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Draconian: NLRB Signals Even Harsher Penalties For Employers May Be Coming

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Recently appointed National Labor Relations Board (NLRB) General Counsel Jennifer Abruzzo issued a memorandum to all NLRB Regional Directors on Aug. 12, 2021, outlining types of cases they should submit to the Division of Advice. Abruzzo states that the topics identified in the memorandum compel centralized consideration and reexamination on whether change is necessary "to fulfill the Act's mission."

Among the litany of cases identified in the memo are "cases in which an employer refuses to recognize and bargain with a union where the union presents evidence of a card majority, but where the employer is unable to establish a good faith doubt as to majority status. . . . See *Joy Silk Mills, Inc.*, 85 NLRB 1263 (1949)."

Under Section 8(a)(5) of the National Labor Relations Act, it is an unfair labor practice for an employer to refuse to recognize and bargain with a union that has been designated as the representative for a majority of the employees in a bargaining unit. In *Joy Silk Mills, Inc.*, the NLRB held that an employer violated Section 8(a)(5) and would be ordered to bargain with the union if it was presented with a union request for recognition and did not possess a good faith doubt as to the union's majority status.

The Supreme Court's 1969 decision in *NLRB v. Gissel Packing Co.* altered the Board's use of bargaining orders by removing the "good faith doubt" test and restricting the number of circumstances in which they can be ordered.

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Thus, under *Gissel Packing*, an employer faced with an alleged majority of signed union cards could still insist on an election and need not make an independent inquiry into the validity of the cards. The more employer-friendly standard announced in *Gissel Packing* meant that only outrageous or pervasive employer misconduct would warrant a bargaining order, where under *Joy Silk*, an employer's failure to establish a good faith doubt or almost any unfair labor practice could serve as the basis for a bargaining order.

Abruzzo's memo suggests that the NLRB may try to revive the *Joy Silk* standard, which would make it easier for the Board to find that circumstances exist that warrant a bargaining order. Given the draconian and punitive nature of bargaining orders, which require an employer to recognize and bargain with a union that has not won an election, employers going through union campaigns should be aware of this potential drastic shift.