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Blog Post

Unsuccessful Union Election? Employers Might Still Be Ordered to Engage in Collective Bargaining

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Employers with a workforce seeking to unionize may soon be ordered to bargain even without a union election (or potentially, even if the employer won the election)—if the NLRB's General Counsel succeeds in resurrecting a 50-year-old legal framework called the *Joy Silk Mills* doctrine.

In the early days of the Biden administration, the President promised to implement a more worker-friendly agenda in its interpretation and enforcement of federal labor law. The administration appears to be making good on that promise. Among other legal initiatives discussed here, the NLRB General Counsel signaled its intent explore the revival of the *Joy Silk Mills* doctrine.

So what is the *Joy Silk Mills* doctrine? The doctrine was first adopted by the NLRB in 1949. It was abandoned in 1969 in favor of what ultimately became today's operating framework.

Under the current framework, if a group of employees announce their intent to unionize, the employer may either voluntarily recognize the union or insist on an NLRB election. Under the *Joy Silk Mills* doctrine, the employer cannot demand an election unless it can demonstrate good faith doubt that a majority of employees actually support the unionization effort.

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Proponents of the doctrine's revival argue the current penalties for unlawful "union busting" activities are not enough to deter violations, and reviving the doctrine will help make it easier for workers to organize over employers' opposition.

Opponents criticize the lack of clarity around the doctrine's potential reinstatement. They worry the NLRB may order employers to bargain *even if there is no evidence the employer engaged in an unlawful labor practice*. In other words, is evidence of employee support (for example, cards signed by employees stating their support), an absence of good faith doubt, *and* proof of an unfair labor practice by the employer required before the NLRB will issue a bargaining order? Or is evidence of majority support for the union and an absence of good faith doubt enough, without evidence of an unfair labor practice?

These and other questions may be answered soon; last fall, NLRB General Counsel Jennifer Abruzzo tweeted extensively about the doctrine and its history, and reiterated her intent to pursue its revival by the NLRB. More recently, in early February 2022, the General Counsel acknowledged its intent to seek a *Joy Silk Mills* bargaining order in a case brought by the NLRB alleging the employer interfered with a union drive. Its brief, which will very likely contain the General Counsel's first formal legal arguments in favor of the doctrine's revival, is currently due April 11, 2022.

How exactly a revived *Joy Silk Mills* doctrine will look remains uncertain. There is no guarantee the doctrine will come back in its traditional form. This could be a good thing for employers; a modern adaptation of the doctrine may allow employers more options in opposing unionization. However, the opposite is also true: a stricter version of the doctrine may, for instance, result in the NLRB taking a harder look at an employer's conduct during the unionization process.

At the very least, the adoption of any version of the doctrine will likely bring a new boom in employees' efforts to unionize; according to an August 2021 Gallup, only 6 percent of private sector workers today are union members, but 68 percent of Americans approve of labor unions (the highest percentage since 1965—when *Joy Silk Mills* was in effect).

If the NLRB revives the doctrine, the resulting increase in employee organization efforts will demand greater attention and resources from employers, along with new legal hurdles and challenges for a greater number of employers. In the meantime, contact your Akerman attorney for help with these and any other employment questions.
