code §§ 56-56.37.
4. Cal. Civ. Code § 56.20(b).
5. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).
6. *See also*, *Crowe v. Wormuth*, 74 F.4th 1011 (9th Cir. 2023) (police officer's Title VII sexual orientation discrimination claim was properly dismissed on summary judgment despite homophobic language used by another officer who had participated in investigation into plaintiff's misconduct).
7. Cal. Lab. Code §§ 232.5 and 1102.5.
8. Cal. Code Civ. Proc. § 387.
9. *Supra*, note 1.

WAGE AND HOUR CASE NOTES

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APPLYING *ADOLPH V. UBER*, PAGA PLAINTIFFS HAD STANDING TO PURSUE CLAIM ON BEHALF OF OTHERS

***Barrera v. Apple American Group LLC*, 95 Cal. App. 5th 63 (Cal. Ct. App. 1st Dist. 2023)**

This is one of the first appellate decisions to apply the recent blockbuster holding in *Adolph v. Uber Techs., Inc.*,[1] in a PAGA case.

Defendants in this matter are related companies that own and operate 460 Applebee's restaurants in California and elsewhere. Plaintiffs worked for Applebee's as a kitchen manager and cook. They filed a PAGA-only action in April 2021, before the U.S. Supreme Court decided *Viking River Cruises, Inc. v. Moriana*.[2] After the trial court initially denied its motion to compel arbitration, Applebee's filed a renewed motion based on *Viking River*.

The arbitration agreement at issue did not contain an explicit PAGA waiver, but provided that all claims filed in arbitration must be brought on an individual basis. Applebee's limited its motion to plaintiffs' individual PAGA claims and did not seek to compel arbitration of the non-individual PAGA claims. The trial court ruled it did not have jurisdiction over the renewed motion and denied it on that basis.

The court of appeal reversed in part and affirmed in part. Because the arbitration agreement limited claims that could be brought in arbitration to individual claims per *Viking River*, the court held that PAGA claim must be split into its "non-individual" and "individual" components, and the individual claims must be sent to arbitration.

It found the plaintiffs did not lose standing to pursue the PAGA claim on behalf of others because they met the two statutory requirements for PAGA standing in that they:

1. were employed by the alleged violator; and
2. allegedly suffered one or more Labor Code violations.

The court in *Barrera* further concluded that in accord with the California Supreme Court holding in *Adolph v. Uber*, nothing more is required to maintain PAGA standing.

Applebee's requested that the court of appeal stay the PAGA claim on behalf of others, pending the arbitration of the individual claims. However, the court declined to enter a stay, instead remanding the stay question to the trial court to decide in the first instance.

EMPLOYERS LIABLE FOR EXPENSES INCURRED BY EMPLOYEES ORDERED TO WORK AT HOME

***Thai v. International Business Machines Corp.*, 93 Cal. App. 5th 364 (2023)**

This case represents a win for employees who worked from home during the COVID-19 pandemic and had to spend their own money on equipment and other items needed to perform their jobs.

Plaintiff Paul Thai is an IBM employee. In March 2020, Governor Gavin Newsom issued an order directing all non-essential employees to work from home because of the COVID-19 pandemic. Following the government's instructions, IBM directed Thai and his coworkers to work from home. Thai needed internet access, phone service, a headset, and a computer to perform his job. IBM provided these items to its employees in its offices, but refused to reimburse Thai and his coworkers after they spent their own money on these items to work from home.

California Labor Code section 2802, which requires employers to reimburse employees for necessary work expenses, is designed to prevent employers from shifting their operating expenses onto their employees.

IBM argued that it was not required to reimburse Thai because the *government* had caused him to spend his own money on work items, not IBM. The trial court agreed, ruling that because IBM was acting in response to government orders, there was an intervening cause precluding direct causation of Thai's losses by IBM.

The court of appeal reversed. It held that the trial court improperly read section 2802 to require reimbursement only for expenses directly caused by the employer. The court surmised this reading inserts into the analysis a "tort-like causation element that is not rooted in the statutory language." It noted that the statutory provision plainly requires employers to reimburse an employee for all expenses that are a "direct consequence of the discharge of [the employee's] duties."

The court further explained that the obligation does not turn on whether the employer's order was the proximate cause of the expenses. It underscored that section 2802 simply allocates the risk of unexpected expenses—such as those caused by the COVID-19 pandemic—to the employer, not the employee.

DRIVERS WHO DID NOT CROSS STATE LINES EXEMPT FROM ARBITRATION UNDER THE FAA

***Carmona v. Domino's Pizza, LLC*, 73 F.4th 1135 (9th Cir. 2023)**

This case represents a win for transportation workers who do not cross state lines and want to stay out of arbitration.

In December 2021, the Ninth Circuit ruled that drivers (D&S Drivers) who transport pizza ingredients from Domino's supply center in Southern California to its franchisees within state lines are "transportation workers" exempt from arbitration under section 1 of the Federal Arbitration Act.[3] The court relied on *Rittmann v. Amazon.com, Inc.*,[4] which held that Amazon drivers who transported goods that had traveled interstate "for the last leg" to their eventual destinations were transportation workers exempt from the FAA even though they did not cross state lines. The D&S Drivers similarly transported mushrooms and other goods that had traveled interstate "for the last leg" to Domino's franchisees in Southern California.

The U.S. Supreme Court then granted certiorari, vacated, and remanded the *Carmona* case for reconsideration in light of *Southwest Airlines Co. v. Saxon*,[5] which held that a ramp worker who loaded and unloaded cargo on and off airplanes that traveled in interstate commerce was an exempt "transportation worker."

According to the Court, the critical question in *Southwest Airlines Co. v. Saxon* is whether the workers are actively "engaged in transportation" of goods in interstate commerce and play a "direct and necessary role in the free flow of goods across borders."[6] In concluding that ramp workers met this description, the Court rejected *Southwest's* argument that the workers themselves must cross state lines to be engaged in interstate commerce. *Saxon* explicitly declined to address whether "last leg" drivers, such as those in the *Domino's* case, would similarly qualify for the exemption.

On remand in *Carmona*, the Ninth Circuit held that nothing in *Saxon* altered its original conclusion that D&S Drivers were transportation workers exempt from the FAA. Noting that *Saxon* had explicitly declined to disapprove *Rittmann*, the Ninth Circuit in *Carmona* held that it was bound by *Rittmann* unless it was "clearly irreconcilable" with *Saxon*.

The Ninth Circuit determined that *Rittmann* was compatible with *Saxon* because the Amazon "last leg" drivers were similar to ramp workers who handled cargo that moved in interstate commerce. Although neither group of workers traveled across state lines, the court found they were an integral part of the flow of goods in interstate commerce. Because *Rittmann* remained good law, the Ninth Circuit's original determination that the D&S Drivers were "transportation workers" exempt from the FAA remained sound.

ROUNDING TIME ENTRIES IMPERMISSIBLE, UNWIELDY PAGA CLAIMS MAY BE LIMITED

***Woodworth v. Loma Linda University Medical Center*, 93 Cal. App. 5th 1038 (2023)**

Employers pay heed: Rounding is on the way out.

Nicole Woodworth was a nurse at Loma Linda University Medical Center. She filed a class action and PAGA case against Loma Linda, alleging numerous wage and hour violations. The trial court granted summary adjudication to Loma Linda on most of the claims. Woodworth appealed.

The court of appeal made three significant rulings.

First, it held that the trial court erred in granting summary adjudication on Woodworth's rounding claim. Loma Linda had a policy of rounding employees' time punches down to the nearest tenth of an hour. In 2012, *See's Candy Shops, Inc. v. Super. Ct.*,[7] held that rounding is permitted if it is facially neutral and applied so that it does not result in underpaying employees over time.

Although several courts have followed *See's Candy*, the California Supreme Court held in a pair of rulings that the *de minimis* doctrine does not apply in California,[8] and employers cannot round time entries in the meal period context.[9] In *Camp v. Home Depot U.S.A., Inc.*,[10] the appellate court broke with *See's Candy* in light of those two rulings to hold that neutral time-rounding rules are not permissible in California. The *Woodworth* holding agreed with *Camp*, thus becoming the second appellate court ruling to invalidate a facially-neutral rounding rule. The court in *Woodworth* held that if an employer can capture the exact number of minutes an employee worked, the employer must pay for all the time worked and cannot use rounding. This holding applies retroactively.

Second, the court of appeal affirmed the trial court's grant of summary adjudication of Woodworth's claim that Loma Linda did not properly implement an alternative workweek schedule (AWS). A validly adopted AWS is an affirmative defense to a claim for overtime compensation, which the employer bears the burden of proving. Loma Linda proffered evidence that it complied with the Wage Order's detailed requirements. It mailed AWS disclosure statements to affected employees and held meetings to discuss the proposed AWS 14 days before the election. The disclosures accurately described the AWS's effect on employee pay and benefits. Loma Linda had a secret ballot election, and more than 2/3 of employees voted for the AWS.

The burden then shifted to Woodward to raise a triable issue of material fact showing that the AWS was not validly adopted. Woodward argued that the disclosures were insufficient because they did not disclose the AWS's effect on meal and rest periods and benefits. The court of appeal rejected this argument, holding that an employer's failure to disclose renders an AWS election "null and void" only if the employee can show a "reasonable probability that disclosure of the information would tend to cause more employees to vote against the AWS." The appellate court found Woodworth failed to make this showing. The trial court's grant of summary adjudication on her AWS claim was therefore proper.

Third, the court weighed in on PAGA manageability. There is a current split of authority on this issue. In 2022, *Estrada v. Royalty Carpet Mills, Inc.*[11] held that courts may not dismiss a PAGA claim for lack of manageability. A case decided one year earlier, *Wesson v. Staples the Office Superstore, LLC*,[12] held that courts are permitted to dismiss a PAGA claim for lack of manageability. The California Supreme Court granted review in *Estrada* and is expected to resolve this conflict soon. *Woodward* was in keeping with *Estrada*, noting that courts faced with unwieldy PAGA claims may limit the scope of the claims or evidence to be presented at trial, but cannot dismiss the claims entirely.

NOTE: *This case is also summarized in the discussion of California employment law, beginning on page 5.*

PUBLIC EMPLOYERS NOT REQUIRED TO REIMBURSE EMPLOYEES FOR WORK EXPENSES

***Krug v. Board of Trustees of California State University*, 2023 WL 5543521 (Cal. Ct. App. 2d Dist. 2023)**

This case hands a big win to public employers who want to argue that provisions of the Labor Code do not apply to them.

Patrick Krug is a biology professor at California State University (CSU). When the COVID-19 pandemic struck, CSU ordered its professors to teach remotely. Krug bought a computer and other equipment from his home office, but CSU refused to reimburse him. Krug filed a class action lawsuit alleging that CSU's failure to reimburse employees for the expenses they incurred in working from home violated Labor Code Section 2802, which requires employers to reimburse employees for all necessary work expenses.

The court of appeal held that section 2802 does not apply to public employers such as CSU. It applied a three-part test to determine whether this Labor Code provision applied to governmental agencies. First, the court must look for "express words" referring to governmental agencies. If there are none, the court must next look for "positive indicia" of a legislative intent to exempt governmental agencies from the statute. If no such indicia appear, the court must then ask whether applying the statute would result in an infringement of "sovereign governmental powers."

The court noted that section 2802 contained no express words referring to governmental agencies, and there was no indication of a legislative intent to exempt governmental agencies. The question was thus whether applying the statute would infringe on CSU's sovereign governmental powers.

