Newsletter

Top Five Labor Law Developments for April 2022

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1. *The National Labor Relations Board (NLRB) General Counsel (GC) filed a brief seeking to expand unions' right to obtain recognition from employers based on signed authorization cards alone, without the need for a Board election.* In a brief filed on April 11 in *Cemex Construction Materials Pacific, LLC*, No. 28-CA-230115, General Counsel Jennifer Abruzzo advocates to reinstate the doctrine set forth in *Joy Silk Mills*, 85 NLRB 1263 (1949), under which an employer faced with signed authorization cards indicating a union's majority status has no right to insist on a secret ballot election unless it can establish a good faith doubt of the union's majority status. It is not clear if *Joy Silk* were to be reinstated, what would constitute such a "good faith doubt" about majority status. The NLRB finally abandoned the *Joy Silk* standard by 1969, adopting its current standard, under which an employer presented with signed union authorization cards need not accept the union's claim of majority status. Instead, the employer can lawfully insist on a secret ballot election. Unions have long advocated a card majority rule. If the NLRB reinstates *Joy Silk*, employers — and employees — might not have the option of a secret ballot election.

2. *General Counsel Abruzzo is advocating that the Board hold "captive audience" meetings and similar employer campaign conduct violates the National Labor Relations Act (NLRA).* As part of GC Abruzzo's campaign to invigorate union organizing, she issued a memorandum (Memorandum GC 22-04) on April 7, 2022, announcing she will argue that employer "captive audience" meetings and similar mandatory meetings violate the NLRA. At such meetings, the employer requires employee attendance at a presentation concerning the election. Captive audience meetings have long been a staple of employer election campaigns. Abruzzo argues that the NLRB has "long-recognized that the Act protects employees' right to listen to—or refrain from listening to—employer speech concerning their rights to act collectively to improve their workplace." Abruzzo cites a 1946 NLRB case for this proposition, decided prior to the 1948 addition of § 8(c) of the NLRA that protects employer free speech. After the NLRA was amended, the Board abandoned this principle. Abruzzo argues that compulsory employee attendance under threat of discipline discourages the employees from refusing to listen to employer speech, which Abruzzo views as inconsistent with the NLRA. While the GC's office cannot effectuate such a change in NLRB policy unilaterally, the GC can advance cases and arguments before the NLRB that advocate for a change in the law in this area, a change the employee-friendly Biden NLRB may support. If the NLRB adopts the GC's proposal, employers will lose a primary vehicle for communicating their position — and employees would lose a significant opportunity to hear facts and opinions that differ from those presented by the union.

3. *Connecticut Governor Ned Lamont signed a bill allowing workers to opt out of*

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captive audience meetings. The new law, styled as *An Act Protecting Employee Freedom of Speech and Conscience*, will prohibit employers from requiring employees to attend meetings on certain political or religious subjects, including unionization. Similar bills have been put before the Connecticut General Assembly and failed for more than a decade. Much of the debate over the bill centered on whether it is preempted by the NLRA. The NLRA permits employers to require employee attendance at meetings about unionization, called "captive audience meetings," but the NLRB GC said in a memorandum (see above) she wishes to see that precedent overturned. Oregon passed a similar law prohibiting captive audience meetings in 2010. That law survived a 2010 lawsuit by the U.S. Chamber of Commerce based on lack of ripeness; it also survived a 2020 lawsuit by the NLRB based on lack of standing.

4. *The NLRB announced that union election petitions and unfair labor practice filings increased significantly in the first half of fiscal year 2022.* According to a NLRB press release issued on April 6, during the first six months of fiscal year 2022 (October 1–March 31), representation case petition filings increased 57%, to 1,174 (up from 748 during the first half of FY 2021). This unprecedented increase in election petitions includes hundreds of cases filed regarding Starbucks stores in the first half of FY 2022. During the same period, unfair labor practice charge filings increased 14%, from 7,255 to 8,254. The increases come amid a surge of union activity nationwide, and even as the percentage of the private sector workforce belonging to unions continues to decrease. This wave of activity comes as the Board contends it is understaffed and underfunded. According to a Government Accountability Office report released in 2021, the NLRB saw its total personnel drop by more than a quarter from 2010 to 2019. The NLRB has also experienced the equivalent of a 25% cut to its budget since 2021. The Biden Administration is aiming to change that, calling for a 16% boost to the Board's budget in its FY 2023 spending plan. It would be the NLRB's first budget increase since 2014.

5. *The NLRB ruled an employer violated the NLRA when it withdrew recognition from a union after unlawfully delaying bargaining. J.G. Kern Enterprises*, 371 NLRB No. 91 (Apr. 20, 2022). Under NLRB law, in certain circumstances, an employer may withdraw recognition from a union if it receives evidence that a majority of bargaining unit employees no longer wish union representation. Among the circumstances temporizing the employer's ability to withdraw is the NLRB's "certification" rule. Under the rule, a union enjoys a conclusive majority for one year following certification of the union's election victory. The purpose of this rule is to allow the newly certified union 12 months in which to reach a collective bargaining agreement. In this case, almost 14 months after certification with no agreement reached, the employer received a petition from a majority of employees stating their disaffection from the union. The employer then withdrew recognition. The Board found the employer's withdrawal was unlawful. It reasoned that the employer delayed actual good faith bargaining for three months following certification. Applying the principle of the "extended certification year," the Board held that the employer's delay prevented the union from having a full 12 months of good faith bargaining, thus the 14-month withdrawal was premature despite the petition from a majority of the employees.

Please contact a Jackson Lewis attorney if you have any questions about these developments.