CLIENT ALERTS & INSIGHTS

Judicial Green Light: Court Upholds NLRB's Cemex Decision

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Key Takeaways and Practical Implications

- The Ninth Circuit recently upheld the NLRB's *Cemex* decision, reinforcing stricter rules for union recognition and employer conduct during organizing campaigns.
- **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.** 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 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.

On April 21st, 2026, the U.S. Court of Appeals for the Ninth Circuit upheld the National Labor Relations Board's ("NLRB") decision in *Cemex Construction Materials Pacific, LLC*., reinforcing a significant shift in federal labor law governing union recognition and employer conduct during organizing campaigns.

On appeal, the Ninth Circuit enforced the Board's order requiring the employer to bargain with the International Brotherhood of Teamsters. But the divided panel declined to rule on the broader legality of the NLRB's new bargaining order framework established in *Cemex.* Instead, the court concluded that the employer's unfair labor practices in *Cemex* were sufficiently justified to issue a bargaining order under the traditional *Gissel* standard. Because this outcome could be justified under *Gissel*, the court declined to decide whether the NLRB exceeded its statutory authority-leaving unresolved questions about the scope of the Board's authority.

The Ninth Circuit's decision follows a recent decision from the Sixth Circuit rejecting *Cemex* (

alert found here) and sets the stage for ongoing appeals and challenges to the *Cemex* standards to resolve its viability and application.

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

In its 2023 decision, the NLRB fundamentally reshaped the union recognition process under *Cemex* (alert found here), changing over 70 years of precedent. When a union presents evidence of majority support, typically through authorization cards, an employer can either:

1. voluntarily recognize the union; or
2. promptly file a petition for a representation election.

Critically, if the employer commits any unfair labor practice that would interfere with the fair election processes, the Board may issue a bargaining order requiring the employer to recognize and bargain with the union without rerunning the election. Notably, under *Cemex*, a technical violation of merely failing to timely file a petition for an election could constitute an unfair labor practice and lead to a bargaining order. Compared to prior practice, this framework dramatically lowered the threshold for imposing bargaining orders and shifts strategic risks onto employers during an organizing campaign.

The *Gissel* Standard

The Supreme Court decision in *NLRB v. Gissel Packing Co., 295 US 575 (1969*) remains the foundational authority governing bargaining orders. Under *Gissel*, the Board may require an employee to bargain with the union if:

1. the union had a majority support; and
2. the employer engaged in an unfair labor practice that makes a fair election unlikely or impossible.

Historically, this standard was applied narrowly. The second element was typically reserved for egregious misconduct or so-called “hallmark” violations that effectively prevented an election because the unfair labor practice so tainted employee free choice prior to the election.

Navigating *Cemex* Across Multiple Jurisdictions

To date, the Sixth Circuit is the only circuit to explicitly reject the NLRB's *Cemex* decision. In March 2026, the Sixth Circuit overturned the NLRB's *Cemex* decision, relying instead on 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. The split between the Ninth and Sixth Circuits may require resolution by the U.S. Supreme Court.

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.