The court also noted that the Education Code[13] gives CSU broad discretion to procure equipment and establish equipment allowances. This discretion permits CSU to standardize equipment, negotiate price advantages by ordering in bulk, and hire and train support personnel. It opined that requiring CSU to reimburse professors for whatever equipment they bought on their own would infringe on this sovereign authority, so section 2802 should

not apply. Further, subjecting CSU to section 2802's requirement to pay attorneys' fees to a prevailing plaintiff would impose a significant burden on CSU, which is subject to strict revenue and budgetary limitations. Imposing section 2802 liability would divert limited educational funds from CSU's core function. The court held that these infringements on CSU's sovereign powers precluded application of section 2802.

Significantly, the court also underscored that its decision should not be interpreted to mean that section 2802 can *never* apply to CSU—only that it did not apply in this case because Krug's claim fell squarely within the ambit of CSU's vested authority to set the terms for employee expense reimbursement.

PAGA CASE NOT BARRED BY PREVIOUS SETTLEMENT THAT CONTAINED DIFFERENT FACTS

***LaCour v. Marshalls of California, LLC*, 2023 WL 5543622 (Cal. Ct. App. 1st Dist. 2023)**

Robert LaCour was a loss prevention specialist at a Marshalls department store. His employment ended in May 2019. He filed a PAGA-only case against Marshalls on January 4, 2021. Marshalls argued that his PAGA claim was untimely because he had only one year and 65 days to bring the claim, and therefore should have filed it by August 2020 at the latest.

The court of appeals, however, ruled that LaCour's PAGA claim was timely. It noted that the Judicial Council issued Emergency Rule 9 during the COVID-19 pandemic, tolling the statute of limitations for civil claims from April 6, 2020 to October 30, 2020—a rule intended to apply broadly. The court rejected Marshalls' constitutional attacks, holding that Governor Gavin Newsom and the Judicial Council acted properly in adopting the rule in response to COVID-19. It found that because the statute of limitations for the PAGA claim was tolled for about six months by Emergency Rule 9, LaCour's PAGA claim was timely.

Marshalls also sought to strike LaCour's PAGA claim on the grounds that the settlement of an earlier PAGA claim against Marshalls by a different plaintiff, Joan Paulino, had a res judicata effect on LaCour's claim. For res judicata to apply, the court noted that two questions were relevant. First, under the primary rights test, did Paulino plead or could she have pled the same claims that LaCour now sought to pursue? Second, when Paulino settled her PAGA claims, was she acting in privity with LaCour? The court answered "no" to both questions.

In Paulino's case, the PAGA complaint contained "narrow" allegations that employees were not paid for time spent undergoing anti-theft bag checks at the end of their shifts. The complaint tracked the allegations in Paulino's LWDA notice. Paulino was not deputized to pursue any PAGA claims beyond those in her LWDA notice, and therefore could not have pled the same claims as LaCour–that is, that Marshalls failed to reimburse employees for uniforms.

With respect to privity, the court focused on whether it would be "fair" to bind a nonparty such as LaCour to the result obtained by Paulino in which LaCour did not participate. The court examined whether Paulino and LaCour had similar interests such that Paulino properly acted as LaCour's representative in the first action, and whether LaCour had sufficient notice that she could reasonably expect to be bound by Paulino's action. The court said "no" on both counts and held that, accordingly, it would not be fair to bind LaCour to the result obtained by Paulino.

NOTE: *This case is also summarized in the discussion of California employment law, beginning on page 5.*

NO PERMISSIVE INTERVENTION FOR PAGA PLAINTIFF WHOSE CASE WAS BEING SETTLED BY A COMPETING PLAINTIFF

***Accurso v. In-N-Out Burgers*, 2023 WL 5543525 (Cal. Ct. App. 1st Dist. 2023)**

Tom Piplack and Brianna Marie Taylor filed a PAGA action against In-N-Out. Five PAGA actions against In-N-Out followed, some in different venues. The fifth-filed case was Accurso's. When Piplack and Taylor learned that Accurso and In-N-Out were headed to mediation, they tried to coordinate global settlement discussions with all six PAGA plaintiffs involved.

Accurso refused and reached a settlement with In-N-Out that excluded the other five plaintiffs. Upon learning a settlement was imminent, Piplack and Taylor and one other plaintiff moved to intervene in Accurso's action. They also requested the trial court stay *Accurso* based on the doctrine of exclusive concurrent jurisdiction, arguing that *Accurso* should be stayed as a later-filed action. The trial court denied the motions, holding that Piplack and Taylor did not meet the threshold requirement for intervention, set forth in the California Code of Civil Procedure section 387, and did not have a cognizable interest in *Accurso*.

The court of appeal reversed, holding that the trial court correctly denied mandatory intervention but

erred in denying permissive intervention. As for mandatory intervention, Piplack and Taylor succeeded in demonstrating they had a significantly protectable interest in *Accurso*, contrary to the conclusion of the trial court. A "personal interest" was not required. As deputized proxies of the LWDA, Piplack and Taylor had a public enforcement charge that qualified as significant protectable interests in the fate of *Accurso*. Any settlement of a PAGA claim within the scope of their proxy authorization could impair that authority. This public interest is sufficient to meet the threshold "interest" requirement for intervention.

However, the court found that Piplack and Taylor failed to meet the burden of demonstrating that Accurso was not adequately protecting their interests. They failed to submit sufficient evidence to support the claim that Accurso was attempting to settle claims outside the scope of the LWDA notice. They did not, for example, present the trial court with the LWDA notices filed in the various cases. And because their intervention motion was filed *before* Accurso asked the trial court to approve a settlement, it was speculative to argue that Accurso was attempting to settle PAGA claims outside the scope of their authority. On this record, the court opined that the plaintiffs failed to meet their burden of showing inadequate representation, which is required for mandatory intervention.

As for permissive intervention, PAGA claimants with overlapping claims, as in the present case, may have something significant to add to the settlement approval process because they can point out deficiencies in the settlement that the parties to the settlement do not have an incentive to identify, such as an overbroad release or inadequate consideration. Piplack and Taylor would not disrupt or expand the scope of the case. They simply asked to stay *Accurso* to coordinate all six actions against In-N-Out, which might ultimately result in saving judicial resources.

The court of appeal ordered the trial court to reconsider the motion to intervene and request for a stay in light of its decision. It observed that the trial court had broad discretion on remand to coordinate the actions—including talking to the judges in the overlapping cases to figure out the best way to proceed.

***NOTE:** This case is also summarized in the discussion of California employment law, beginning on page 5.*

ENDNOTES

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1. *Adolph v. Uber Techs., Inc.*, 14 Cal. 5th 1104 (2023).
2. *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022).
3. Federal Arb. Act, 9 U.S.C. §§ 1-16.
4. *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904 (9th Cir. 2020).
5. *Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783 (2022).
6. *Id.* at 1790.
7. *See's Candy Shops, Inc. v. Super. Ct.*, 210 Cal. App. 4th 889 (2012).
8. *Troester v. Starbucks Corp.*, 5 Cal. 5th 829 (2018).
9. *Donohue v. AMN Services, LLC*, 11 Cal. 5th 58 (2021).
10. *Camp v. Home Depot U.S.A., Inc.*, 84 Cal. App. 5th 638 (2022).
11. *Estrada v. Royalty Carpet Mills, Inc.*, 76 Cal. App. 5th 685 (2022).
12. *Wesson v. Staples the Off. Superstore, LLC*, 68 Cal. App. 5th 746 (2021).
13. Cal. Educ. Code, §§ 89036 and 89500.

PUBLIC SECTOR CASE NOTES

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PERB REAFFIRMS PUBLIC SECTOR EMPLOYEES' RIGHT TO STRIKE

***City and County of San Francisco*, PERB Decision No. 2867-M (2023); judicial appeal pending**

On July 24, 2023, the Public Employment Relations Board (PERB) issued its decision in *City and County of San Francisco*,[1] regarding three consolidated cases brought by the Service Employees International Union, Local 1021 and the International Federation of Professional & Technical Engineers, Local 2. The cases challenged two San Francisco City Charter provisions that prohibit city employees from striking, mandate termination of employees who have engaged in strike activity, and strip such employees of accrued seniority if they are rehired. This decision is the sixth in a similar line of cases related to San Francisco's charter provisions.

Here, PERB reiterated that "strikes by public employees are statutorily protected, except as limited by other provisions of the MMBA [Meyers-Milias-Brown Act] or other public sector labor relations statutes and controlling precedent." It also underscored that: "The limitations on California public sector employees' right to strike are few and carefully defined." As previously explained by the California Supreme Court: "Strikes by public employees are not unlawful at common law unless or until it is clearly demonstrated that such a strike creates a substantial and imminent threat to the health or safety of the public."[2]

Under the MMBA,[3] a local agency may adopt reasonable rules and regulations pertaining to resolving collective bargaining disputes. However, for such rules to be lawful, they may not undercut or frustrate the MMBA's policies and purposes. Moreover, as PERB previously determined, the "home rule" doctrine "does not alter the fact that a city's charter must be consistent with the MMBA." In addition, PERB found the right to strike is not subject to regulation by charter cities and counties under the home rule doctrine.

In this case, PERB determined that the entirety of city charter section A8.346 is invalid because it totally conflicts with established precedent recognizing the statutory right to strike. Also, contrary to the city's assertions, the quid pro quo for interest arbitration is that the city can decline to resolve negotiations through interest arbitration after a union has engaged in an economic strike.

Moreover, PERB found that the Declaration of Policy in charter section A8.409—stating that strikes by city employees are not in the public interest and engaging in a strike equals automatic termination—is void and unenforceable and that distributing and requiring employees to sign a form acknowledging these provisions is unlawful and constitutes interference with protected rights. The city charter's ban on unfair labor practices and sympathy strikes was previously deemed void and unenforceable by PERB in a 2017 decision.[4]

In sum, PERB declared that all of city charter section A8.346—and all references to it, including those in section A8.409—are void and unenforceable. PERB also ordered the city to cease and desist from its prior practice of requiring employees to sign the Declaration of Policy acknowledgement form. In addition, it ordered a citywide notice posting.

The city has since appealed this decision to the court of appeal.

PERB ORDERS A SPOKEN REMEDY

***Mt. San Jacinto Community College District*, PERB Decision No. 2865-E (2023)**

On June 28, 2023, PERB issued *Mt. San Jacinto Community College District*,[5] and for the first time ordered a notice reading remedy. In this decision, PERB decided that the employer,

the San Jacinto Community College District, violated the Educational Employment Relations Act[6] when it:

- removed two faculty members, Rosaleen Gibbons and Farah Firtha, as chairs of the chemistry department;
- refused to recognize their reelection as chairs;
- reassigned them to teach lower level classes; and
- issued two counseling documents in retaliation for protected activities that included raising workplace safety concerns.

PERB also determined that these retaliatory acts interfered with the bargaining unit employees' right to be represented by the Mt. San Jacinto College Faculty Association and also denied the association its right to represent bargaining unit employees.

Among other remedies, PERB ordered the district to issue a verbal reading of the notice posted by a district representative to district employees in the impacted faculty members' bargaining unit. PERB determined that the notice reading was necessary to dull the impact of the district's actions by providing information to the workforce in a clear and effective way.

A spoken remedy is a "non-standard" remedy, which PERB finds is warranted "whenever customary remedies are insufficient."[7] In its decision, PERB did not specify who needed to read the posting aloud, but it directed the district to "conduct the reading in a manner designed to reach the most employees possible," and to allow an association representative to be present.

PUBLIC ENTITIES CANNOT HIDE BEHIND A PRIVATE ENTITY TO ESCAPE PERB'S JURISDICTION

***El Camino Healthcare District*, PERB Decision No. 2868-M (2023); judicial appeal pending**

PERB, rather than an administrative law judge, issued a post-hearing decision in *El Camino Healthcare District*[8] regarding the application of the single/joint employer test from *County of Ventura*.[9] This is somewhat rare.

