

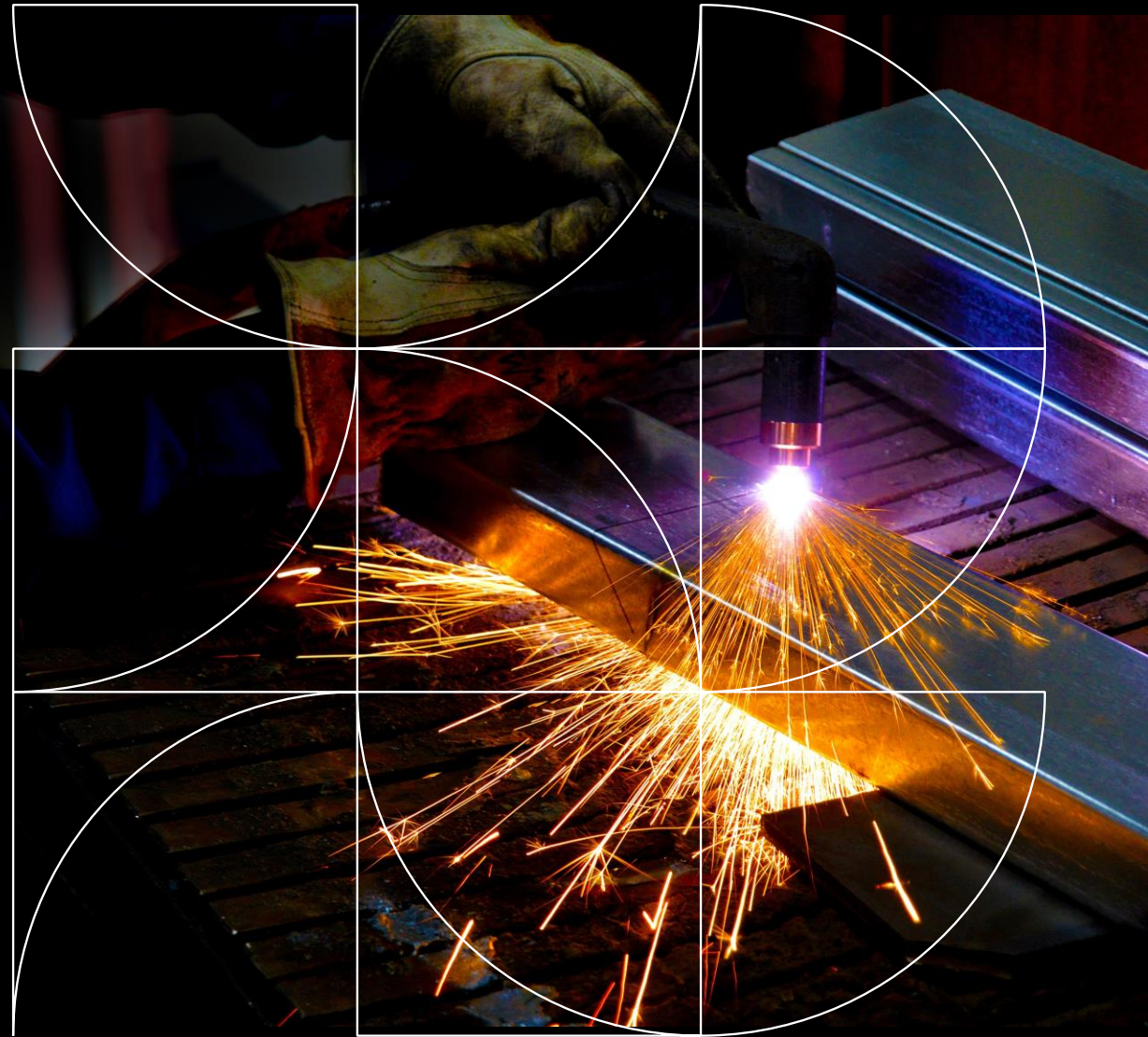


# Could *Cemex* Cement a Union in Your Workplace?

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**Seyfarth Shaw LLP**

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# Cemex Construction Materials Pacific, LLC

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The NLRB's *Cemex* standard changes the framework for union representation in the following ways:

