CLIENT ALERTS & INSIGHTS

Brown-Forman Decision Rolls Back NLRB's Pro-Union Cemex Policy

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Key Takeaways:

- The Sixth Circuit has overturned the NLRB's *Cemex* decision, returning to the long-standing *Gissel* standard and limiting the Board's ability to impose bargaining orders. The court found that the NLRB exceeded its authority by creating new policy through case decisions rather than formal rulemaking.

- This decision reduces the immediate risk of bargaining orders being imposed, primarily after a lost union election, by the NLRB, but the legal landscape remains unsettled as other courts may reach different conclusions, and the NLRB may continue to pursue similar policies through other means, including under *Gissel*.

In a blow to agency rulemaking and pro-union National Labor Relations Board ("NLRB") policy, on March 6, 2026, the U.S. Court of Appeals for the Sixth Circuit dismantled the Biden-era NLRB decision in *Cemex Construction Materials Pacific, LLC*. That decision had significantly strengthened unions' ability to establish pre-election unfair labor practices against employers and overcome election losses by securing bargaining orders that would require employers to bargain with unions, even after employees voted against union representation. This decision in *Bown-Forman Corp. v. NLRB* marks a significant development in federal labor law by returning to the pre-*Cemex* standards for establishing whether an election should be held and also how to remedy pre-election unfair labor practices.

***Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130 (Aug. 25, 2023).**

The Sixth Circuit decision addresses the NLRB's earlier 2023 *Cemex Construction Materials Pacific, LLC*, ruling which significantly altered the traditional union recognition process (alert found here). Under that framework, when a union presents evidence that a majority of employees support representation, typically through signed authorization, an employer must either voluntarily recognize the union or properly petition the NLRB for a representation election. If the employer chooses the election route, but commits an unfair labor practice, that will warrant setting aside the election. Under *Cemex*, the Board may then order the employer to recognize and bargain with the union. In effect, the decision expanded the circumstances under which the NLRB could impose bargaining orders without requiring a successful election - an action which previously was reserved for serious, "hallmark" violations under the 1969 Supreme Court decision in *NLRB v. Gissel Packing Co.*, 295 US 575 (1969).

***Brown-Forman Corp. v. NLRB*, 6th Cir., No. 24-02107, 3/7/26.**

The Sixth Circuit rejected the Board's reliance on that framework in *Brown-Forman*, where production workers sought representation through the International Brotherhood of Teamsters. During the election campaign, the union collected authorization cards from a majority of employees. Brown-Forman declined voluntary recognition, and an election was held in which the union ultimately lost. The union then filed an unfair labor practice charge, alleging that the company had attempted to influence the vote by granting wage increases and other benefits during the campaign period. The NLRB agreed and vacated the election results. The NLRB, relying on *Cemex*, then ordered the company to recognize and bargain with the union despite the election result.

The Sixth Circuit held that the NLRB's decision improperly created the *Cemex* standard through an adjudicatory decision rather than through formal rule making procedures, including the notice-and-comment procedures in the Administrative Procedure Act. Notably, the 6th Circuit relied on the Supreme Court's 2024 decision in *Loper Bright Enterprises v. Raimondo*, 603 US 369 (2024), which overruled the *Chevron* doctrine that had permitted significant deference to legislative rulemaking to executive agencies, to find that the NLRB exceeded its authority when making the decision in *Cemex*, determining that *Cemex* disguised the Biden NLRB's rulemaking as the adjudication of a dispute. Because the Board attempted to introduce a sweeping policy change outside the bounds of its adjudicatory authority, the court concluded that the standard could not serve as the legal basis for the bargaining order issued against Brown-Forman. As a result, the court vacated the Board's order requiring the company to bargain with the union.

Practical Implications

The *Brown-Forman* decision returns the NLRB and labor law to the pre-*Cemex* standards in place under *Gissel* and other decisions, which had been the established law since 1969. Furthermore, the Sixth Circuit signaled that it would scrutinize NLRB efforts to expand its authority after the Supreme Court's *Loper Bright* decision.

In light of the Sixth Circuit's decision, employers should keep several considerations in mind:

- **Political Policy Landscape Remains Unsettled.** The legality of the *Cemex* framework is still being litigated in multiple circuits, and likely will be targeted by the current NLRB, meaning the governing standard could change further.
- **Elections Conduct Remains Critical**. Even with the Sixth Circuit's ruling, alleged unfair labor practices during organizing campaigns can still lead to election challenges, vacated election results, or even bargaining orders under existing *Gissel* precedent.
- **Union Card Majority Still Matters**. Authorization cards demonstrating majority support can trigger significant legal obligations and strategic decisions for employers.
- **Campaign Decisions Should Be Carefully Vetted**. Wage increases, benefit changes, or other workplace actions during an organizing drive can be scrutinized as potential interference with employee choice.
- **Documentation Is Essential.** Employers should maintain clear records of communications, policy decisions, and business justifications during organizing activity to support their position if disputes arise.

Employers navigating organizing campaigns should remain attentive to both evolving case law and the evidentiary record supporting their actions.

To learn how this can affect your business, contact a member of Benesch's Labor & Employment Practice Group.