In 2008, El Camino Hospital acquired six outpatient clinics from the Verity bankruptcy and created a private company called Silicon Valley Medical Development (SVMD) to own and operate these clinics, with the hospital as its only owner and member. While there is PERB precedent making it clear that the El Camino Healthcare District and hospital are public entities subject to PERB's jurisdiction, the hospital and district took the position that SVMD is a private entity and therefore under the jurisdiction of the National Labor Relations Board, not PERB.

However, PERB rejected this argument and held that a private corporation whose sole "parent" is a public entity is subject to its jurisdiction. PERB took into account that the private entity in this case is subject to the control of a public entity that is ultimately responsible to the public, uses public funds, and accomplishes a public purpose—providing healthcare to the public.

In applying the *County of Ventura* test for a single employer relationship, PERB looks at:

- the functional integration of operations;
- centralized control of labor relations;
- common management; and
- common ownership or common financial control.

Since PERB found a single-employer relationship, it did not need to reach the question of a joint-employer relationship. When various facilities are part of an integrated healthcare network, (SVMD clinics were part of El Camino Health), PERB views that network as having functionally integrated operations. PERB also looked at the financial investment made by the hospital in SVMD, as well as the fact that SVMD profits and losses ultimately belonged to the hospital. In addition, PERB noted that SVMD and the hospital shared officials and upper management, including labor relations for a period of time, and that the hospital had the authority to appoint and remove SVMD leadership.

PERB also analyzed the successorship doctrine in this case, which delineates rights and obligations when one employer takes over for another—for example, after the sale of a business. In this case, SVMD was a "clear successor," meaning it had to bargain over terms and conditions. Since SVMD was in a single-employer relationship with both the district and hospital, all three entities had an obligation to bargain with the union.

PERB PROMULGATES NEW REGULATIONS FOR EXPEDITED CASE HANDLING

Effective August 8, 2023,[10] PERB has a new process for parties to request expedited handling of a case. The regulation also identifies types of cases in which expediting at all levels is mandatory—from filing through conclusion of the case—without the need for any party to file a motion. The PERB Board, General Counsel, Chief Administrative Law Judge, or Director of the State Mediation and Conciliation Service can expedite any case they deem appropriate.

As before, expedited handling is mandatory for all cases involving petitions for recognition, amendment of certification, decertification and unit modification for all PERB-administered legislation. Party representatives do not need to file a motion or take any action to trigger expedited handling of these cases.

In all other cases, a motion to expedite needs to be filed with the PERB Board, General Counsel, Chief Administrative Law Judge, or Director of the State Mediation and Conciliation Service as appropriate—based on the current stage of the case and the proceeding that the party seeks to expedite.

For nonrepresentation matters, PERB will evaluate seven factors to determine whether a case should be expedited, including whether expedited processing is necessary to preserve the Board's ability to issue an effective remedy, whether there is a risk of irreparable harm to employee or employee organization rights, and whether there is an important and unresolved question of law.

ENDNOTES

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The authors thank Michaela Posner for her contributions.

1. *City and County of San Francisco*, PERB Dec. No. 2867-M (2023).
2. *County Sanitation Dist. No. 2 v. Los Angeles County Emp. Ass'n*, 38 Cal.3d 564, 586 (1985).
3. Cal. Gov't Code §§ 3500-11.
4. *City and County of San Francisco*, PERB Dec. No. 2536-M (2017).
5. *Mt. San Jacinto Community C. District*, PERB Dec. No. 2865-E (2023).
6. Cal. Gov't Code § 3540.
7. *Regents of the U. of California*, PERB Dec. No. 2755-H (2021), p. 56.
8. *El Camino Healthcare Dist.*, PERB Dec. No. 2868-M (2023).
9. *County of Ventura*, PERB Dec. No. 2600-M (2018).
10. PERB Regs., Nos. 32147 and 32305.

NLRA NOTES

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STATUTORY EMPLOYEES' ACTIONS IN SUPPORT OF NON-STATUTORY EMPLOYEE CAN BE PROTECTED

***American Federation for Children, Inc.*, 372 NLRB No. 137 (2023)**

In a 3-1 decision, the National Labor Relations Board (NLRB) found that a statutory employee's actions in support of a non-statutory employee could constitute protected concerted activity if the conduct benefited both types of workers. The NLRB overruled its previous ruling in *Amnesty International of the USA, Inc.*,[1] which held that employee action in support of non-employee interns was not protected by the National Labor Relations Act (NLRA). Notably, while the facts of *American Federation* involved an employee and applicant for a position in the same workplace, the Board suggested its holding would also apply in broader circumstances.

In the present case, the employer was a national nonprofit organization. Gaby Ascencio was a highly regarded employee there, but lost her eligibility to work in the United States in 2017. In January 2019, the employer was in the process of rehiring Ascencio and sponsoring her for a work permit. At the same time, the employer hired a new director in Arizona, where Ascencio worked. A current employee, Sarah Raybon, became concerned that the new director would not continue Ascencio's hiring and sponsorship process and talked with several coworkers about the issue. Raybon attempted to gather support for Ascencio's hiring while simultaneously opposing some of the director's new policies. The employer subsequently sought and received a resignation from Raybon based on her conduct. In August 2019, Raybon filed a charge with the NLRB, alleging that the employer sought her resignation in retaliation for engaging in protected concerted activity.

The administrative law judge (ALJ) found that Raybon's actions were not protected by the NLRA because her conduct was not for the purpose of mutual aid or protection. The ALJ found Raybon's efforts to build support for Ascencio's hiring and to oppose the director's perceived lack of support for rehiring were for the benefit of a non-employee. Relying on *Amnesty International*, the ALJ found that advocating on behalf of individuals who were not statutory employees could not be viewed as mutually aiding or protecting the statutory employees.

The NLRB reversed, finding that Raybon's support of Ascencio's hiring was protected concerted activity. It first held that, contrary to the decision below, Ascencio was a statutory employee, noting that "it is very well established that job applicants are employees under the Act, and where (as here) there is no question that they genuinely seek employment." It also underscored that Raybon's conduct was protected because of the solidarity principle—specifying that one employee who helps another can reasonably expect help in return—and because hiring a coworker affects the terms and conditions of all employees. The NLRB then went further, and held that even if this conduct involved statutory employees advocating for non-statutory employees, the resulting benefits to the statutory employees would make it a protected activity.

Dissenting, Member Marvin E. Kaplan opined that Raybon's separation was caused by her accusations made against the director unrelated to Ascencio's hiring, and thus the separation was lawful. Kaplan also noted that because the majority found that Ascencio was a statutory employee, there was no need to overrule *Amnesty International*.

BOARD RETURNS TO 'TOTALITY' TEST IN PROTECTED EMPLOYEE/SUPERVISOR COMMUNICATIONS

***Miller Plastic Products, Inc.*, 372 NLRB No. 134 (2023)**

In a 3-1 decision, the NLRB expanded the types of complaints by an individual employee that can be considered protected concerted activity. In doing so, the NLRB overruled the recent narrowing of the test for concerted activity engaged in by individual employees in *Alstate Maintenance, LLC*.[2]

The employer manufactures plastic storage projects. It was routine for employees to hold casual discussions among themselves while working. Employee Ronald Vincer was informally counseled about excessive talking, but not given a written warning. In the initial days of the COVID-19 pandemic, Vincer began discussing the employer's pandemic response and the propriety of continuing to operate. These communications were made to other employees and to supervisors, including those attending a workplace meeting. Shortly after Vincer raised his complaints, the employer saw him texting at work and terminated him for "poor attitude, talking, and a lack of profit."

The ALJ found that Vincer's COVID-19 complaints constituted concerted activity under the *Meyers Industries* cases,[3] which established that a single employee's conduct can be concerted if the employee is acting with the authority of other employees, or is seeking to "initiate, or to induce, or to prepare for group action." According to the ALJ, Vincer's discussions related to COVID-19 protocols and, consequently, constituted protected concerted activity for employees' mutual aid and protection. The ALJ then found that the employer discharged Vincer for protected concerted activity. The employer excepted, alleging the conduct was merely unprotected individual "griping" under *Alstate Maintenance*.

The Board adopted the ALJ's finding that the discharge of the employee violated section 8(a)(1) of the NLRA under existing law—including *Meyers* and *Alstate Maintenance*. In addition, the Board expressly overruled *Alstate Maintenance* because it created unwarranted restrictions on concerted activity in tension with the *Meyers* cases. Whereas the *Meyers* cases allowed a broad totality of circumstances analysis to determine whether an employee's conduct was concerted, the majority found that *Alstate Maintenance* inappropriately narrowed the analysis by adopting a checklist of five factors and restrictions to be reviewed when a single employee raised an issue with a supervisor. It included whether:

- the statement was made in an employee meeting called by the employer to discuss terms and conditions of employment;
- the decision affected multiple employees at the meeting;
- the communication was framed as a protest or complaint;
- the protest or complaint was focused on an individual or the general workforce; and
- the meeting's timing prevented the employee from discussing the issue beforehand.

Accordingly, the Board majority overruled *Alstate Maintenance*.

Concurring, Member Marvin E. Kaplan agreed that the employees' COVID-19 complaints constituted protected concerted activity under both *Meyers* and *Alstate Maintenance*. However, because *Alstate Maintenance* did not alter the decision, Kaplan disagreed with the majority's decision to overrule it.

BOARD ANNOUNCES NEW STANDARD FOR EVALUATING WORK RULES

***Stericycle, Inc.*, 372 NLRB No. 113 (2023)**

In *Stericycle*, the NLRB overruled the balancing test for employer work rules set forth in *Boeing Co.*,[4] and returned to a modified version of *Lutheran Heritage Village-Livonia*.[5]

When evaluating facially neutral work rules, the *Boeing* analysis involved balancing the nature and extent of the policies' potential impact on NLRA rights against the legitimate justification associated with the work rule. The *Boeing* decision placed work rules in one of three categories based on the subject of the rule. Those categories included:

- certain subjects always classified as lawful—for example, civility rules;
- other subjects sometimes lawful that required scrutiny in each case; and
- some subjects that were always classified as unlawful—such as rules prohibiting discussing wages.

In this case, after inviting briefing from amici, the NLRB overruled *Boeing* and announced a return to and revision of the prior standard in *Lutheran Heritage*. Under the new standard, the NLRB found that employer handbook policies violate the NLRA if the policies have a "reasonable tendency" to discourage employees from engaging in protected activity.

The standard has two parts. First, a workplace rule is presumptively unlawful if the general counsel demonstrates that an employee *could* reasonably interpret the rule to restrict or prohibit protected activity. The Board also clarified it will interpret this test from the perspective

of an employee who is "economically dependent on the employer," as opposed to the former "reasonable employee" standard. Second, an employer can rebut the presumption of the rule's unlawfulness only by "proving that the rule advances a legitimate and substantial business interest, and that the employer is unable to advance that interest with a more narrowly tailored rule."

STANDARDS REVISED FOR UNILATERAL CHANGES ABSENT A COLLECTIVE BARGAINING AGREEMENT

Wendt Corp., 372 NLRB No. 132 (2023) and _Tecnocap LLC_, 372 NLRB No. 136 (2023)

The NLRB issued two companion cases that overruled *Raytheon Network Centric Systems*,[6] and revised the standard for assessing whether a unilateral change to a mandatory subject of bargaining is privileged under the past practice defense.

In *Wendt Corp.*, the Board held that an employer cannot make a unilateral change in terms and conditions of employment informed by discretion, even if it is similar in kind and degree to past changes. The Board also reaffirmed the principle that an employer cannot justify a unilateral change by relying on a past practice established prior to the employees' selection of a bargaining representative—including such changes made prior to reaching a first collective bargaining agreement.

