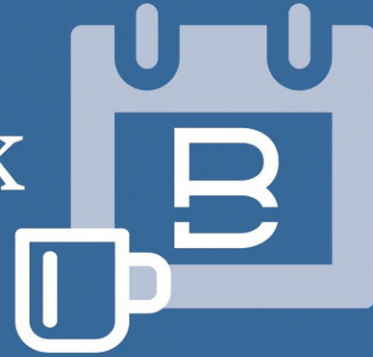


# The Work Week

Bassford Remele Employment Practice Group



September 5, 2023

Welcome to another edition of *The Work Week with Bassford Remele*. Each Monday morning, we will publish and send a new article to your inbox to hopefully assist you in jumpstarting your work week.

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## The NLRB Continues its Trend of Reversing Precedent and Expanding Employee and Union Rights

[Daniel R. Olson](#)

Last week, the National Labor Relations Board (“Board”) concluded a busy August by issuing a trio of important decisions that continue its trend of overturning prior rulings to the benefit of unions and employees alike. Below is an overview of each case.

### ***Cemex Construction Materials Pacific***

The most-significant decision is *Cemex*, which overhauled longstanding procedures governing union organizing and employer recognition. Prior to *Cemex*, unions needed to file an election petition with the Board before the union could demand recognition from an employer. That is no longer the case. Now, under the new *Cemex* rules, unions can bypass filing an election petition with the Board and simply demand that an employer recognize the union based on a majority of recognition cards.

If a union makes a claim of majority support, employers are now faced with two options: (1) immediately grant recognition without requiring a Board election; or (2) file its own election petition with the Board within two weeks of receiving the union’s claim of majority support. In doing so, the Board essentially flipped the obligation of petitioning the Board for a union election from the union to the employer.

Importantly, the Board also declared that an employer’s failure to either immediately grant recognition or promptly file an election petition constitutes an unfair labor practice. The penalty for this unfair labor practice is a bargaining order that will force the employer to directly bargain with the union. Thus, *Cemex* increased both the ease with which a union can demand recognition and the urgency for employers to promptly respond.

### ***Intertape Polymer Corporation***

In *Intertape Polymer Corporation*, the Board also clarified the burden of proof for anti-union-retaliation claims. The Board previously issued a decision in 2019 that had been interpreted as requiring evidence of “particularized animus” toward protected activities to maintain a retaliation claim. The Board rejected that interpretation in *Intertape Polymer Corp.* Instead, the Board reaffirmed the burden of proof that had previously been in place for decades. NLRB prosecutors now need only show that an employee’s union activity was a “motivating factor” behind an employer’s actions. Prosecutors can establish a motivating factor through three showings: (1) the employee was engaged in protected activity; (2) the employer knew of the protected activity; and (3) the employer held an anti-union animus. The Board also clarified that the third element may be established through direct or circumstantial evidence.

As a whole, *Intertape Polymer* has made it easier to prosecute retaliation claims. Employers will need to be even more mindful of actions taken in response to protected conduct as a result, including organizing efforts.

### ***Miller Plastics Products, Inc.***

The Board overturned another 2019 decision in *Miller Plastics Products, Inc.* The 2019 decision involved an airline employee complaining to a manager about a poor-tipping customer in front of three other coworkers. The employee was fired and subsequently filed a retaliation complaint with the Board. In evaluating whether the comment in question was “concerted activity” protected under the NLRA, the Board reasoned that “to be concerted activity, an individual employee’s statement to a supervisor or manager must either bring a true group complaint regarding a workplace issue to management’s attention, or the totality of circumstances must support a reasonable inference that in making the statement, the employee was seeking to initiate, induce or prepare for group action.” There, the Board easily concluded that the conduct in question was not concerted activity under this standard.

The Board rejected this standard in *Miller Plastics Products*, determining that it “imposed significant and unwarranted restrictions on what constitutes concerted activity.” The Board reinstated the standard for evaluating protected conduct that existed prior to 2019. Moving forward, the analysis will turn on whether the activity was “engaged in with or on the authority of other employees, and not solely by and on behalf of the employee” himself or herself, as judged by the totality of circumstances. The Board removed the “true group complaint” requirement as well as the requirement of bringing an issue to the management’s attention to constitute concerted activity.

Here again, the Board reversed a ruling from the previous presidential administration and increased union and employee rights in the process. Consequently, employers now need to return to the broader analysis of concerted activity that governed prior to 2019.

As demonstrated by a [previous edition of \*The Work Week\*](#), last week’s decisions were not the first time the Board has reversed rulings from 2019. The Board is expected to continue reversing rulings issued during the prior presidential administration moving forward. In addition to regularly counseling employers on labor issues under the NLRA, Bassford Remele continues to monitor these sweeping Board changes. Keep an eye on future editions of *The Work Week* to stay on top of these important developments!

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## Women's Leadership Summit: *Reframing the Alpha Female*

Bassford Remele proudly announces its Second Women's Leadership Summit. Join us for an invigorating discussion with Minnesota women business leaders.

Our panelists will discuss what it means to be an "alpha female." Through this discussion, the panel will explore the conventional perceptions of women in leadership positions. What is working? What isn't? How can we dismantle the misconceptions, limitations, and often damaging tropes and stereotypes surrounding powerful women and reframe what it means to be an "alpha female?"

### PANELISTS

- **Jessica Monson**, Chief Legal Officer, Caribou Coffee
- **Erikka Ryan**, Director of Equity, Inclusion and Foundations, Minnesota State Bar Association
- **Jennifer Thompson**, Regional General Counsel, Ames Construction
- **Lola Velazquez-Aguilu**, Vice President and Chief Legal Officer, Neuromodulation at Medtronic
- **Brook Mallak**, Claim Attorney, Minnesota Lawyers Mutual Insurance Company

*1.50 CLE credits will be applied for in Minnesota and Wisconsin*

**DATE** Tuesday, September 12, 2023 | Registration and Networking: 2:30-3:00 pm  
Summit: 3:00 – 4:30 pm Networking: 4:30 – 5:30 pm

**LOCATION** The Grand 1858 at Minneapolis Event Centers, 212 Second Street SE, Minneapolis  
(Complimentary Parking)

[RSVP HERE](#) or contact Janet Nelson, Marketing Director, [summit@bassford.com](mailto:summit@bassford.com) or 612.376.1656

**DRESS FOR SUCCESS** Bassford will be hosting a donation drive for Dress for Success, which believes in empowering every woman through employment. Dress for Success offers high touch, high impact career and workplace skills development programs for low income women to help them achieve career advancement, career stability and economic stability. Donations can be brought to the summit.

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