- A demand for recognition by a union can now trigger the representation process, even if the employer rejects the demand & commits no ULPs.
- The **union** is no longer required to file an RC petition for an election.
- The burden is now on the **employer** to (1) file an RM petition "promptly" if it rejects the union demand, or (2) risk an NLRB-imposed bargaining order if the union can prove majority support in an appropriate unit.
- The employer can take no action following a demand and defend against a refusal to bargain charge by challenging the union's claim that it had majority support in an appropriate unit.
- The decision is retroactive

# ***Cemex Construction Materials Pacific, LLC*** (continued)

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Employers should take note of the following:

1. The *Cemex* decision places more weight on signed authorization cards and reduces reliance on the NLRB secret ballot election.
2. It lowers the threshold for when the Board will require union recognition and bargaining:
  - The Board may now issue a bargaining order in circumstances when the employer does not promptly file a representation petition, even when the union's majority status is based entirely on authorization cards and the employer has committed no ULPs.
  - The Board may now issue a bargaining order in circumstances for even a single post-petition ULP sufficient to overturn the election, even without a finding that a fair rerun election could not be held.
  - It is more important for employers to avoid even a single ULP during the critical election period





***What is a valid demand and what are an employer's options if it receives one?***



## ***Employer Options Under Cemex***

Under *Cemex*, if a union demands recognition, an employer has five options:

1. voluntarily recognize
2. agree to a card check
3. if an RC is filed, await that process
4. if no is RC filed, then “promptly” file an RM (14 days) to test majority support, appropriateness of unit, or both
5. do nothing and be prepared to defend a Section 8(a)(5) ULP by showing the union can’t prove it represented majority in an appropriate unit



***Should an employer file a RM petition and will unions still file RC petitions?***





## NLRB Quickie Election Rules

- Unions are filing more petitions and winning more elections
- Key Changes:
  - Statements of position are due sooner
  - Regional Directors have less discretion to extend deadlines or postpone hearings
  - Notices posted sooner
  - Limits what can be litigated at a hearing (defers litigation of eligibility and inclusion issues to post-election stage).
  - Briefs generally not allowed
  - Regional Directors to schedule elections on “the earliest date practicable” after issuance of decision and direction of election
- Absent significant issues, a petition will normally result in an election within 3 to 4 weeks from the filing of the petition



***What is the NLRB process if the employer rejects the union's demand, and the union files an 8(a)(5) charge, but neither party files a petition?***





***Why should an employer care about Stericycle or McLaren Macomb?***



## New Standards for Handbooks and Other Policies

- *McLaren Macomb*, 372 NLRB No. 58 (2023)
  - Employers may not offer severance agreements that require employees to broadly waive their rights under the NLRA
    - Non-disparagement
    - Confidentiality/disclosing terms of agreement
- *Stericycle Inc.*, 372 NLRB No. 113 (2023)
  - Adopted a new standard for evaluating handbooks and other policies
  - A facially neutral work rule is presumptively unlawful if a “reasonable” employee – “who is economically dependent on the employer” and “predisposed to engaging in protected concerted activity” – “could” interpret the rule to have a “coercive meaning”
  - An employer may rebut this presumption by proving that the rule “advances legitimate and substantial business interests that cannot be achieved by a more narrowly tailored rule”

## The History of Demands for Recognition

- *Joy Silk Mills, Inc.*, 85 NLRB 1263 (1949)
- *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969)
- *Linden Lumber*, 419 U.S. 301 (1974)
  - U.S. Supreme Court formally abandons *Joy Silk* in a 5-4 decision