In *Tecnocap*, the Board held that an employer cannot make a unilateral change in terms and conditions of employment by relying on a past practice established under an expired management rights clause—that is, unilateral changes made after a collective bargaining agreement has expired, but prior to a successor agreement.

ENDNOTES

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1. *Amnesty International of the USA, Inc.*, 368 NLRB No. 112 (2019), *rev. denied sub nom, Jarrar v. NLRB*, 858 F. App'x 374 (D.C. Cir. 2021) (unpublished).
2. *Alstate Maintenance, LLC*, 367 NLRB No. 68 (2019).
3. *Meyers Indus., Inc.*, 268 NLRB No. 493 (1984) (Meyers I), *remanded sub nom, Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 948 (1985); *Meyers Indus., Inc.*, 281 NLRB No. 882 (1986) (Meyers II), *aff'd sub nom, Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988).
4. *Boeing Co.*, 365 NLRB No. 154 (2017).
5. *Lutheran Heritage Village-Livonia*, 343 NLRB No. 646 (2004).
6. *Raytheon Network Centric Sys.*, 365 NLRB No. 161 (2017).

ADR UPDATE

AUTHOR*

Ramit Mizrahi

PARTIES CANNOT CONTRACT FOR REVIEW OF AWARD ON THE MERITS BY APPELLATE COURT

***Housing Authority of the City of Calexico v. Multi-Housing Tax Credit Partners XXIX, L.P.*, 94 Cal. App. 5th 1103 (2023)**

The parties' arbitration agreement in this case provided that the arbitrator "shall endeavor to decide the controversy as though the arbitrator were a judge in a California court of law." It further provided that the parties would maintain their appeal rights and that the arbitrator's decision and "findings of fact and conclusions of law shall be reviewable on appeal upon the same grounds and standards of review as if said decision and supporting findings of fact and conclusions of law were entered by a court with subject matter and present jurisdiction."

After the arbitrator issued a final award denying all claims and counterclaims and declined to award attorneys' fees or costs, the plaintiffs sought review in the trial court. That court declined to review the award on the merits for errors of fact or law and declined to grant the plaintiffs' petition to partially reverse or vacate the award. It reasoned that the arbitration agreement provided for such a review only by the appellate court. The plaintiffs appealed.

The court of appeal reversed, holding that the trial court should have undertaken the review. It noted that "courts are not parties to arbitration agreements and are not bound by their terms." It reasoned that just as parties cannot agree that a legal dispute arising from their arbitration agreements will be resolved by the California Supreme Court, they have no ability to leapfrog over the superior court's original jurisdiction to undertake such a review by placing this authority in the hands of the court of appeal.

NO AUTHORITY TO ISSUE 3RD-PARTY SUBPOENAS FOR DISCOVERY DOCUMENTS

***McConnell v. Advantest America, Inc.*, 92 Cal. App. 5th 596 (2023)**

A few years ago, in *Aixtron, Inc. v. Veeco Instruments, Inc.*,[1] the court of appeal held that the California Arbitration Act (CAA)[2] does not provide for prehearing discovery subpoenas to third parties. Thus, with the exceptions of wrongful death and personal injury cases, third-party discovery subpoenas are not available in most arbitrated cases unless the parties explicitly contract to allow for them.

Some arbitrators have attempted a workaround: issuing subpoenas to third parties to appear and produce documents at a hearing set specifically "for the limited purpose of receiving documents," with the actual arbitration hearing on the merits—where testimony from the same nonparties could be sought—adjourned until a future date.

This case makes clear that such a workaround fails—and that where a "hearing" is merely a tactic to provide for discovery of information and documents from third parties, such subpoenas are invalid under the CAA.

That was the reality in this case, where the arbitrator issued broad third-party subpoenas for producing documents at a hearing limited to collecting them, did so with the intention of adjourning the hearing for nearly a year—when the same third parties would be summoned to testify, and allowed for the documents to be uploaded to a portal controlled solely by the subpoenaing party's counsel.

JURY WAIVER IN ARBITRATION AGREEMENT DOESN'T RENDER DELEGATION CLAUSE UNCONSCIONABLE

***Holley-Gallegly v. TA Operating, LLC*, 74 F.4th 997 (9th Cir. 2023)**

Kenneth Holley-Gallegly filed a putative class action lawsuit against his former employer, TA Operating, LLC. TA removed the case to federal court and moved to compel arbitration. Holley-Gallegly had signed an arbitration agreement with a delegation clause that provided: "All challenges to the interpretation or enforceability of any provision of this Agreement shall be brought before the arbitrator, and the arbitrator shall rule on all questions regarding the interpretation and enforceability of this Agreement."

TA argued this clause placed the determination of whether the case was arbitrable in the arbitrator's hands. The district court held the clause was procedurally unconscionable because the arbitration agreement was a contract of adhesion presented as a condition of continued employment. It then found that the delegation clause was also substantively unconscionable because the agreement contained a jury waiver provision that stated: "IF THIS AGREEMENT IS DETERMINED TO BE UNENFORCEABLE, ANY CLAIMS BETWEEN YOU AND THE COMPANY RELATED TO YOUR EMPLOYMENT SHALL BE SUBJECT TO A NON-JURY TRIAL IN THE FEDERAL OR STATE COURT THAT HAS JURISDICTION OVER THE MATTER."

It then denied the motion to compel arbitration. TA appealed.

The Ninth Circuit held that the district court had erred in holding the delegation clause unenforceable. It vacated the order with instructions that the district court order the arbitrator to decide the issue of arbitrability. The Ninth Circuit explained that, under *Rent-A-Center, West, Inc. v. Jackson*,[3] delegation clauses are essentially severable mini-agreements within agreements to arbitrate. As such, the court is not to look at the arguments about the unconscionability of the arbitration agreement *as a whole*, but only at those that apply to the delegation clause specifically.

The court emphasized that the jury waiver provision did not render the delegation clause substantively unconscionable because it would only apply if the agreement were determined to be unenforceable. Under that circumstance, the plaintiff would be able to argue against the jury waiver provision in court. If the agreement *were* deemed enforceable, then pursuing the case in arbitration would serve to waive a jury trial, anyway. Thus, the court noted that the provision had no bearing on whether the delegation of arbitrability was unconscionable.

SEPARATE ORDER DENYING MOTION TO COMPEL ARBITRATION NOT SUBJECT TO INTERLOCUTORY APPEAL

***Boshears v. PeopleConnect, Inc.*, 76 F.4th 858 (9th Cir. 2023)**

In this non-employment case, John Boshears sued PeopleConnect, a digital identity company, for violating his right to publicity by using his photo on a website, Classmates.com. PeopleConnect sought to compel arbitration under section 4 of the Federal Arbitration Act (FAA). It also sought to dismiss Boshear's complaint under Federal Rule of Civil Procedure 12(b)(6), arguing that it had immunity under the Communications Decency Act.[4]

The district court denied both requests for relief in a single 26-page document titled "order." PeopleConnect filed an interlocutory appeal challenging both of these denials, citing to section 16(a) of the FAA. That section provides: "An appeal may be taken from . . . an order . . . denying a petition under section 4 of this title to order arbitration to proceed."

In a concurrently filed memorandum disposition, the Ninth Circuit vacated the district court's order denying the motion to compel arbitration and remanded for further proceedings. It issued this published opinion to explain the "obvious principle" that "two orders do not become one 'order' for the purposes of section 16(a) solely by virtue of the fact that they appear in the same document."

Despite the fact that the denial of the rule 12(b)(6) motion was made in the same document that denied the motion to compel arbitration, each constituted a separate order, so the denial of the arbitration motion was not subject to review under section 16(a) of the FAA.

PRACTICE TIP: MEDIATION BRIEFS

Mediation briefs are usually your mediator's first exposure to your case. In addition to providing the basics—a statement of facts, analysis of the legal claims and defenses, and discussion of damages—you should give your mediator background and context to help understand the dynamics of the case.

- What discussions led to mediation?
- How have the interactions between the parties/counsel been so far?
- Is there any history of which the mediator should be aware?
- What is your client like and what are that client's needs?
- What barriers to resolution do you anticipate?

Sometimes, some of this information may be better conveyed through a phone call. Don't hesitate to ask for one.

Given the option to exchange briefs, most attorneys choose to keep them confidential. This is often a missed opportunity to give the other side's decisionmaker an unfiltered view of your case and to demonstrate the quality of your work—particularly when you have written a strong brief that lays out your client's positions and anticipates and addresses the opposing side's best arguments.

There may be arguments or evidence you wish to hold back from sharing with the other side, particularly when the other side has not yet been "pinned down." Make this explicit for the mediator—and make the brief easier to share if you choose to do so—by placing all facts, evidence, and arguments that should not be shared or discussed with the other side in a separate section explicitly titled as confidential.

ESTOPPEL APPLIED WHERE DEFENDANT REPRESENTED PLAINTIFF COULD OPT OUT OF ARBITRATION AGREEMENT

***Perez v. Discover Bank*, 74 F.4th 1003 (9th Cir. 2023)**

This non-employment case involves a claim of discrimination based on citizenship and immigration status after an application for consolidation on student loans was denied. The lead plaintiff in this case signed two arbitration agreements: one during the original loan application process years prior, and one during the loan consolidation application process. She took the position that her claims were outside of the scope of the first arbitration agreement and that both agreements were unconscionable. At a hearing on these issues, the defendant bank argued that the consolidation agreement was not unconscionable because the plaintiff would not be bound by it if she sent an opt-out notice that day.

On that basis, the district court granted the motion to compel arbitration based on the second agreement.

Shortly after the hearing, the plaintiff sent in an opt-out notice. She moved for leave to file a motion for partial reconsideration, seeking to have the court reverse its decision compelling arbitration. The defendant responded by arguing that the opt out did not apply to her discrimination claim because it had accrued before her opt out and that, in the alternative, the first arbitration agreement also applied. The court granted the plaintiff's motion and rescinded the portion of the order compelling her to submit her discrimination claims to arbitration. It determined that her opt out was valid, and that her claims were outside of the scope of the first arbitration agreement. The defendant appealed.

The Ninth Circuit affirmed. It held that the defendant was judicially estopped from now arguing that the plaintiff could not opt out of the second arbitration agreement. Its position clearly contradicted the one it previously took, upon which the court relied. Absent estoppel, the defendant would derive an unfair advantage.

ENDNOTES

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1. *Aixtron, Inc. v. Veeco Instruments, Inc.*, 52 Cal. App. 5th 360 (2020).
2. California Arb. Act, Cal. Code Civ. Proc. §§ 1280-1294.4.
3. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010).
4. Communications Decency Act, 47 U.S.C. § 230.

CASES PENDING BEFORE THE CALIFORNIA SUPREME COURT

AUTHOR*

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ARBITRATION

***Basith v. Lithia Motors*, Inc., 90 Cal. App. 5th 951 (2023); *review granted*, 2023 WL 5114947 (Aug. 9, 2023); S280258/B316098**

The petition for review is granted. Further action in this matter is deferred pending consideration and disposition of a related issue in *Fuentes v. Empire Nissan, Inc.*, S280256/B314490 (see Cal. Rules of Ct., rule 8.512(d)(2)), or pending further order of the court. Submission of additional briefing, pursuant to Cal. Rules of Ct., rule 8.520, is deferred pending further order of the court.

Holding for the lead case.

***Fuentes v. Empire Nissan*, 90 Cal. App. 5th 919 (2023), *review granted*, 2023 WL 5114942 (Aug. 9, 2023); S280256/B314490**

Petition for review after reversal of order denying a petition to compel arbitration. Is the form arbitration agreement that the employer here required prospective employees to sign as a condition of employment unenforceable against an employee due to unconscionability?

Review granted/brief due.

