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Are Captive-Audience Meetings and Secret-Ballot Elections About to Vanish?

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Uncertainty looms as NLRB General Counsel seeks to upend a combined 127 years of settled labor law to help unions organize workplaces

Labor law has long been somewhat prone to uncertainty and inconsistency. Each new presidential administration brings with it different National Labor Relations Board (NLRB) appointees and different labor law priorities, which, unsurprisingly, often lead to changes. Despite the inherent malleability brought on by the political process, many fundamental principles have stood the test of time. Two of those fundamental principles—supported by a combined 127 years of case law—are that employees (almost) always have the right to vote by secret ballot on the question of whether to unionize, and that employers have the right to speak to employees about their opinions on unionization during required worktime meetings. Despite many other changes, and through Democratic and Republican presidencies, these fundamental principles of labor law have remained constant.

Current NLRB General Counsel Jennifer Abruzzo intends to end this consistency. In two recent memorandums, she promised to revive the *"Joy Silk"* doctrine—under which the NLRB can require an employer to recognize and bargain with a union without holding an election—in Memo GC 21-04, and to argue that mandatory employee meetings about labor topics are *per se* illegal, Memo GC 22-04. She has already made good on her promise by filing a brief with the NLRB, and arguing for these changes in a pending case.

Given the current makeup of the NLRB, her arguments may be successful in overturning 127 years of settled precedent. Employers should update their employee relations strategies and prepare, now for a legal landscape in which they may no longer be able to present their views on unionization to employees during

working time or demand elections prior to unionization.

WHAT IS THE *JOY SILK* DOCTRINE?

The *Joy Silk* doctrine takes its name from *Joy Silk Mills, Inc.*, an NLRB case from 1949. Under the original *Joy Silk* doctrine, if a union produced signed authorization cards from a majority of a bargaining unit it was targeting for representation, no secret ballot election was required, and the employer had to recognize and bargain with the union unless the employer established it had a "good-faith doubt" as to the union's majority status necessitating an election. In determining whether the employer had a "good-faith doubt," the NLRB evaluated "all relevant facts in the case, including any unlawful conduct of the employer, the sequence of events, and the time lapse between the refusal [to recognize and bargain with the union] and the unlawful conduct." If the NLRB determined that an employer that had received evidence of a card majority lacked a good-faith basis for refusing to recognize and bargain with the union, then it would issue a bargaining order requiring the employer to recognize and bargain with the union without an election.

Over time, the *Joy Silk* doctrine was modified and weakened, and the NLRB abandoned it during oral arguments before the Supreme Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). For the 53 years since *Gissel*, the NLRB has protected employees' right to a secret ballot election, and allowed an employer to demand an election, except when an employer commits unfair labor practices so serious that they make a fair representation election nearly impossible.

General Counsel Abruzzo seeks to restore the *Joy Silk* doctrine "in its original form," which would once again put the burden of proof on the employer to demonstrate the existence of a good-faith doubt about a union's majority status. It would also remove the requirement that there be "substantial unfair labor practices" present to demonstrate the employer's lack of good faith. Under this framework, an employer acting completely lawfully—committing *no* unfair labor practices—would still be immediately required to bargain with a union unless it could establish a good-faith doubt about the union's majority status.

That is, the NLRB would be able to order the employer to recognize and bargain with the union without giving employees a chance to vote in a secret-ballot election.

WHAT IS A CAPTIVE-AUDIENCE MEETING?

A "captive-audience meeting" is a mandatory meeting where an employer has the right to share its views regarding unionization with its employees. Such meetings are highly regulated by NLRB case law, and employers are prohibited from threatening, interrogating, or making promises to employees during them. Before secret-ballot elections, however, many employers find it useful to hold these types of meetings to provide truthful information about unions, and the employer's opinions about unionization, to employees in order to ensure employees are fully informed before voting.

Are Captive-Audience Meetings and Secret-Ballot Elections About to Vanish?

Prior to the Taft-Hartley Act's significant amendments to the National Labor Relations Act (NLRA) in 1947, the status of captive-audience meetings was uncertain, and in fact the NLRB had held that it was unlawful for employers to require attendance at such meetings in a 1946 case (*Clark Bros. Co., Inc.*). However, after the 1947 NLRA amendments made it clear that an employer may express its views on unionization so long as its speech "contains no threat of reprisal or force or promise of benefit," the NLRB quickly overruled *Clark Brothers* in a 1948 case called *Babcock & Wilcox Co.* For the past 74 years, the NLRB has recognized the legality of captive-audience meetings.

General Counsel Abruzzo seeks to return to the pre-Taft-Hartley era of *Clark Bros*. She has requested that the NLRB hold that all captive-audience and similar mandatory meetings are *per se* unlawful; that is, any mandatory meeting that touches on any right protected by Section 7 of the NLRA is unlawful because, at minimum, an inherent threat exists that an employee will be disciplined, discharged, or otherwise reprised against by failing to attend or listen to the meeting. General Counsel Abruzzo would limit an employer's ability to express itself in accordance with Section 8(c) of the NLRA only after providing employees with assurances that their attendance is voluntary, that they may leave at any time, that attendance will not result in rewards or benefits, and that nonattendance will not result in reprisals.

WHAT SHOULD COMPANIES DO NOW?

In the very near future, the Board may accept General Counsel Abruzzo's request to upend 127 years of settled precedent. If it does so, employers will lose two *significant* rights. If the *Joy Silk* doctrine is resurrected, in many cases employers will lose the right to demand a secret-ballot election in order to determine if employees actually want to unionize. And, if captive-audience speeches are outlawed, employers will lose the right to require meetings where they can speak to employees about their position on unionization before any such election the NLRB allows. Working in tandem, if the NLRB accepts General Counsel Abruzzo's positions, employers seeking to remain union-free will do so with one hand tied behind their back.

The bottom line is that these would be momentous labor law changes that would make it significantly easier for unions to organize your employees.

In the face of these likely changes, the best defense when it comes to union avoidance is a strong offense. Employers who proactively identify and acknowledge workplace challenges, and ensure their employees are well-informed, involved and recognized for their efforts, stand the best chance of maintaining a direct working relationship with their employees without third-party interference from a union. Accomplishing these lofty goals is not easy, but it can be done. Stinson advises companies on these issues, and our services range from comprehensive positive employee relations audit, to supervisor/manager training, to behind-the-scenes consultation.

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