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The NLRB General Counsel Seeks to Overturn the Levitz Furniture Decision: Rearranging Furniture on the Titanic

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American workers are increasingly turning away from union representation. According to the U.S. Bureau of Labor Statistics, between 2011 and 2015, the rate for union membership, which is the percent of wage and salary workers who were members of unions, fell from 11.8 to 11.1. In 1983, the first year for which comparable union data is available, the union membership rate was 20.1 percent. In what would be a major reversal of long established NLRB case law, the NLRB General Counsel announced on May 9, 2016 that he will seek to have the NLRB overrule *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001). In *Levitz*, the NLRB reaffirmed that an employer need not await the outcome of an NLRB election to withdraw recognition from a union. The General Counsel now wants to place before the NLRB the proposition that, absent an agreement between the parties, an employer may lawfully withdraw recognition from a union representative based only on the results of an RM election (one requested by the employer) or RD election (one requested by employees). Under the General Counsel's proposal, no longer would employees be able to circulate their own petition and present it to the employer—employees could resort to only those mechanisms approved and provided by the federal government.

Under *Levitz*, the NLRB held that an employer could unilaterally withdraw recognition from an incumbent union only on a showing that the union has actually lost the support of a majority of the bargaining unit employees. The NLRB overruled earlier decisions that allowed employers to withdraw recognition merely by establishing an objectively based, good-faith reasonable doubt as to unions' majority support. In the NLRB's view at the time of *Levitz*, the good-faith reasonable doubt standard was flawed because it allowed employers to withdraw recognition from unions that had not, in fact, lost majority support. Accordingly, the NLRB held that an employer that unilaterally withdraws recognition violates Section 8(a)(5) unless it can show that, at the time it withdrew recognition, the union had actually lost majority support. Further, under *Levitz*, an employer could obtain an RM election by demonstrating an objectively based, good-faith reasonable **uncertainty** as to the union's majority status, rather than by demonstrating a good-faith **doubt or disbelief**.

The General Counsel maintains that abandoning *Levitz* is warranted because experience has shown that employers have not always acted where evidence "clearly indicates" a loss of majority support and this in turn has led to protracted litigation, which has interfered with the right of employees to choose a bargaining representative. In the General Counsel's view, an NLRB election is the best means of ascertaining employee sentiment. However, the General Counsel does not take into

account that unions will likely respond to an RM or RD petition by filing blocking charges, which will delay the conduct of an election and frustrate employee free choice.

Importantly, under *Levitz*, an employer only may rebut the continuing presumption of an incumbent union's majority status and withdraw recognition only on a showing that the union has in fact lost the support of a majority of employees in the bargaining unit. An employer acts at its peril in withdrawing recognition. The change now sought by the General Counsel would limit the means by which employees may seek to remove an incumbent union, force employers and employees to be more dependent on the federal bureaucracy as the arbiter of their work place, and more tightly bind a union upon employees and their employers – perhaps, forever.

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