***Quach v. Cal. Commerce Club, Inc.*, 78 Cal. App. 5th 470 (2022); *review granted*, 297 Cal. Rptr. 3d 592 (Mem) (Aug. 24, 2022); S275121/ B310458**

Petition for review after reversal of order denying petition to compel arbitration. Does California's test for determining whether a party has waived the right to compel arbitration by engaging in litigation remain valid after the U.S. Supreme Court decision in *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708 (2022)?

Fully briefed.

***Ramirez v. Charter Comm., Inc.*, 75 Cal. App. 5th 365 (2021); *review granted*, 2022 WL 2037698 (Mem) (June 1, 2022); S273802/B309408**

Petition for review after affirmance of order denying petition to compel arbitration. Did the court of appeal err in holding that a provision of an arbitration agreement that allowed recovery of interim attorney's fees after a successful motion to compel arbitration was so substantively unconscionable that it rendered the arbitration agreement unenforceable?

Fully briefed.

***Zhang v. Superior Court*, 85 Cal. App. 5th 167 (2022); *review granted*, 304 Cal. Rptr. 3d 549 (Mem) (Feb. 15, 2023); S277736/B314386**

Petition for review after denial of petition for writ of mandate.

1. If an employer files a motion to compel arbitration in a non-California forum pursuant to a contractual forum-selection clause, and an employee raises as a defense Cal. Lab. Code § 925, which prohibits an employer from requiring a California employee to agree to a provision requiring the employee to adjudicate outside of California a claim arising in California, is the court in the non-California forum one of "competent jurisdiction" (Cal. Code Civ. Proc. § 1281.4) such that the motion to compel requires a mandatory stay of the California proceedings?

2. Does the presence of a delegation clause in an employment contract delegating issues of arbitrability to an arbitrator prohibit a California court from enforcing Cal. Lab. Code § 925 in opposition to the employer's stay motion?

Fully briefed.

DISCRIMINATION | HARASSMENT | RETALIATION

B*ailey v. San Francisco Dist. Att'y's Off.*, nonpublished opinion, 2020 WL 5542657 (2020); *review granted* (Dec. 30, 2020); S265223/A153520

Petition for review after affirmance of judgment. Did the court of appeal properly affirm summary judgment in favor of defendants on plaintiff's claims of hostile work environment based on race, retaliation—and failure to prevent discrimination, harassment, and retaliation?

Fully briefed.

WAGE AND HOUR

***Camp v. Home Depot U.S.A., Inc.*, 84 Cal. App. 5th 638 (2022); *review granted* (Feb. 1, 2023); S277518/H049033**

Petition after reversal of judgment. Under California law, are employers permitted to use neutral time-rounding practices to calculate employees' work time for payroll purposes?

Reply brief due.

***Castellanos v. State of California*, 89 Cal. App. 5th 131 (2023); *review granted* (June 28, 2023); S279622/A163655M**

Petition for review after affirmance in part and reversal in part the judgment in an action for writ of mandate. Is Proposition 22 (Protect App-Based Drivers and Services Act) invalid because it conflicts with article XIV, section 4 of the California Constitution?

Opening brief due.

***Estrada v. Royalty Carpet Mills, Inc.*, 76 Cal. App. 5th 685 (2022) *Inc.*; *review granted*, 294 Cal. Rptr. 3d 460 (Mem) (June 22, 2022); S274340/G058397, G058969**

Petition after the affirmance in part and reversal in part of judgment. Do trial courts have inherent authority to ensure that claims under the Private Attorneys General Act (Cal. Lab. Code §§ 2698-2699.8) will be manageable at trial, and to strike or narrow such claims if they cannot be managed?

Fully briefed.

***Huerta v. CSI Elec. Contractors, Inc.*, 39 F.4th 1176 (9th Cir. 2022); *cert. granted* (Aug. 31, 2022); S275431/9th Circ. No. 21-16201**

Request under Cal. Rules of Court, rule 8.548, that this court decide questions of California law presented in a matter pending in the U.S. Court of Appeal for the Ninth Circuit.

1. Is time spent on an employer's premises in a personal vehicle and waiting to scan an identification badge, have security guards peer into the vehicle, and then exit a security gate compensable as "hours worked" within the meaning of California Industrial Welfare Commission Wage Order No. 16?

2. Is time spent on the employer's premises in a personal vehicle, driving between the security gate and the employee parking lots, while subject to certain rules from the employer, compensable as "hours worked" or as "employer-mandated travel" within the meaning of California Industrial Welfare Commission Wage Order No. 16?

3. Is time spent on the employer's premises, when workers are prohibited from leaving but not required to engage in employer-mandated activities, compensable as "hours worked" within the meaning of California Industrial Welfare Commission Wage Order No. 16 or under Cal. Lab. Code § 1194 when that time was designated as an unpaid "meal period" under a qualifying collective bargaining agreement?

Fully briefed.

***Iloff v. LaPaille*, 80 Cal. App. 5th 427 (2022); *review granted*, 299 Cal. Rptr. 3d 770 (Mem) (Oct. 26, 2022); S275848/A163504**

Petition for review after affirmance in part and reversal in part.

1. Must an employer demonstrate that it affirmatively took steps to ascertain whether its pay practices comply with California Labor Code and Industrial Welfare Commission Wage Orders to establish a good faith defense to liquidated damages under Cal. Lab. Code § 1194.2(b)?

2. May a wage claimant prosecute a paid sick leave claim under section 248.5(b) of the Healthy Workplaces, Healthy Families Act of 2014 (Cal. Lab. Code §§ 245-49) in a de novo wage claim trial conducted pursuant to Cal. Lab. Code § 98.2?

Fully briefed.

***Naranjo v. Spectrum Security Services, Inc.*, 13 Cal. 5th 93 (2022); *review granted* (May 31, 2023); S279397/B256232**

Petition for review after affirmance in part and reversal in part of judgment. Does an employer's good faith belief that it complied with Cal. Lab. Code § 226(a) preclude a finding that its failure to report wages earned was "knowing and intentional" as is necessary to recover penalties under Cal. Lab. Code § 226(e)(1)?

Reply brief due.

***Rattagan v. Uber Techs.*, 19 F.4th 1188 (9th Cir. Dec. 6, 2021), *cert. granted* (Feb. 29, 2022) S272113/9th Circ. No. 20-16796**

Request under Cal. Rules of Court, rule 8.548, that this court decide questions of California law presented in a matter pending in the U.S. Court of Appeal for the Ninth Circuit. Under California law, are claims for fraudulent concealment exempted from the economic loss rule?

Fully briefed.

***Ruelas v. County of Alameda*, 51 F.4th 1187 (9th Cir. Nov. 1, 2022), *cert. granted* (Jan. 11, 2023) S277120/9th Cir. No. 21-16528**

Request under Cal. Rules of Court, rule 8.548, that this court decide a question of California law presented in a matter pending in the U.S. Court of Appeal for the Ninth Circuit. Do non-convicted incarcerated individuals performing services in county jails for a for-profit company to supply meals within the county jails and related custody facilities have a claim for minimum wages and overtime under Cal. Lab. Code § 1194 in the absence of any local ordinance prescribing or prohibiting the payment of wages for these individuals?

Fully briefed.

***Stone v. Alameda Health Sys.*, 88 Cal. App. 5th 84 (2023), *rev. granted*, 2023 WL 3514241 (May 17, 2023); S279137/A164021**

Petition for review after affirmance in part and reversal in part of an order in a civil action.

1. Are all public entities exempt from the obligations in the California Labor Code regarding meal and rest breaks, overtime, and payroll records—or only those public entities that satisfy the "hallmarks of sovereignty" standard adopted by the court of appeal in this case?

2. Does the exemption from the prompt payment statutes in Cal. Lab. Code § 220(b), for "employees directly employed by any county, incorporated

From the Editors
EDITORIAL POLICY

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city, or town or other municipal corporation" include all public entities that exercise governmental functions?

3. Do the civil penalties available under the Private Attorneys General Act of 2004, codified at Cal. Lab. Code §§ 2698-2699.8 apply to public entities?

Answer brief due.

***Turrieta v. Lyft, Inc.*, 284 Cal. Rptr. 3d 767 (2021), *review granted*, 288 Cal. Rptr. 3d 599 (Mem) (Jan. 5, 2022); S271721/B304701**

Petition for review after affirmance of judgment. Does a plaintiff in a representative action filed under the Private Attorneys General Act (Cal. Lab. Code §§ 2698-2699.8) have the right to intervene, or object to, or move to vacate, a judgment in a related action that purports to settle the claims that plaintiff has brought on behalf of the state?

Fully briefed.

WHISTLEBLOWER

***Brown v. City of Inglewood*, 92 Cal. App. 5th 1256 (2023), review granted 2023 WL 6300304 (Mem) (Sept. 27, 2023), S280773/B320658**

Petition for review after affirmance in part and reversal in part of an anti-SLAPP order. Are elected official employees for purposes of whistleblower protection under Cal. Lab. Code § 1102.5(b)?

Review granted/brief due.

ENDNOTE

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DATE	TITLE	LENGTH	LOCATION
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December 5, 2023	Webinar: Are Anti-Discrimination, Harassment & Retaliation Policies & Trainings Working; if Not, What Do We Do	1.0 Hour MCLE	Interactive Webinar
December 5, 2023	2023 Advanced Mediation Conference	6.5 Hours MCLE	In Person Conference San Francisco, CA

Continued from page 4

This may lead to the question of what kinds of ULPs will result in remedial *Cemex* bargaining orders. The Board's answer is: "If the employer commits an unfair labor practice that requires setting aside the election, the petition (whether filed by the employer or the union) will be dismissed, and the employer will be subject to a remedial bargaining order."[23] It also explains that any violation of section 8(a)(3) during the critical period will result in a bargaining order.[24] Another clarification is that any violation of that section will also result in a bargaining order unless the violation is so minimal or isolated "that it is virtually impossible to conclude that the misconduct could have affected the election results."[25] The impact of the violation is analyzed by review of "all relevant factors, including the number of violations, their severity, the extent of dissemination, the size of the unit, the closeness of the election (if one has been held), the proximity of the conduct to the election date, and the number of unit employees affected."[26]

As a result, the General Counsel will still need to show dissemination of unfair practices to other members of the unit to establish that a section 8(a)(1) violation is sufficient to support a *Cemex* bargaining order.[27] In a close election, as in *Cemex*, a lesser degree of dissemination is necessary, as an event that impacted just a few votes could have determined the outcome of the election. As a result, it is expected that an employer's maintenance of an employee handbook that includes overbroad rules likely to chill employee's section 7 rights may be sufficient to result in a *Cemex* bargaining order.[28] Most employers distribute their handbooks to all employees and require them to document that the handbook has been received and read, so most would likely be affected.

The representation process with the potential for a *Cemex* order is set into motion by the union advising the employer that it represents a majority of employees in an appropriate bargaining unit.[29] The statement of majority support can be made prior to the union initiating an RC petition[30] with the Board, such as by a union demand or worker delegation, or by means of the petition itself. Although a union need only certify a 30% showing of interest to initiate an RC petition at the Board, nothing requires filing once that threshold is met and, under most circumstances, a union only initiates the Board process once it has established strong majority support.

Thus, it is expected that in addition to increased demands for voluntary recognition by means of written communication from the union or direct action by the employees, unions will begin to add language to their RC petitions that clearly informs the employer of the union's majority status.

