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BREAKING: NLRB General Counsel Seeks to Scrap 50 Years of Precedent and Require Card Check Recognition

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With Congress failing to make the organizing process easier for unions, the NLRB General Counsel Jennifer Abruzzo is now asking the Board to require employers to recognize unions without a secret ballot election.

As foreshadowed by her August 2021 memo on Mandatory Submissions to Advice, in a brief filed in *Cemex Construction Materials Pacific LLC*, the Office of the NLRB General Counsel argued that the Board should reinstate an antiquated Board standard that was rejected **more than 50 years (since 1969)**—the *Joy Silk* doctrine—that would require employers to recognize and bargain with a union if it is presented with signed authorization cards from a majority of workers.

Under this old standard, the burden of proof rests with the employer to demonstrate that it has a "good faith doubt" as to the union's majority status where the union presents evidence of a card majority and the employer refuses to recognize the union. If the employer was unable to satisfy this "good faith doubt" test, the Board would order the employer to recognize and bargain with the union without a secret ballot election. According to the General Counsel, the rationale for reverting to the *Joy Silk* doctrine is that the "Board's current remedial scheme has failed to deter unfair labor practices during union organizing drives and provide for free and fair elections." While the Board may issue bargaining orders against employers whose unfair labor practices are so severe and pervasive as to make a fair election unlikely or impossible (known as a *Gissel* bargaining order), this is an extraordinary remedy that is only granted in the rarest of circumstances.

As such, the General Counsel is requesting the Board return to its "good faith doubt" test under *Joy Silk*, without requiring a showing of "substantial unfair labor practices" to demonstrate the employer's lack of good faith in questioning a union's card majority. Under the General Counsel's proposed paradigm, an employer may still ask a union to respond to its good faith concerns about the authenticity of card signatures or the appropriate scope of the bargaining unit. However, an employer "may not simply refuse to respond or object to authorization cards as a method of demonstrating majority status."

Highlighting the magnitude of the General Counsel's position, the brief explicitly explained its understanding of the *Joy Silk* card check doctrine whereby

> [T]he Board may determine that a bargaining order should issue if the circumstances demonstrate a lack of good faith doubt even absent unfair labor practices, such as due to testimony or internal documentary evidence revealing the employer's purpose at the time of its refusal to bargain, the legitimacy of the employer's proffered reasons for refusing to bargain, or its failure to offer any explanation. **This would include situations in which the employer's reason for refusing to bargain is to gain time in order to persuade employees to change their minds, even using what would otherwise be lawful persuasion**.

Takeaways

This is only the General Counsel seeking to change precedent. However, if the Board agrees with the General Counsel's position and that action was upheld in the courts (both doubtful at this time), employers would lose the right to insist on a secret ballot election to ensure its employees have an opportunity to exercise their statutory right to refrain from union representation if they so choose. This would greatly facilitate the ease with which unions assert representative status over employees and likely encourage unions to seek to organize more workplaces.

As always, we will keep you up to date on the latest in this developing story.

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