Updates
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NLRB GC Abruzzo Signals Significant Changes for Employers in Cemex Brief

The general counsel for the National Labor Relations Board (the Board), Jennifer Abruzzo, on April 11, 2022, filed a brief in a case pending before the NLRB, *Cemex Construction Materials Pacific, LLC*, 28-CA-230115 et al., asking the Board to overturn decades-old precedent and make several significant changes to employers' rights during unionization campaigns. Specifically, she seeks to (1) ban so-called "captive audience" meetings, (2) eliminate the ability of employers to insist on secret-ballot elections, and (3) restrict an employer's right to inform employees about how the employer-employee relationship may change with union representation. The general counsel is independent from the Board, so her views do not necessarily indicate how the Board would decide these issues. However, her brief serves as an invitation to unions to file unfair labor practice charges around these common practices, which, in the near term, may have a chilling effect on employers' ability to counter unions' organizing activities.

"Captive Audience" Meetings

Abruzzo argues that "captive audience" meetings should be outlawed, a legal change that would require the Board to ignore nearly 75 years of case law and return to the Truman-era rule in *Clark Brothers*, 70 NLRB 802 (1946). In *Clark Brothers*, the Board held that an employer commits an unfair labor practice when it requires employees to attend meetings where the employer expresses its view on unionization.

In her brief, Abruzzo states that such captive audience meetings "inherently involve a threat of reprisal to employees for exercising the protected right to refrain from listening to such speech." This view is directly at odds with both the National Labor Relations Act (Act) and U.S. Supreme Court precedent. In 1947, Congress enacted several amendments to the Act, including Section 8(c), which *explicitly* allowed employers to express their views about labor organizing absent a threat of reprisal or promise of benefit. The following year, the Board overruled *Clark Brothers* in *Babcock & Wilcox Co.*, 77 NLRB 577 (1948) stating that "the language of Section 8(c) of the amended Act, and its legislative history, make it clear that the doctrine of the *Clark Bros.* case no longer exists as a basis for finding unfair labor practices."

It should also be noted that Abruzzo's view is also at odds with the Supreme Court precedent announced in *Chamber of Commerce of United States v. Brown*, 554 US 60 (2008), which prohibits the regulation of noncoercive speech about labor issues because the Act "favor[s] uninhibited, robust, and wide-open debate in labor disputes." For nearly 75 years, employers have been able to use work time to express how unions can alter the work environment—even during required meetings. Undaunted in the face of this precedent, the general counsel has asked the Board to overrule *Babcock* and return to *Clark Bros.* making all mandatory meetings unlawful if they concern an employee's Section 7 rights.

Secret-Ballot Elections

The general counsel also seeks to eliminate or significantly diminish the use of elections to determine union representation. Currently, a union can organize employees two different ways, either through a secret-ballot

election overseen by the NLRB or by employer recognition through a card check. In a card check, an employer presented with evidence that a majority of its employees wish to be represented by a union can simply recognize the union. The multitude of reasons to refuse a card check are well known, including forged cards, disingenuous organizing techniques, employees being browbeaten into signing, relentless home visits, and other coercion. By contrast, in order to request a secret-ballot election, the union must now submit authorization cards to the NLRB signed by at least 30% of employees which indicate employee support for a union. The current process ensures a democratic election takes place and allows employees to express their preference anonymously.

Notwithstanding these benefits, in her brief, the general counsel has asked the Board to reinstate the standard set forth in *Joy Silk Mills, Inc.*, 85 NLRB 1263 (1949), a standard rejected decades ago. Reinstatement of the *Joy Silk* doctrine would require an employer to recognize and bargain with a union if it is presented with signed authorization cards from a majority of workers. The burden of proof would then shift to the employer to demonstrate that it has a "good faith doubt" as to the union's majority status. If the employer is unable to satisfy this "good faith doubt" test, the Board would order the employer to recognize and bargain with the union without a secret-ballot election. The change proposed by Abruzzo would make it much easier for unions to assert representation status, would deny the vote to employees who oppose unionization, and is likely to lead to a steep uptick in union organization efforts.

Employer-Employee Relationship With Union Representation

Currently, under *Tri-Cast*, 274 NLRB 377 (1985), employers may tell employees that their access to management will be limited if they vote for union representation, and this statement does not violate Section 9(a) of the Act. Section 9(a) provides that employees have the right to have their grievances adjusted, without the intervention of the bargaining representative, *as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract and so long as the representative has been given opportunity to be present at such adjustment*. So while Section 9(a) may preserve employees' rights to take action on their own behalf in theory, in practice the vast majority of collective bargaining agreements explicitly bar it, instead granting exclusive representation rights to the union. The *Tri-Cast* Board recognized that section 9(a) *does* contemplate a change in the manner in which the employer and employee deal with each other and that it is a fact that when a union represents employees, they deal with the employer indirectly through a shop steward.

In her brief, Abruzzo asks the Board to overrule *Tri-Cast* and find that employer statements suggesting that access to management will be curtailed by union representation are "unlawful threats of the loss of existing benefits." Abruzzo argues that such statements do not simply convey an anticipated change in the employer-employee relationship, but that they instead misrepresent employee Section 9(a) rights. She argues that Section 9(a) provides employees the opportunity to "deal directly" with management to adjust grievances—despite unambiguous language in 9(a) requiring the adjustment be consistent with the collective bargaining agreement and that the union be given the opportunity to be present. If the Board were to adopt this departure from precedent, employers can expect immediate union scrutiny of any statement during organizing campaigns regarding the impending change in the employer-employee relationship and additional grounds to challenge election results where employees have exercised their right to remain union-free.

Takeaway for Employers

President Biden has pledged to be the most pro-union president in American history. General Counsel Abruzzo's *Cemex* brief breathes life into that promise. While the general counsel is independent from the Board, she is responsible for the investigation and prosecution of unfair labor practice cases and for the general supervision of the NLRB field offices which processes cases and handle representation elections. The *Cemex* brief

unequivocally telegraphs her views on the direction that enforcement should take, and employers should take proactive steps to ensure that their current union avoidance practices take this radical shift in enforcement into account.

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