It is also anticipated that most unions will not wait for the employer to file an RM petition. Nothing in *Cemex* limits a petitioning union's right to file its RC petition simultaneously with, or even before, advising the employer it has attained majority support. That allows the union to control the timing of the hearing and ensure the election is held as quickly as possible. It also ensures that the union is the party defining the proposed unit. Although this does not change the obligations or burdens on the parties at the pre-election hearing, it does tee up the question as defined by the union which may include, for example, a request for a self-determination election adding the newly organized employees into an already existing unit organized by the same union with the same employer.[31]

When a party petitions for a representation election, it defines the unit it is seeking to represent. The NLRA does not require a particular unit; more than one may be appropriate. On many occasions, the union's petitioned-for unit is less than a "wall-to-wall" unit of all non-managerial employees of the employer at one location. In response, employers regularly attempt to argue that the complete unit is the only appropriate unit. This appears, generally, as simply an attempt to buy time and "stack" the unit[32] before an election, as the standard used to determine the appropriate unit requires the employer to establish that any additional employees share an "overwhelming community of interest" with the unit as defined by the union.[33]

Ultimately, the Regional Director makes the determination, which, under most circumstances, is the smallest possible unit that includes the petitioned-for employees.[34] As an example, a union may petition for meatcutters in a supermarket. The employer may contend that all employees in the supermarket—including cashiers, courtesy clerks, deli employees, bakery employees, produce employees, and all employees in the meat department (including meatcutters), is the only appropriate unit. The Regional Director may find, applying the community-of-interest test, that a unit of only meatcutters is appropriate. Alternatively, the Regional Director may find that a unit of meat department employees is the smallest appropriate unit, or that the wall-to-wall unit of all employees is the smallest appropriate unit that includes the meatcutters.

The Board's decision in *Cemex* does not indicate whether a bargaining order would issue if the Regional Director ultimately finds the appropriate unit to be all employees in the meat department. In that situation, the union never claimed or demonstrated majority support in the unit that

was ultimately found to be appropriate and, depending on the number of employees added to the petitioned-for unit (the difference between all meat department employees and meatcutters), the original support may no longer represent the majority of the unit. Given this possibility, unions may provide more than one statement of majority support—each one addressing a different potential bargaining unit. These could be simultaneous or sequential as the pre-election procedure plays out.

However, under *Cemex*, the employer can still question the appropriateness of the union's petitioned-for unit, but any ULPs (that are not minimal or isolated) engaged in while the question of representation is pending will result in a *Cemex* order. It is anticipated in situations where ULPs occur while the pre-election process is pending, that the Regional Director will determine the appropriate unit and, on a parallel track, the litigation of the ULP will move forward. If the union is not successful and a violation is found, the bargaining order will apply to the appropriate unit, even if it differs from the petitioned-for unit.

While *Cemex* provides key advantages over the prior remedy of merely holding a rerun election, unions generally would prefer voluntary recognition or a ULP-free election. Starting a bargaining relationship with a bargaining order does not provide the same power and leverage at the table as a vote in which a strong majority of the employees designate their union. The full impact of the decision and the deterrent effect of the bargaining order remains to be seen as employers weigh the odds of being saddled with a bargaining order against its ability to convince its employees that they don't want a union—without resorting to illegal acts.

EMPLOYER ANALYSIS

According to some reports, Millennials and Gen Z workers are more receptive to organized labor and have assumed a larger role in the workforce and their influence will continue to grow.[35] In addition to a "hot labor summer" of strikes at levels not seen in decades, there are many public nationwide organizing campaigns in industries with little to no history of prior union activity. All of this occurs under the leadership of President Joe Biden, who is self-proclaimed as the "most pro-union president in American history."

Now, the *Cemex* decision will add to this dramatic shift in the labor landscape, requiring all employers, whether union or non-union, to shift their approach from a defensive, reactionary one to a proactive one. This is a posture that should emphasize clarity in position coupled with legal compliance.

IS *CEMEX* A RETURN TO *JOY SILK*?

The NLRB's General Counsel intended to use *Cemex* to prompt the Board to revert to the *Joy Silk* doctrine, alleging that Cemex's refusal to grant recognition based merely on the union's presentation of cards, and the employer's lack of a "good faith" doubt as to the union's support, violates the NLRA. In advocating for a return of *Joy Silk*, the General Counsel sought to overrule the time-tested standard set forth in *Linden Lumber*.[36] Though it declined to re-invigorate *Joy Silk's* unworkable "good faith standard," which previously spawned unending litigation over the employer's subjective mindset, the Board held that an employer must, if it doubts the union's status, file an RM petition to initiate a Board-supervised, secret ballot election.

If handled correctly, *Cemex* should result in very few unions obtaining recognition without an election, either through an RC petition or an RM petition. Employers will undoubtedly adapt to *Cemex's* standard that the employer must "promptly" file a petition when faced with a union's demand for recognition. At the same time, unions may elect to file their own RC petition to avoid awaiting an employer's petition. Since *Cemex*, unions continue to file RC Petitions, and the number of RM Petitions has only moderately increased.

The NLRB's jumbling of the parties' respective burden to file election petitions may accomplish very little at the expense of clouding a long-established process to determine union representation. Even after *Cemex*, most employers will insist on secret ballot elections. But now they must take care to "promptly" file their own petition. In addition, they must steadfastly refuse to consider or accept authorization cards from unions claiming majority status to protect the demand for a secret ballot election.

THE WAY THEY WERE: SECRET BALLOT ELECTIONS

Unions have always been able to *request* recognition based on a claim to majority support, which has been recognized by the U.S. Supreme Court.[37] However, *Linden Lumber* ensured that employers could *insist* on a secret ballot election before granting recognition to a union and balanced the interests of all parties to a recognitional proceeding. Unions could benefit from the legal rights conferred by certification after a secret ballot election. Employers could avoid the risk of unlawfully recognizing a union lacking majority support.[38] Most importantly, it ensured that employees' true preference would be established through an election—undisputedly the best method for determining employee support of a union. As

the U.S. Supreme Court held in *Gissel*: "The Board itself has recognized . . . that secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support."[39]

Consistent with *Linden Lumber*, unions have traditionally filed most of the election petitions—for example, there were 2,072 union election petitions (RC petitions) in fiscal year 2022, compared to 32 employer election petitions (RM petitions). Indeed, since 2013, the highest number of employer petitions has been 61 (2015), while the lowest number of union petitions has been 1,269 (2021).[40]

CEMEX DISAVOWS SECRET BALLOTS, FAVORS 'CARD CHECKS'

Despite *Linden Lumber* having been settled law for 52 years, and being adopted by the U.S. Supreme Court, the Board in *Cemex* overruled the holding, justifying its reversal by the fact that it represented "a permissible, but not mandatory, construction of the Act."[41] Indeed, the Board cited favorably the opinion of a Court *minority* that concluded that "where an employer refuses, upon request, to bargain with a majority-supported union without taking any other action, 'the Act clearly provides that the union may charge the employer with an unfair labor practice . . . for refusing to bargain collectively with the representatives of his employees."[42] The Board noted that this language was consistent with its decision in *Cemex*, while the dissent highlighted that it conflicts with the Court's *Linden Lumber* decision, and may render *Cemex* unenforceable.[43]

In place of *Linden Lumber*, the Board proclaimed: "An employer violates section 8(a)(5) and (1) by refusing to recognize, *upon request*, a union that has been *designated* as . . . representative by the majority of employees in an appropriate unit unless the employer promptly files a [RM] petition . . . to test the union's majority status or the appropriateness of the unit, assuming that the union has not already filed a petition pursuant to section 9(c)(1)(A)."[44]

The Board has repeatedly tried to force union representation on employees based upon means other than verifiable proof of actual, uncoerced majority support, with construction industry cases being a critical example. For instance, in *Nova Plumbing* and *Colorado Fire Sprinkler*,[45] the NLRB relied on boilerplate language falsely purporting to embody the employees' majority support as the platform to claim a majority-based bargaining relationship. Relying on U.S. Supreme Court authority, including *Ladies Garment Workers*,[46] the D.C. Circuit reaffirmed the importance of actual, uncoerced employee choice and the secret ballot election process. As the Court noted in *Colorado Fire Sprinkler*: "The rule is that the employees pick the union; the union does not pick the employees. . . [E]xceptions [are] not meant to cede all employee choice to the employer or union."[47]

> *CEMEX* FLIPS LABOR LAW ON ITS HEAD, LIKELY MAKING BARGAINING ORDERS THE RULE.

Despite court rejections of efforts to forgo a secret ballot vote, *Cemex*—though claiming to give employers a choice—merely reiterated the Board's preference for union recognition based on authorization cards.[48] This type of recognition is obviously preferred by unions, as it does away with any requirement that a union undergo a secret ballot election and prevents campaigning.

CEMEX GIVES ONLY ONE VIABLE OPTION

As noted above, *Cemex* purports to give employers three choices to respond to demands for recognition.

The first option is that an employer simply recognizes the union. The Board noted that, though elections are usually "preferred," they are not required, and recognition based on union authorization cards signed by a majority of employees is an acceptable "alternative nonelection showing."[49]

However, given the imperfect ability of authorization cards to confirm a union's majority status (which the Board noted but discounted),[50] an employer's only real option is to promptly[51] file an RM petition, as without it, the employer commits an alleged unfair labor practice and employees suddenly lose their right to vote. The employer's petition is likely the last resort to "test the union's majority status."[52]

In any representation case, a key issue is the "appropriateness of the unit."[53] In *American Steel Construction*, the Board returned to its pro-labor standard endorsing "micro units" as appropriate for collective bargaining. The Board noted that: "Employerwide and plantwide units are presumptively appropriate" and stated it will once again reject a unit only if there is an "overwhelming community of interest" between the petitioned-for unit and excluded, or theoretically included, employees. And it emphasized it "will consider only whether the requested unit is an appropriate one even though it may not be the optimum or most appropriate unit for collective bargaining."[54] It is not clear under *Cemex* how the appropriateness of the union would be resolved

in a refusal-to-bargain charge, though the Board stated that the regional office must always confirm that the unit is appropriate before issuing a bargaining order.[55]

In responding to bargaining demands, employers should be vigilant in refusing to review or consider the union's authorization cards. Under longstanding Board precedent, an employer that agrees to review authorization cards is impliedly agreeing to card-check recognition.[56] In such cases, the union may file a refusal to bargain charge and "if majority support in an appropriate unit is proven, . . . [the Board will] issue a remedial bargaining order."[57] Any employer who chooses to do nothing would act "at its peril,"[58] as the employer's obligation to bargain, if later proven, would attach from the moment of the union's demand for bargaining and the employer would be liable for any later unfair labor practices, including unilateral changes to the terms and conditions of employment.[59]

PUNITIVE BARGAINING ORDERS NOW THE STANDARD

Arguably, the most radical holding of *Cemex* is endorsing the bargaining order as *the* standard remedy for any serious pre-election ULPs. Ultimately, the Board's tinkering with the parties' respective duties to file a representation petition may prove inconsequential to the election process, but the new remedial scheme will undoubtedly result in more mandatory bargaining orders imposed on workplaces in the absence of certification following a secret ballot election.

Under *Gissel*, a bargaining order is "extraordinary" because it requires an employer to recognize and bargain with a union even though the employees have voted against union representation. In approving the use of such orders, the U.S. Supreme Court summarized when they should issue.

