

Insights: Alerts

Recognition Without an Election: NLRB Tweaks and Resurrects *Joy Silk*

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The National Labor Relations Board (“NLRB” or “Board”) continued its aggressive efforts to curtail longstanding management rights under federal labor law, this time by reviving key features of a long-dormant legal doctrine allowing unions to bypass the formal representation election process. The ruling fulfills Board General Counsel Jennifer Abruzzo's stated goal of reviving the so-called *Joy Silk* doctrine. The Board's decision replaces secret ballot elections as the preferred method for determining whether a union has majority support with a de facto “card-check” process.

Coupled with the procedural [Final Rule](#) issued yesterday, the practical effect of the Board's decision today in *Cemex Construction Materials Pacific, LLC*, is that it makes organizing easier for unions by eliminating the formal election process and, by extension, deprives employers of any opportunity to run campaigns. Unions will now be able to secretly (and swiftly) gather authorization cards, force employers to petition for a representation election, and proceed to an election in a matter of days.

History of the *Joy Silk* Doctrine

The *Joy Silk* doctrine stems from a 1949 Board decision, wherein the NLRB created a second avenue to union recognition through Section 8(a)(5) of the National Labor Relations Act (“NLRA” or “Act”), which makes it an unfair labor practice for an employer to refuse to bargain collectively with the representative of its employees.

The doctrine created a de facto “card-check” process in which a union could become a group of employees' bargaining representatives without going through the formal election process. Instead, unions were able to obtain bargaining orders from the Board if they obtained authorization cards from the majority of employees and requested recognition from the employer, only to have the employer refuse to recognize the union. The refusal to recognize the union was deemed an unfair labor practice unless the employer could demonstrate it possessed a “good-faith doubt” as to the union's majority status when it refused to recognize the union.

The good-faith doubt test was officially scrapped by the Supreme Court more than 50 years ago in *NLRB v. Gissel Packing Co.*, noting the Board's then-General Counsel “announced at oral argument that [the Board] had virtually abandoned the *Joy Silk* doctrine altogether.” Under the *Gissel Packing* standard, employers have the right to decline to voluntarily recognize the union and insist on an election. Further, entry of a bargaining order

without an election is only permitted in cases where the Board determines that the union did at some point enjoy majority support and a fair election is either highly unlikely or impossible due to widespread and egregious unfair labor practices committed by the employer during the campaign.

The Supreme Court confirmed the demise of the good-faith doubt test a few years later in *Linden Lumber Division v. NLRB* and held that it is not an unfair labor practice for an employer to deny a union's request for voluntary recognition based upon a card-check.

The Cemex Construction Framework

Today, the Board issued its anticipated decision in *Cemex Construction*, affirming an administrative law judge's ("ALJ") decision to set aside the results of a union election due to numerous severe unfair labor practices committed by the employer between the union's filing of a petition for an election and the election date.

Contrary to the ALJ, however, the Board determined that an affirmative bargaining order, rather than a rerun election, was necessary due to the extent of coercive misconduct on the part of the employer. The Board reached this result using the *Gissel Packing* standard. Nonetheless, the Board majority then proceeded to address and ultimately adopt GC Abruzzo's request for the Board to overturn *Linden Lumber* and reinstate *Joy Silk*. The Board majority began its analysis by overruling *Linden Lumber*, describing it as "inadequate to safeguard the fundamental right to organize and bargain collectively...." In its place, the majority established a new framework for determining when an employer has unlawfully refused to recognize and bargain with a union with majority support.

Under the new framework, an employer presented with a request for recognition from a union having majority support (e.g., vis-à-vis authorization cards) must either recognize the union or "promptly" file an RM petition under Section 9(c)(1)(B) of the Act to test the union's majority status or the appropriateness of the unit. Failure to take either step will result in an unfair labor practice and, as was the case under *Joy Silk*, the Board will issue a bargaining order. The majority further explained that even where the employer promptly files an RM petition, the petition will be dismissed, and a bargaining order issued if the employer commits any unfair labor practice after the request for recognition and before the election.

While the majority stated that it was not resurrecting the "good-faith" test, it cited approvingly a Board decision holding that employers may obtain RM elections "by demonstrating reasonable good-faith uncertainty" as to the union's majority status. The RM standard was not addressed in *Cemex Construction*. The new framework has retroactive effect.

Key Takeaways

The Board's revival of a modified *Joy Silk* doctrine in *Cemex Construction* could largely eliminate Board-conducted representation elections. In doing so, the Board undermines a key aspect of the NLRA, which is to promote employee free choice in the selection of their bargaining representative, preferably through secret ballot elections.

To prepare for the inevitable uptick in organizing efforts and union demands for recognition employers should:

- Increase the training provided to front-line supervisors at all locations regarding their role in maintaining positive relationships with employees and avoiding unfair labor practice charges. Under the new framework, it is vital that supervisors have an understanding of what conduct may constitute an unfair labor practice because any unfair labor practices committed by the employer after a request for recognition is likely to result in a bargaining order.
- Provide thorough training for supervisors on the authorization card process. Supervisors should understand how to detect union activity and how to identify potential coercive union conduct. The latter is especially significant because, under the new framework, authorization cards alone can earn unions a seat at the bargaining table unless an employer can successfully challenge the validity of the union's majority status.
- Train management to identify objective evidence that would support "good-faith doubt" in the event of a demand for recognition. Typically, evidence of good-faith doubt would be focused on the validity of the union's procurement of cards from employees, questions about the scope of the union's representation, or evidence of supervisory participation in the union's campaign.
- Review workplaces believed to be at risk for organizing and make changes necessary to increase the likelihood that the employer's desired unit(s) are the appropriate ones.
- As card checks often contribute to rash and uninformed decisions, employers should educate employees on the implications of signing authorization forms, bearing in mind the current Board's efforts to ban "captive audience" meetings.
- Develop an internal playbook for responding to requests for recognition based on authorization cards, including strategies for assessing the union's majority status and/or the appropriateness of claimed units.

If you have any questions about this Alert, please contact one of the authors or the attorney(s) in our firm with whom you are regularly in contact.

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