BREAKING NEWS! NLRB Makes It Much Easier For Unions to Represent Employees By Forcing Employers to Recognize A Union Under Certain Circumstances

Labor & Employment Law Update

By Michael Hughes and Jeffrey Risch on August 25, 2023

Today, the National Labor Relations Board (NLRB) just handed big labor a major assist when it comes to union organizing. In *Cemex Construction Materials Pacific, LLC* and *International Brotherhood of Teamsters* 31-CA-238239, 372 NLRB 130, the NLRB ruled that an employer must essentially recognize a labor union claiming to represent a majority of its employees in an appropriate unit --- unless the employer promptly files a petition (an RM Petition) to test the union's majority status or the appropriateness of the unit. The NLRB went on to explain that absent unforeseen circumstances which may be presented in a particular case, promptly will mean that the employer must file its petition within 2 weeks following the union's demand for recognition. This new procedure assumes the union has not already filed its own petition with the NLRB --- an option that still exists.

Most unions will demand recognition when they have secured (through a variety of means) a majority of the employer's workers signed "union authorization card." A majority is defined as 50% + 1. Historically, and under past NLRB precedent for over 50 years, once the union has secured a majority of "cards" from a claimed bargaining unit, the union could seek voluntary recognition from the employer and the employer could freely reject the demand --- forcing the union to file its own petition with the NLRB and secure an election whereby a secret ballot election would ultimately resolve the matter one way or the other. Remember, the union must ultimately secure 50% + 1 of the votes counted, if an election is held.

As we discussed back in April 2022, the NLRB's General Counsel (Jennifer Abruzzo) argued in the *Cemex* case that the NLRB reinstate the 1960s-era *Joy Silk* doctrine. Under that doctrine employers would be required to recognize and

bargain with a union claiming to have majority support of the employer's employees, unless the employer could affirmatively establish a good-faith doubt as to the claimed majority status of the union. In the years when the *Joy Silk* doctrine was used, it was modified by the NLRB to put the burden on a union to demonstrate an employer's bad faith in failing to recognize a union that claimed to have majority support, and the doctrine eventually required a showing that the employer had committed a serious unfair labor practice before the NLRB would require the employer to recognize and bargain with the union absent an election. By the late 1960s, the NLRB abandoned *Joy Silk* completely and established that an employer did not have to accept card check (or any other method of claimed majority status), but could insist that the question be determined by a secret ballot election. Here, GC Abruzzo argued for a return to the original *Joy Silk* method, placing the burden on any employer to affirmatively establish that it has a good-faith doubt of the union's claimed majority status if it refuses to voluntarily recognize a union upon demand.

While the NLRB ultimately did not adopt the *Joy Silk* doctrine whole-hog, it did obviously adopt certain key aspects of the doctrine. Namely, if and when a union claims majority representative status for a particular group of employees, the employer will be compelled to recognize the union and bargain with that union unless it timely moves for a petition to hold a secret ballot election. However, by not fully adopting *Joy Silk,* the NLRB need not have to demonstrate and prove an employer's LACK OF GOOD FAITH in rejecting the union's claim of having representative status.

Of significant consequence, an employer moving for an election under this new standard cannot commit an unfair labor practice charge that would otherwise frustrate the election process. If the employer commits an unfair labor practice that would set aside an election, then the employer's petition will be dismissed by the NLRB. Additionally, it should be noted that even if an employer's petition is processed and the election results are in the employer's favor, the union can file objections and claim that the employer committed unfair labor practices to a degree and nature that could overturn the election and result in a bargaining order that requires the employer to recognize the union.

The NLRB's decision also did not go so far (as advocated by GC Abruzzo) to prevent lawful persuasive action by an employer when faced with potential or ongoing union organizing. The NLRB's decision in *Cemex* went on to state that an employer may continue to persuade employees with lawful expressions of its views under Section 8(c) of the National Labor Relations Act. But, the reality is that the current NLRB will be closely scrutinizing everything an employer says and does with regards to its workers --- particularly when union organizing is being conducted and especially prior to any secret ballot election being conducted.

As employers, employees and labor officials know full well, secret ballot elections allow employees to cast their vote privately and anonymously. By contrast, card signing is often completed by pro-union employees approaching other employees to have them sign an authorization card in their presence. Often, card signing is carried out in group meetings, where employees may feel pressured into signing in front of their peers. Also, the process is nearly completely unregulated and employees may not fully understand the purpose of the card. Therefore, compelling union recognition through card signing only is a no-brainer for union organizers. And, as we have seen union representation drop to an all-time low in recent years (down to 6% in the private sector entering 2023), labor organizations and the current administration are willing to do everything in their power to help reverse the downward trend. The NLRB's decision today goes a long way in re-establishing the significance of a union "card check" – and creates a vehicle for unions to use simple card check and secure recognition from an employer.

Non-union employers must act now to protect against a union demand for recognition based on a clandestine card-signing campaign. Employers must learn how to lawfully educate employees on what it would mean to belong to a union and how they can see through common union false promises and propaganda. These efforts should focus on educating employees on what signing a union card may mean—so that they can make a full, informed decision before signing a card. Under the new standard expressed in *Cemex*, educating employees on the good, bad and ugly of union representation after a majority have already signed cards could be too late.

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