> [T]he Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.[60]

In *Cemex*, the Board expands this holding and reaches a new standard: "[I]f the Board finds that an employer has committed unfair labor practices that frustrate a free, fair, and timely election, the Board *will* dismiss the election petition and issue a bargaining order, based on employees' prior, proper designation of a representative for the purpose of collective bargaining."[61] In the Board's view, this new standard is necessary as it "did not believe that conducting a new election—after the employer's unfair labor practices have been litigated and fully adjudicated—can ever be a truly adequate remedy."[62]

The magnitude of an unfair labor practice that will result in this new bargaining order remains murky, variously described as, "an unfair labor practice that requires setting aside the election;"[63] a violation that "frustrate[s] a free, fair, and timely election;"[64] and a violation that "has rendered a current election (normally the preferred method for ascertaining employees' representational preferences) less reliable than a current alternative nonelection showing."[65] In conjunction with established Board precedent that unfair labor practices require setting aside an election unless it is "virtually impossible" that the violations affected the outcome,[66] the Board's new standard will likely result in many more bargaining orders.[67]

Much like the rest of the *Cemex* decision, this dramatically departs from the previous *Gissel* bargaining order standard. As the dissent noted, federal circuit courts have upheld these strict requirements and limited the Board to a strict case-by-case analysis of the appropriateness of bargaining orders by refusing to enforce them.[68]

The U.S. Supreme Court, federal circuit courts and the Board have in the past expressed a preference for secret ballot elections as the best method to determine whether a union will represent a unit of employees.[69] *Cemex* abruptly discounts it by blankly stating that a "right to vote in a secret ballot election" is derived from a right to have representatives designated or selected by employees, and that no one "could seriously argue that a Board bargaining order entered as a remedy for an employer's refusal to bargain with the representative designated" by the employees "frustrates . . . the Act, [or] deprives employees of a distinct 'right to vote in a secret ballot election.'"[70]

With this blanket statement, the Board overruled decades of precedent. Rather than being the exception for circumstances where pervasive violations of the law threaten the environment for a fair election, the *Cemex* ruling flips labor law on its head, likely making bargaining orders the rule.

CHALLENGES AND LEGISLATION

Cemex is challenging the Board's ruling in the courts.[71] As noted in the case's dissent, numerous appellate courts and the Board itself have underscored that an employer need not file its own petition in response to a recognition demand, and have endorsed a preference for secret ballot elections and approved using bargaining orders only in the most egregious cases—all of which *Cemex* reverses. Given

that at least two U.S. Supreme Court precedents are at stake—*Gissel* and *Linden Lumber*—there is good reason for employers to consider court review in *Cemex* bargaining order cases.

"Card check" has been advanced legislatively on several occasions in different forms, but has failed to pass. More than a decade ago, the Employee Free Choice Act would have completely done away with elections "if the Board [found] that a majority of the employees in an [appropriate unit] for bargaining ha[d] signed valid authorizations."[72] Currently, the Protecting the Right to Organize Act—similar to *Cemex*—seeks mandatory recognition and bargaining if a union lost a vote but the union had authorization cards from a majority of employees in the previous year and employers committed any violation of the Act or "otherwise interfered with a fair election, and the employer has not demonstrated that the violation or other interference is unlikely to have affected the outcome."[73]

PRACTICAL EFFECTS

Cemex erases the need for unions to file election petitions. With the historic lows of current private sector union membership, eliminating what unions see as the procedural inconvenience of secret ballot elections is a win.[74] But it lacks respect for the individual choice of each employee, which the secret ballot allows. Under the new election rules mentioned here, if an election petition *is* filed, the election process will move swiftly and with less sensitivity to issues important and unique to each workplace.

Employers should take the following steps:

- Plan for a representation demand in advance by designating and training appropriate personnel to respond to any recognition demand.
- Adopt a company policy in favor of secret ballot elections. The courts have long recognized that authorization cards are less credible and prone to abuse. Employers should meet any recognitional demands with an employer petition for a secret ballot election.
- Review employee handbooks, policies, and procedures to ensure compliance with the Board's newly adopted legal standard regarding employer policies. As the *Cemex* dissent noted, merely maintaining an overbroad handbook rule could now form the basis for a bargaining order.
- Be proactive regarding employee engagement and workplace satisfaction. Establish protocols for employee feedback and methods to resolve employee complaints. Once a recognitional demand is made, Board law prohibits soliciting and resolving grievances.
- Once an employer petition is filed, train supervisors on appropriate pre-election conduct and messaging. Remember that the Board's General Counsel is actively promoting a legal standard that prohibits mandatory campaign meetings.

Employers should expect that unions will gather cards and spring demands upon employers when the unions feel it is most opportune, often at times unions view employers as vulnerable, and when an employer may be most easily pressured into accepting the arrangement. While recognition demands in recent decades have served as a precursor to a union filing an election petition, that is likely to change.

If there is a vote, unions will likely feel encouraged to challenge any employer communications and actions as an unfair labor practice by filing a charge with the NLRB. There is little disincentive to file a charge, as it is a one-page form that can be pulled from the internet, which starts a Board investigation of the accused employer, and, after *Cemex*, has a high probability of resulting in a bargaining order.

Cemex defies Board law and court precedent. The ruling opens a door for unions and the NLRB to run roughshod over employees by denying them a secret ballot choice while injecting immediate demands and chaos for employers dedicated to running businesses and managing workplaces consistent with applicable law. With one of the most dramatic changes in labor law in decades, the NLRB has made it harder for those covered by the NLRA to predict and understand the rules of the road. This dramatic shift in rules benefits no one, except potentially, the labor lawyers.

AND BY THE WAY: THE NLRB'S NEW (OLD) REPRESENTATION RULES

The *Cemex* decision was issued the day after the NLRB completed the rulemaking process regarding representation elections. The new representation regulations are scheduled to go into effect on December 26, 2023. (See 88 FR 58076 published August 25, 2023 modifying 29 C.F.R. § 102, effective December 26, 2023.) These rules will, in essence, rescind the 2019 changes to the representation procedures and return the NLRB to the 2014 rules. Under those rules, sometimes termed the "quickie" election rules, the period of time between a party filing a petition and a pre-election hearing is eight calendar days as compared to the 14 business days currently in place.

In addition, under the 2023 rules, briefing after a pre-election hearing will be subject to the discretion of the Regional Director as compared to a matter of right (with at least five business days to do so). Importantly, under the 2019 election rules, nearly all issues of inclusion and eligibility were to be litigated prior to the election. Under the 2023 rules, the Regional Director has the authority to limit pre-election litigation to issues likely to affect the outcome of the election and reserve litigation on all other issues unless and until necessary to resolve post-election objections or determinative challenges. In all, it is expected that the change to the representation rules will move the average number of days between petition and election from approximately 45 to 24, as was the experience under the 2014 rules.

The change in framework under Cemex to provide for more voluntary recognition and remedial bargaining orders for violations in the critical period, paired with the decrease in time to process petitions in the upcoming representation rules, and the changes to community of interest standards embodied in *American Steel Construction, Inc.* make for interesting and fast-moving times in union representation.

ENDNOTES

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1. *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130 (2023).
2. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).
3. ULP charges are filed with a region of the NLRB, where regional staff conduct an investigation; the Regional Director determines whether a complaint should issue. Once a complaint issues, counsel for the General Counsel, an attorney employed by the NLRB at the regional level, prosecutes it. Hearings are held before an administrative law judges employed by the NLRB.
4. *Supra* note 2.
5. Under NLRB regulations, the employer must provide a petitioning union with the name, job title, work location, shift, and home contact information of all employees in the proposed unit at
6. *Joy Silk Mills, Inc.*, 85 NLRB No. 1263 (1949), enf'd, 185 F.2d 732 (D.C. Cir. 1950), cert. denied 341 U.S. 914 (1951).
7. *Babcock & Wilcox*, 77 NLRB No. 577 (1948) (captive audience meetings); *Tri-Cast, Inc.*, 274 NLRB No. 377 (1985) (statements regarding access to directly discuss issues with management).
8. *Cemex*, 372 NLRB No. 132, at slip op. 12, *citing Gissel*, 395 U.S. 614-615.
9. *Id.* at slip op. 13.
10. 29 U.S.C. § 159(a).
11. *Cemex*, *supra* note 8 at slip op. 20.
12. *Joy Silk Mills, Inc.*, *supra* note 6; *Linden Lumber Division, Summer & Co.*, 190 NLRB No. 718 (1971), rev'd. sub nom *Truck Drivers Union Local No. 413 v. NLRB*, 487 F.2d 1099 (D.C. Cir. 1973), aff'd 419 U.S. 301 (1974).
13. *Cemex*, *supra* note 1 slip op. at 22 *citing Joy Silk*, *supra* note 6, 85 NLRB at 1264.
14. *Id.* slip op. at 24, *citing Linden Lumber.*

15. 29 U.S.C. § 158(a)(1) prohibits an employer from interfering with, restraining, or coercing employees in exercising their section 7 rights (29 U.S.C. § 157). The right to engage in protected concerted activity and to select a bargaining representative are both encompassed within section 7.

16. *Cemex supra* note 1 at slip op. 25. This type of petition is known as an "RM petition." 29 U.S.C. §, 159(c)(1)(B).

17. *Id*. at slip op. 26.

18. *Id*. at slip op. 28.

19. 29 U.S.C. § 151.

20. 29 U.S.C. § 159(b).

21. NLRB Form 502 (RM).

22. Under the current regulations, voluntary recognition can be converted to a formal certification by means of a 45-day posting. 29 C.F.R. § 103.21. Absent taking this step, voluntary recognition is not provided the same legal protection as a Board certification. However, the Board has announced rulemaking on this issue and the proposed rule would place voluntary recognition on equal footing with certification after a Board conducted election. 87 FR 66890 published November 4, 2022.

23. *Cemex*, *supra* note 1 at slip op. 26.

24. 29 U.S.C. § 158(a)(3) prohibits an employer from engaging in "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

25. *Cemex*, *supra* note 1 at slip op. 26, fn. 142 *citing Lucky Cab Co*., 360 NLRB No. 271, 277 (2014).

26. *Id*. *citing Bon Appetit Mgmt*. *Co*., 334 NLRB No. 042, 1044 (2001).

27. IBT and the General Counsel took exception to the existing dissemination requirement, but the Board did not address this issue as it found, even applying the standard in place in *Crown Bolt*, *Inc*., 343 NLRB No. 776, 779 (2004), that the burden had been met to show dissemination.

28. The Board's standards for analyzing the effect and import of employer-maintained rules was recently revised in *Stericycle*, *Inc*., 372 NLRB No. 113 (2023).

29. An NLRB representation election is held, for these purposes, after a petition is filed. If the responding party (the employer when a union files an RC petition or the union when the employer files an RM petition) disagrees with the petitioning party's unit description, the matter proceeds to a non-adversarial pre-election hearing. Thereafter, the regional director issues a Decision and Direction of Election advising the parties of the job classifications eligible to vote in the election and the details of when and how the election will be held.

30. NLRB Form 502 (RC).

31. In Board parlance, this is referred to as an *Armour-Globe* election. *See Globe Machine & Stamping Co*., 3 NLRB No. 294 (1937); *Armour & Co*., 40 NLRB No. 1333 (1942).

32. For example, an employer might assume that the union's support is limited to the singular department that is described on the RC petition. It may seek to add additional departments to the petitioned-for unit, believing that union support for that change is low and thus would defeat the union's majority support.

33. *See American Steel Construction*, 372 NLRB No. 23 (2022). The holding returns unions and employers to the community of interest to the test found in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), enfd. sub nom. *Kindred Nursing Centers East*, *LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013) and overrules the standard announced in *PCC Structurals*, *Inc*., 365 NLRB No. 160 (2017) and later revised in *The Boeing Co*., 368 NLRB No. 67 (2019).

34. *Bartlett Collins Co*., 334 NLRB No. 484, 484 (2001).

35. Center for the New American Progress, "What You Need To Know About Gen Z's Support for Unions," available at https://www.americanprogress.org/article/what-you-need-to-know-about-gen-zs-support-for-unions/#:~:text=Gen%20Z%20is%20America's%20most,generations%20were%20at%20their%20age..

36. *Cemex*, *supra* note 1 at slip op. 2.

37. *Gissel*, *supra* note 2 at 596-97.

38. 29 U.S.C. § 158(a)(2).

39. *Gissel*, *supra* note 2 at 602.

