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FEDERAL APPEALS COURT REJECTS BIDEN-ERA BARGAINING-ORDER FRAMEWORK, BUT EMPLOYERS SHOULD NOT RELAX DURING ORGANIZING DRIVES

Insights
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Federal Appeals Court Rejects Biden-Era Bargaining-Order Framework, But Employers Should Not Relax During Organizing Drives

A new 6th Circuit decision gives employers an important appellate win on one of the most consequential labor law developments of the past several years. The court's March 6 ruling refused to enforce a bargaining order issued by the National Labor Relations Board under the framework set by the controversial 2023 *Cemex* decision. While that is welcome news for employers, it should not be mistaken for a green light to take a more aggressive approach during union organizing campaigns. Unfair labor practices committed during an organizing drive can still result in rerun elections and, in the right case, even bargaining orders under pre-*Cemex* law. So what should employers make of the latest appellate setback for a signature Biden-era Board doctrine? And what are some practical steps you can take right now?

The Radical *Cemex* Framework

To understand the significance of this ruling, it helps to revisit what *Cemex* did. As we noted when the Board issued that decision in August 2023, *Cemex* dramatically changed the way employers must respond to union recognition demands.

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- For decades, employers generally could decline voluntary recognition and insist on a secret-ballot election.
- Under *Cemex*, however, when a union demands recognition based on claimed majority support, an employer that does not voluntarily recognize the union must move promptly to file its own election petition if it wants a Board-conducted election.
- More importantly, if the employer commits unfair labor practices that would warrant setting the election aside, the Board held that it would generally issue a bargaining order rather than direct a rerun election.

That represented a substantial shift away from the longstanding preference for secret-ballot elections and toward a framework that significantly increased the risk of mandatory bargaining, regardless of electoral outcomes.

For employers, the practical message was that even missteps that might once have resulted in a second election could now lead directly to an order requiring it to recognize and bargain with the union.

What Happened In This Case?

In February 2022, citing dissatisfaction with pay, employees at a Kentucky distillery began organizing a union. According to the court, once management learned of the organizing activity, it accelerated multiple compensation-related changes, including a $4-per-hour across-the-board wage increase, expanded pay-progression and merit opportunities, and more flexibility with holiday vacation time.

The union lost the election decisively. But the court nevertheless held that there was substantial evidence supporting the Board's finding that the employer committed unfair labor practices. In the court's view, the timing and circumstances surrounding the changes supported the Board's conclusion that management was attempting to undermine employee support for the union. In other words, the employer succeeded in defeating the election, but not in convincing the court that its campaign-period conduct was lawful.

Where the Board Lost: The Rulemaking Problem

The Board lost not on the unfair labor practice findings, but on its attempt to impose a *Cemex* bargaining order as the

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remedy.

The 6th Circuit emphasized that bargaining orders have historically been treated as an extraordinary remedy and that secret-ballot elections remain the preferred method of testing employee sentiment. The court contrasted the Supreme Court's traditional *Gissel* framework with the Board's new *Cemex* regime.

- Under *Gissel*, the Board must undertake a case-specific analysis and determine whether the employer's misconduct was so serious that a fair rerun election is unlikely.
- Under *Cemex*, by contrast, the Board largely treated a bargaining order as the default result once it concluded that the election should be set aside because of employer misconduct.

According to the court, the Board under *Cemex* had effectively stopped asking the key *Gissel* question: whether a new election could still reliably measure current employee sentiment. In the 6th Circuit's view, that was not just a modest refinement of existing law. It was a significant policy change that altered the governing remedial standard in representation cases.

And that is where the court's rulemaking analysis came in. The 6th Circuit did not actually decide whether the *Cemex* framework was wise as a matter of labor policy, or even whether it might be lawful if adopted through a different process. Instead, the court focused on how the Board got there. It reasoned that *Cemex* was not simply an adjudicative decision resolving the dispute before the agency. Rather, it functioned more like a broad, forward-looking rule of general applicability that would govern future recognition and election disputes throughout the country.

In the court's view, the Board crossed the line between adjudication and rulemaking. While the Board certainly has latitude to develop labor law principles through adjudication, the 6th Circuit concluded *Cemex* went further by effectively creating a new binding standard of general application without using the procedural safeguards associated with formal rulemaking. Put differently, the court saw *Cemex* less as an incremental interpretation of precedent and more as a wholesale policy rewrite dressed up as case adjudication.

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That distinction drove the outcome. Because the Board relied on *Cemex*'s new framework instead of applying the traditional *Gissel* analysis, the 6th Circuit denied enforcement of the bargaining order and remanded the case to the Board.

What's Next for Employers Facing Union Organizing?

First, this is not the end of *Cemex* nationally. It is an important appellate setback, but not a universal elimination of the Board's framework. As employers know, the NLRB continues applying its own precedent in other cases unless and until the Supreme Court resolves the issue – or the Board itself changes course. That means employers should not assume *Cemex* has disappeared simply because one federal appellate court rejected the Board's approach.

Second, the decision reinforces a core organizing-drive lesson that predates *Cemex*: changing the status quo during a union campaign is risky. Sudden improvements to wages, benefits, scheduling flexibility, time-off practices, or other terms and conditions of employment may invite unfair labor practice allegations if they appear tied to union activity. Even if an employer succeeds in defeating a bargaining order, it may still face a Board finding of unlawful interference and an order requiring a rerun election.

Third, employers should continue to expect an aggressive organizing environment. Although the Board may revisit key Biden-era precedents if the agency's composition changes, that process is not yet complete. Until then, employers should proceed on the assumption that existing Board law still governs.

Practical Steps Employers Should Take Now

Employers should use this decision as a reminder to tighten their organizing-response practices, not loosen them. In addition to having a basic response plan in place, employers should consider the following steps:

1. Prepare for recognition demands before they arrive. Management should know in advance who should receive a demand, who should evaluate it, and who will make decisions about next steps.

2. Train front-line supervisors and managers. Many unfair labor practice allegations start with comments or actions by

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supervisors who are trying to “help” but do not understand the legal limits. Supervisors should be trained well before any campaign begins.

3. Freeze non-essential changes to terms and conditions where appropriate. Employers should carefully evaluate whether any wage, bonus, scheduling, leave, or policy changes should be postponed until after a campaign. Even positive changes can become evidence against the employer if implemented at the wrong time.

4. Audit campaign communications before they are delivered. Captive-audience are now subject to additional scrutiny, and even lawful messaging can become problematic if phrased poorly. Employers should ensure that all communications are accurate, measured, and legally reviewed.

5. Review handbook rules, disciplinary practices, and HR procedures for consistency. Inconsistent enforcement during an organizing drive can quickly become evidence of discriminatory motive or unlawful retaliation.

6. Document legitimate business reasons for any operational decisions. If an employer must move forward with a wage increase, schedule adjustment, or operational change during a campaign, it should contemporaneously document the non-union-related reasons for doing so.

7. Coordinate closely with labor counsel early. Counsel should be involved before any major communication, policy adjustment, economic change, or petition-related response is made. Early review is almost always easier – and far less expensive – than litigating after the fact.

Conclusion

We will continue to monitor NLRB developments and provide updates as information becomes available. Make sure you are subscribed to Fisher Phillips’ Insight System to get the most up-to-date information. Any questions may be directed to your Fisher Phillips attorney, the authors of this Insight, or any attorney in our Labor Relations Practice Group.

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