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NLRB Reinvigorates 1949 Joy Silk Doctrine Giving Great Weight To Demands For Recognition

Labor Relations Update on **August 29, 2023**

As we previously reported in April 2022, the National Labor Relations Board ("NLRB" or "Board") General Counsel, Jennifer Abruzzo, asked the Board to revive the *Joy Silk* doctrine (which was rejected in 1969) and require employers to recognize unions without a secret ballot election.

On August 25, 2023, the Board released its decision in *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130 (2023), which falls short of a complete revival of the *Joy Silk* doctrine, but overrules existing precedent and establishes an easier way for unions to establish representation. This decision, which comes on the heels of new final rules issued by the NLRB that paves the way for a much shorter timeframe for representation elections (see our discussion here), puts greater pressure on employers when faced with union organizing.

Legal Background

Once union representation is established in the United States, the union becomes the exclusive representative of the employees in the bargaining unit. Since its inception, the Board has taken a variety of approaches to how such exclusive representation is established. Must it be by secret ballot election? Can the union meet the requirements by collecting authorization cards from a majority of employees in the unit? The Board recently swung the pendulum back towards the collection of authorization cards being sufficient.

Union demand sufficient unless good faith doubt. Under the *Joy Silk* doctrine, once a union asserted majority status based on authorization cards, the burden of proof rested with the employer to demonstrate that it had a "good faith doubt" as to the union's majority status. In analyzing an employer's good-faith doubt, the Board considered "all relevant facts in the case, including any unlawful conduct of the employer, the sequence of events, and the time lapse between the refusal and the unlawful conduct." 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***.

Serious unfair labor practices can undermine a secret ballot election. Twenty years after *Joy Silk,* in *NLRB v. Gissel Packing Co*., the Supreme Court held that a bargaining order without an election is appropriate where a union has achieved majority support ***and*** an employer engages in unfair labor practices which "have the tendency to undermine majority strength and impede the election processes." In practice, *Gissel* bargaining orders have been rarely issued.

In *Linden Lumber Division, Summer & Co.*, the Board overruled *Joy Silk* and abandoned the "good faith doubt" test, ruling that when confronted with authorization cards purportedly signed by a majority of employees, an employer could reject the cards and insist on a Board-conducted election—even without reason to do so—prior to engaging in bargaining.

Board Develops A New Standard

In *Cemex*, the Board overruled *Linden Lumber*, and in its place, established a new standard, as follows:

> "an employer violates Section 8(a)(5) and (1) by refusing to recognize, upon request, a union that has been designated as Section 9(a) representative by the majority of employees in an appropriate unit unless the employer promptly files a petition pursuant to Section 9(c)(1)(B) of the Act (an RM petition) to test the union's majority status or the appropriateness of the unit, assuming that the union has not already filed a petition pursuant to Section 9(c)(1)(A)."

The Board defined “promptly” as within two (2) weeks of the union’s demand for recognition. The Board was careful to point out that this new standard does not require an employer to prove “good faith doubt” of majority status prior to filing a petition—rather, employers have the right to file a “RM” petition for an election to be held.

However, after a petition is filed, if an employer subsequently “commits an unfair labor practice that requires setting aside the election, the petition (whether filed by the employer or the union) will be dismissed, and the employer will be subject to a remedial bargaining order.”

Employers must now act quickly when faced with a request from a union for voluntary recognition, because the Board also noted in its decision that if the employer neither recognizes the union nor promptly files a petition, the union may file a failure to bargain unfair labor practice charge against the employer. If the union establishes majority support, and the Board finds the employer violated the NLRA by failing and refusing to recognize and bargain with the union, the Board may issue a remedial bargaining order.

Lastly, the Board held that its new standard will apply ***retroactively***, finding that doing so would not be a manifest injustice.

Applying this standard to the facts of the case, the Board found that the Employer engaged in coercive and intimidating tactics before, during, and after a union representation election. According to the Board, this misconduct warranted setting aside the election where ready-mix cement truck drivers and driver trainers voted against representation. In addition, the Board found that the Employer’s conduct warranted a remedial affirmative bargaining order pursuant to *Gissel*.

Member Kaplan’s Dissent

In partial dissent, Member Kaplan did not join his colleagues in issuing a bargaining order or in overruling *Linden Lumber*. In finding a bargaining order inappropriate, Member Kaplan pointed to changed circumstances since the Employer’s unfair labor practices.

Given the facts of the case, Member Kaplan believed that the portion of the decision overruling *Linden Lumber* was *dicta* and thus was “devoid of precedential effect.”

Member Kaplan otherwise disagreed with the standard espoused by the majority, based on numerous reasons, noting that the new standard:

- Undermines employees' statutory rights by potentially forcing employees into unionization against their wishes;
- Conflicts with the Supreme Court's decision affirming the Board's holding in *Linden Lumber*;
- Does not include a reasoned explanation for step one of its standard, *i.e.* that affirmative bargaining orders will be issued to employers who decline a request for recognition without promptly filing a petition;
- Conflicts with *NLRB v. Gissel Packing* and decades of circuit court precedent applying that decision;
- Does not include an adequate justification for the second step of the new standard, *i.e*. that an affirmative bargaining order will be issued to employers who commit an unfair labor practice warranting setting aside an election; and
- Should not apply retroactively.

Takeaways

This decision drastically changes how exclusive representation will attach. While the dissent seems to think the discussion of the new standard was "*dicta*" and contradicts Supreme Court precedent,employers will ignore it at their peril. ***Indeed, when confronted with a demand for recognition, employers now will have two weeks to decide whether to (a) accept recognition and bargain with the union or (b) file an RM petition to seek a government-supervised secret ballot election.***

The Board did not address how bargaining unit issues will be resolved under the new pathway. It is often the case the unit sought by the union is different than the unit the employer asserts is appropriate. If the union petitions for a smaller unit and the employer in good faith asserts a larger unit is appropriate in its petition, is the risk of having the union imposed diminished? These and other questions will unfold as the case is applied.

Practically speaking, the decision also likely will result in more unfair labor practice charges being filed, given the greater potential likelihood that the Board will impose a bargaining order if the union loses the election. As a result, any conduct engaged in by the employer in communicating its position to its employees on unionization will be subject to scrutiny as the union attempts to bypass the vote in favor of a Board-imposed bargaining obligation.

We will keep you posted as developments occur.

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