40. For RC petitions, see https://www.nlrb.gov/reports/nlrb-case-activity-reports/representation-cases/intake/representation-petitions-rc; for RM petitions, see https://www.nlrb.gov/reports/nlrb-case-activity-reports/representation-cases/intake/employer-filed-petitions-rm.

41. *Cemex*, *supra* note 1 at slip op. 25, fn. 138.

42. *Id*., slip op. 31 (*citing Linden Lumber*, 419 U.S. at 310-321 (Stewart, J. diss.).

43. *Id*. at 44.

44. *Id*. at 25. (emphasis added).

45. *Colorado Fire Sprinkler, Inc, v. NLRB*, 891 F.3d 1031 (2018) (overruling Board attempt to use contract language to impose a Section 9(a) relationship instead of the section 8(f) relationship presumed for construction which expires with the contract); *Nova Plumbing*, *Inc. v. NLRB*, 330 F.3d 531 (2003).

46. *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 738–739 (1961).

47. *Colorado Fire Sprinkler, Inc, v. NLRB*, 891 F.3d 1031 at 1038 (2018).

48. *Cemex*, *supra* note 1 at slip op. 32.

49. *Id*. at slip op. 28, fn. 140 (noting the privileges enjoyed by unions "certified" through an election process versus unions merely recognized based on being "designated" as representatives); fn. 152.

50. *Id*. at slip op. 33, fn. 173-76.

51. The Board indicated that this duty is fulfilled if "[a]llowing for unforeseen circumstances that may be presented in a particular case, . . . an employer [] file[s] its RM petition within two weeks of the union's demand for recognition." *Id*. at slip op. fn. 139.

52. *Id*. at slip op. 25.

53. 29 U.S.C. § 159(a).

54. *American Steel Construction, Inc*., *supra* note 33.

55. *Cemex*, *supra* note 1 at slip op. 26, n. 141; *see also*, McFerran, Lauren, "NLRB Chair Touts How New Test Boosts Free, Fair Union Choice," Interview by Robert Iafolla, *Bloomberg Law Daily Labor Report*, (Sep. 20, 2023) *available at* https://news.bloomberglaw.com/daily-labor-report/nlrb-chair-touts-how-new-test-boosts-free-fair-union-choice.

56. *See In re Research Mgmt. Corp*., 302 NLRB No. 627, 638 (1991); *Idaho Pacific Steel Warehouse Co*., 227 NLRB No. 326 (1976); *see also*, *Allied Mechanical Serv., Inc. v. NLRB*, 668 F.3d 758, 766-768 (D.C. Cir. 2012) (if there is strong evidence of majority support in the record, a union's offer to provide evidence of its majority status can convert a construction voluntary relationship into a mandatory one, whether an employer viewed the evidence or not.)

57. *Cemex*, *supra* note 1 at slip op. 26 at fn. 141.

58. *Id*., fn. 145.

59. *Supra*.

60. Gissel, supra note 2 at 614-15.

61. *Cemex*. *supra* note 1 at slip op. 28 (emphasis added).

62. *Id*. at 26.

63. *Supra*.

64. *Id*. note 61.

65. *Supra* at fn. 152.

66. *See*, *e.g*., *Bon Appetit Mgmt. Co*., 334 NLRB 1042, 1044 (2001) (citing cases); *Lucky Cab Co*., 360 NLRB 271, 277 (2014) (citing cases).

67. The Board's opinion focused on employers that commit unfair labor practices during the critical period, but the U.S. Supreme Court noted in *Gissel* that its holding "need not decide whether a bargaining order is ever appropriate in cases where there is no interference with the election processes." (395 U.S. at 594-595, 601, fn. 18).

68. *Cemex*, *supra* note 1 at slip op. at 47, 49, fn. 20 (citing cases).

69. *Gissel*, 375 U.S. at 602; *see also*, *Cemex*, 372 NLRB No. 130, at slip op. 43, *citing Skyline Distributors v. NLRB*, 99 F.3d 403, 411 (1996) ("'[C]ourts have been strict in requiring the Board to justify *Gissel* bargaining orders . . . because employees lose the final say over whether to endorse or reject unionization with the issuance of a bargaining order,' and that the right to have that final say by means of a secret ballot election 'is a core right under the NLRA.'")

70. *Cemex*, *supra* note 1 at slip op. 32.

71. *See* https://www.nlrb.gov/case/28-CA-230115.

72. Employee Free Choice Act of 2009, S. 560, 111th Congress, § 2a (2009).

73. Richard L. Trumka, Protecting the Right to Organize Act of 2023, S. 567, 118th Congress, § 105(1) (2023).

74. *See*, Bureau of Labor Statistics News Release, Union Members–2022, available at https://www.bls.gov/news.release/pdf/union2.pdf.

MESSAGE FROM THE CHAIR

AUTHOR*

Kevin Hosn

This issue marks the beginning of my term as the Chair of the Executive Committee of the Labor and Employment Law Section. I take over from Scott Stillman, who did such a wonderful job leading during the past year.

As for me, I have worked as a public sector attorney for nearly 20 years, practicing employment law. I emigrated from Iran at a young age in the middle of the Iran-Iraq War of the 1980s, and lived in Southern California for most of my life. I obtained a Bachelor of Arts in Economics from the University of California at Irvine and graduated from the University of San Diego School of Law.

After working as an associate attorney in civil litigation firms in Southern California, I decided to pursue a legal career practicing employment law in government. First, I worked as a trial attorney at the U.S. Department of Justice in Washington, DC, investigating and litigating federal civil rights claims against local and state governments. The national scope of this practice afforded the unique opportunity to interact with, and learn from, various individuals in small communities in the Midwest and the South. After the Justice Department, I returned to California and worked at the Attorney General's Office, for a few years in Sacramento and then for more than a decade in Los Angeles. I represented state agencies in matters including government law, employment law, and general civil litigation. Last year, I joined the legal division of the California Department of Transportation in Los Angeles.

I was a member of this Section for several years and enjoyed attending its conferences and learning from its programming. When I applied to join the Executive Committee six years ago, I never thought I would be embarking on this journey as Chair. Nonetheless, the community created by this Section, the scholarships that we undertake, and the intriguing education and the networking at the conferences made the decision to pursue the Chair-track an easy one.

This year, the Section celebrates 40 years of bringing high-level programming, innovation, leadership, harmony, and collegiality to practitioners from different sides of the bar. Throughout the year you may notice various events commemorating this milestone—culminating at the Section's annual meeting in the summer of 2024.

And what a great time to be involved with this Section. We just received the California Lawyers Association 2023 Section Innovation Award! This award is presented to a Section that has demonstrated a commitment to promoting excellence in its field of practice. CLA presented this award to the Labor and Employment Law Section last September at its annual meeting in San Diego.

Notably, the support we receive from our members for our programming has enabled us to create a track record of success. Every year the Executive Committee works hard to put on five annual conferences featuring insightful panelists. We also provide monthly webinars typically based on recent developments in labor and employment law. In the past few years, we have also provided a noticeable amount of diversity scholarships and grants and intend to continue to do so at the same rate in the future. And our *Law Review* keeps

THE COMMUNITY, THE SCHOLARSHIPS, THE INTRIGUING EDUCATION AND NETWORKING AT THE CONFERENCES MADE THE DECISION TO PURSUE THE CHAIR-TRACK EASY.

our membership updated on recent developments in our practice area.

I also welcome five new members to our executive committee: Andrea Kelly Smethurst of Andrea Kelly Smethurst Law P.C. (investigations), Leonard Sansanowicz of Sansanowicz Law Group P.C. (representing employees), Emily Patajo (representing employers), James Wu of Tesla (in-house), and Wendy Musell of Law Offices of Wendy Musell (representing employees). Our officers include Vice-Chair Christina Ro-Connolly, Secretary Stephanie Joseph, and Treasurer Anne Giese. Ireneo Reus was sworn in as our Section's new CLA Board Representative during the 2023 CLA Annual Meeting in San Diego. She takes over from Phil Horowitz, who worked hard in this role for many years—and we are very so appreciative.

As we get ready for another exciting year, I encourage members to follow the Labor and Employment Section on social media and its website.

ENDNOTE

* Kevin Hosn, current Chair of the Executive Committee of CLA's Labor and Employment Section, is a deputy attorney with the California Department of Transportation in Los Angeles. He can be reached at kevinhosn@yahoo.com.

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LABOR & EMPLOYMENT LAW SECTION EXECUTIVE COMMITTEE 2023-2024

Assistant to the Regional Director Danielle Pierce

Danielle Pierce is the Assistant to the Regional Director of Region 31 of the National Labor Relations Board in Los Angeles, California. In that role, Ms. Pierce assists Regional Director Mori Rubin in the administration and enforcement of the National Labor Relations Act in parts of Los Angeles County and six other counties in Southern California.

Ms. Pierce graduated from the University of Illinois at Urbana-Champaign in 2004 with a degree in Political Science and Speech Communication. She went on to obtain her Master of Human Resources and Industrial Relations from that university's School of Labor and Employment Relations in 2011. Ms. Pierce began her career with the NLRB in a Student Co-Op internship in 2010. She joined Region 31 as a Field Examiner in 2011, where she rose through the ranks as a Compliance Officer and Supervisor Field Examiner. Most recently she was appointed to the position of Assistant to the Regional Director in May 2021.

Lisl Soto (née Duncan) is a shareholder in the Los Angeles office of Weinberg, Roger & Rosenfeld. Ms. Soto represents unions in all aspects of labor and employment law, including through arbitrations, collective bargaining agreement negotiations, and before the National Labor Relations Board (NLRB). In *Purple Communications*, 361 NLRB No. 126 (Dec. 11, 2014) [overruled by the Trump-era Board in *Caesars Entertainment d/b/a/ Rio All-Suites Hotel and Casino*, 368 NLRB No. 143 (Dec. 17, 2019)], Ms. Soto represented a union client before the NLRB administrative law judge. *Purple Communications* established that employees could use their work email to communicate about union organizing efforts. Ms. Soto's practice also focuses on wage-and-hour litigation. She has acted as the primary plaintiffs' attorney on numerous wage-and-hour class action lawsuits in the California counties of Alameda, Fresno, Kings, Los Angeles, Orange, San Diego, San Francisco, Santa Clara, Sacramento and Solano, as well as in federal court. Along with others at WRR, Ms. Soto represented employees in *Marquez v. City of Long Beach* (2019) 32 Cal.App.5th 552, successfully establishing new precedent in California over whether charter cities like the City of Long Beach are required to comply with state minimum wage laws. Additionally, Ms. Soto serves as general counsel to several multiemployer trust funds and labor management cooperation committees. She delivers trainings to clients covering a broad variety of topics, including grievance processing, contract negotiations, wage-and-hour law, anti-harassment and anti-discrimination, and forms of protected leave. Ms. Soto earned her juris doctor from the University of California, San Francisco Law (formerly Hastings) after receiving her undergraduate degree from the University of California at Berkeley.

Thomas Lenz is a partner in the Atkinson, Andelson, Loya, Ruud & Romo law firm, working from Pasadena, California. For over 30 years his practice has involved advice, training, and representation of employer clients across California and western states. He leads the Firm's labor relations team. He began his career as an attorney with National Labor Relations Board Region 21, Los Angeles, in a practice using Spanish regularly as well as English. He teaches at the University of Southern California Gould School of Law. He also serves as an Advisor to the Labor and Employment Law Section of the California Lawyers Association, having led the Section as Chair during 2017-2018. He currently chairs CLA's Civics Education and Outreach Committee. He is licensed in several jurisdictions including all Pacific Coast states and Arizona. He frequently appears in print and broadcast media in English and Spanish to discuss workplace issues of the day. He graduated from Marquette University (B.A.) and the Louisiana State University Law Center (J.D.).

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