***Predictions: what will happen to Cemex on appeal?***



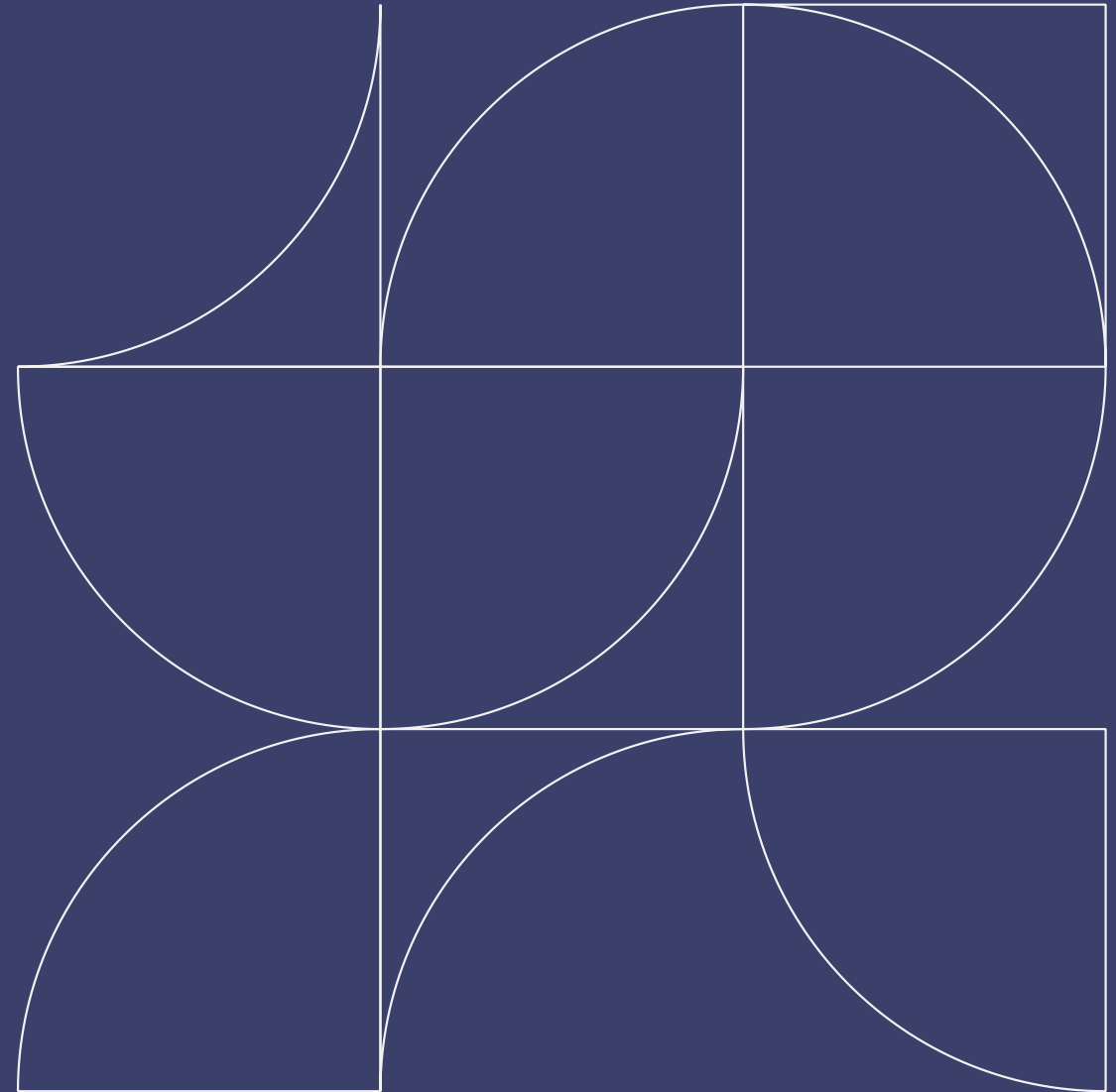


***What are your recommendations for employers in light of Cemex?***





# CLE Code



# Recommendations

- Create positive relationships with employees.
- Educate employees on the company's labor relations philosophy.
- Educate employees about authorization cards.
- Understand warning signs.
- Train (and retrain) managers & supervisors to avoid TIPS.
  - Threats
  - Interrogations
  - Promises
  - Surveillance
- Educate managers and supervisors on how to lawfully reject a union's demand for recognition.

# Recommendations

(continued)

- Be vigilant regarding supervisor taint/involvement in the organizing process.
- Consider creating and training a rapid response team to handle any demand or election petition.
- Know the basic election and petition timelines and procedures.
- Prepare materials for a “quickie” election.
- Privileged review of work rules, policies, practices & handbooks for compliance with *Stericycle* and *McLaren Macomb*.
- Privileged review of post-petition communications, handouts, speeches, and other materials.

**thank  
you**

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