

# TOP NLRB LAWYER AIMS TO IMPOSE UNION RECOGNITION THROUGH 'CARD CHECK' PROCESS

Insights  
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An employer can generally refuse a union's demand for recognition and insist on a secret ballot vote, according to established federal labor law authority, but relying on this authority seems somewhat risky at the moment. For more than 50 years, a secret ballot election has been the only path to union representation if an employer refuses voluntarily recognition. In recent months, however, the National Labor Relations Board's (NLRB's) general counsel, Jennifer Abruzzo, has repeatedly confirmed that she wants to prohibit employers from refusing a demand for recognition unless they can show that they have a good faith basis for doing so. In doing so, Abruzzo wants to revive the 73-year-old *Joy Silk* doctrine, which is named for the 1949 NLRB decision [\*In the Matter of Joy Silk Mills Inc. and United Textile Workers of America\*](#). Although the *Joy Silk* doctrine has not been resurrected yet, organized labor is aggressively asserting *Joy Silk* claims and trying to create a *de facto* "card check" process – through which a union would become the authorized representative as soon as a majority of employees in its desired bargaining unit sign electronic or paper authorization cards. What would a return to the *Joy Silk* doctrine mean for employers, and how can they prepare?

## What is the *Joy Silk* Doctrine?

The *Joy Silk* doctrine once imposed bargaining obligations on an employer that either rejected (or ignored) union recognition demands unless the employer could show that it had a reasonable, good faith doubt as to the union's majority

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status or committed unfair labor practices (ULPs) thereafter. This doctrine created a *de facto* card-check process through which the union became the authorized representative without ever going through an election.

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## Service Focus

### Labor Relations

Through a pair of decisions, the Supreme Court wiped out the *Joy Silk* doctrine more than 50 years ago. Ever since then, an employer refusing to recognize a union claiming to possess a majority of signed authorization cards leaves that union with no choice but to invoke the Board's secret ballot election process. In other words, employers were safe in rejecting (or disregarding) such "bargaining demands," relying upon their established right to insist upon resolution of the representation issue through a democratic election.

### Reviving the *Joy Silk* Doctrine

By issuance of GC Memo 21-04, General Counsel Abruzzo announced last year that she wants NLRB lawyers to seek out cases that might reinstate the *Joy Silk* doctrine, and they have been busy doing just that. Her call to revive *Joy Silk* would make it even easier for organized labor to secure representation rights *without* the heavy lift of secret-ballot elections. This would effectively deprive employees of the opportunity to evaluate additional facts before making an informed decision on the issue of union representation through the time-tested process of secret ballot elections.

While it remains to be seen whether the courts (or even a Democratically controlled NLRB) will uphold this doctrine over the months to come, we can certainly expect the Regions that make up the first point of NLRB contact to enforce it through the administrative procedures available to them in the meantime.

### What are GC Memos, and Why Should You Care?

Employers may be curious to note that Abruzzo first called for the resurrection of the *Joy Silk* doctrine through a General Counsel (GC) Memo. While GC Memos don't represent the official legal position of the entire agency, they do represent the policy and guidance for all Regional offices investigating and prosecuting charges against employers. These memos are also used to advance proposed legal doctrine through an administrative framework that runs from the agency's Division of Administrative Law Judges up through the five members of the NLRB itself.

## How Can Employers Prepare?

While there was much talk of increased union activity stemming out of the pandemic, the percentage of union-represented workers [declined](#) in 2021. Union organizing activity is now on the rise however, as reflected by the 57% increase in representation petition filings over the first six months of the NLRB's 2022 fiscal year (which commences on October 1), relative to that same period one year earlier.

Employers should therefore be proactive by taking the following four steps:

- Create positive relationships with employees. Human Resources and frontline managers should commit to developing a positive culture. You should seek input from and listen to employees about their needs in the workplace and promptly respond to employee concerns.
- Lawfully educate employees on your employee relations philosophy and the implications of signing authorization forms – [while taking into consideration the Board's recent rebuke of "captive audience" meetings](#).
- Train front-line supervisors on the card-signing process, the importance of avoiding ULPs, and on the role they play in maintaining your employee relations infrastructure.
- Develop a process for addressing and handling union recognition demands.

## Conclusion

We will continue to monitor this situation as it unfolds. Make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information direct to your inbox. For further information, contact your Fisher Phillips attorney, the authors of this Insight, or [any member of our Labor Relations group](#).