FP Manufacturing Snapshot: Resurrection of Long-Extinct Doctrine Brings Threat of De Facto "Card-Check"

Insights
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The Biden administration is deploying a number of initiatives in its ongoing efforts "to be the most pro-union administration in American history" – but the current effort to resurrect the decades-old *Joy Silk* doctrine, which would all but eliminate secret ballot votes and set up a d*e facto* "card check" process, may ultimately be the most impactful for manufacturers. However, these efforts cannot be viewed in isolation. When you combine this initiative with the recent efforts to restrict lawful communications from employers, employees wanting to work non-union and without the pressure to pay union dues may have few options. Clearly, the Biden administration has a comprehensive plan to help unions add members, and manufacturers are caught in the middle.

What is the *Joy Silk* Doctrine?

The *Joy Silk* doctrine is named after a 1949 decision of the National Labor Relations Board (NLRB) extending bargaining rights to unions merely upon an employer rejecting a demand for recognition in the absence of a reasonable good faith doubt as to the union's majority status, or upon the subsequent commission of independent unfair labor practices. The *Joy Silk* doctrine created a *de facto* "card-check process" in which a union can become the bargaining representative for a group of employees without going through a secret-ballot election. While the U.S. Supreme Court issued a pair of decisions phasing out this doctrine over a half-century ago, it is now making a major comeback.

A Revival of the *Joy Silk* Doctrine is Already Under Way

Widespread reports confirm that the NLRB now has a case on which it will rely to reinstitute the *Joy Silk* doctrine. Anecdotally, Fisher Phillips is already seeing unions developing strategies specifically designed to obtain a *Joy Silk* bargaining order. It's not coming – it's here.

Why is This More Critical For Manufacturers?

The *Joy Silk* revival should be a concern for all U.S. employers. However, it may be more significant for manufacturers. Between 2020 and 2021, the number of private sector manufacturing workers was on the rise. Interestingly, the percentage of union-represented workers declined over that same period. If labor unions are going to stem the tide of decline, they will have to improve their

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penetration in the manufacturing sector. The revival of the *Joy Silk* doctrine seems to be organized labor's option of choice.

Employer Strategies Will Need to be Comprehensive

With the *Joy Silk* doctrine, unions will have a distinct advantage out of the gate. They can manipulate facts to orchestrate a recognition demand that restricts an employer's options to effectively respond, thereby increasing the risk of inadvertently committing unfair labor practices thereafter. More importantly, unions will be able to select the manner and timing of their demands for maximum advantage.

To overcome this, manufacturers will need to tailor lawful strategies for responding to these tactics around the unique aspects of their workplace cultures. In the process, they will need to reevaluate their entire employee relations infrastructure, including their workforce structure, interactions between departments and multiple sites, employee communications, and supervisory training (preferably safeguarded by the attorney-client privilege) to effectively exercise their own free speech rights on the representation process without committing unfair labor practices. This is something for all manufacturing employers to consider and develop well before a union organizer shows up and demands recognition in an effort to bypass a secret ballot election.

Conclusion

We will continue to monitor workplace law developments as they apply to manufacturers, so make sure you are subscribed to Fisher Phillips' Insight system to get the most up-to-date information directly to your inbox. If you have questions, contact your Fisher Phillips attorney, the author of this Insight, or any attorney on our Manufacturing Industry Team or Labor Relations Practice Group.

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