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# Cemex Status Quo: Ninth Circuit Declines to Address NLRB's Cemex Standard

**Labor Relations Update** on **April 28, 2026**

On April 21, 2026, in *Cemex Construction Materials Pacific, LLC v. National Labor Relations Board*, Case No. 23-2302 (9th Cir.), the U.S. Court of Appeals for the Ninth Circuit declined to evaluate the new union-organizing standard adopted by the National Labor Relations Board ("NLRB" or the "Board") in *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130 (2023) ("*Cemex*"). The Ninth Circuit's decision is an unpublished memorandum disposition.

The court held that the employer's unfair labor practices during and leading up to a union representation election were sufficient to warrant a bargaining order under the traditional *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) standard, making it unnecessary to reach the Board's newer *Cemex* framework.

**Background**

As previously reported, the NLRB's 2023 *Cemex* decision—one of the most significant Board rulings of the Biden administration—upended nearly 50 years of precedent by creating a new framework for responding to union recognition demands and lowering the bar for remedial bargaining orders.

Under *Cemex*, an employer confronted with a recognition demand must decide within two weeks whether to (a) accept recognition and bargain, or (b) file an RM petition to test the union's majority status. *Cemex* also replaced the longstanding *Gissel* standard for bargaining orders: if the Board finds that an employer committed unfair labor practices frustrating a free, fair, and timely election, it will dismiss the election proceedings and issue a bargaining order as the default remedy. Since *Cemex* was issued, employers have broadly challenged this framework.

**The Case**

The Ninth Circuit heard oral argument in October 2024 (discussed here) but held its ruling until a separate Ninth Circuit panel resolved a related challenge to one of the remedies the Board imposed on Cemex.

Although the panel devoted significant attention at oral argument to the Board's new bargaining-order standard, the court ultimately sidestepped the issue in its decision.

The court reasoned that the Board was "well within its range of discretion" to issue a bargaining order under the traditional *Gissel* standard, making it unnecessary to opine on *Cemex* because doing so would "unnecessarily delay th[e] case's resolution."

In dissent, Judge Richard Clifton would have vacated the Board's bargaining order and remanded for further consideration, finding that the Board's decision to change the bargaining-order standard cast "a substantial shadow on everything the Board did with this case."  Though Judge Clifton did not directly address *Cemex*'slegality, he called the Sixth Circuit's rejection of the *Cemex* bargaining-order framework in *Brown-Forman Corp. v. NLRB* (reported on here) "persuasive."

**Takeaways**

The *Cemex* framework remains good law—unless and until reversed by the Supreme Court or, more likely, the NLRB itself reverses it.

The Board has continued to apply *Cemex* (as reported here), but is expected to overturn the decision once a third Republican member is confirmed by the Senate and the NLRB regains a three-Member majority.

This reflects the Board's recent pattern of continuing to apply Biden-era precedents when it lacks the votes to overturn them.  A recent example is the Board's application of *McLaren Macomb*, 372 NLRB No. 58 (2023)—which held that broad confidentiality and non-disparagement clauses in severance agreements violate Section 8(a)(1) of the National Labor Relations Act—in *Prime Communications*, *LP*, 374 NLRB No. 88 (2026).

As we recently reported, on April 13, 2026, President Trump nominated James Macy to fill the third vacant Republican seat on the NLRB and re-nominated Democratic Board member David Prouty to a second term—a political maneuver that may speed Senate confirmation for both nominees.  Once confirmed, the reconstituted Board could move to reconsider *Cemex*, *McLaren Macomb*, and many other Biden-era NLRB decisions.  We will continue to monitor these developments.


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