

Insights: Alerts

NLRB Finalizes New Rule Modifying Election Procedures To Better Protect Employee Free Choice

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On March 31, 2020, the National Labor Relations Board (NLRB) issued a new rule modifying election procedures so that employees have more of a say as to whether or not they want union representation. The new rule, which is scheduled to be published in the Federal Register on April 1, 2020, is part of a broader effort by the NLRB to revise its election procedures to better protect employee free choice. The rule is scheduled to go into effect on or about June 1, 2020.

The NLRB's rule will change its election procedures in the following three areas: (1) blocking charges; (2) recognition in the construction industry; and (3) voluntary recognition bar. Each of these areas will be separately discussed below.

Blocking Charges

Employees who no longer desire to be represented by a labor union can move to decertify the union. If at least 30 percent of employees in the bargaining unit sign a petition, the NLRB will conduct a decertification election to determine if the union has lost its majority status.

A blocking charge is when a union files an unfair labor practice charge (ULP) for the purpose of delaying or preventing a decertification election from going forward. In recent years, unions have abused the blocking charge process by filing frivolous ULP charges for the sole purpose of blocking decertification elections. The new rule is designed to minimize that practice.

Currently, the NLRB may suspend decertification procedures if a ULP is filed against the employer for interfering with the process. The new rule will replace that policy with a "vote-and-impound" procedure, whereby ballots will be collected and held until the charge(s) are resolved, or a process by which ballots are opened and counted instead of being impounded.

Pursuant to the rule, when a blocking charge is filed alleging violations of Sections 8(a)(1) or 8(a)(2) of the Act, "ballots will be impounded for up to 60 days post-election if the charge has not been withdrawn or dismissed or if a complaint has not issued prior to the conclusion of the election." However, "if a complaint issues with respect

to the charge at any time prior to expiration of the 60-day post-election period, then the ballots will continue to be impounded until there is a final determination regarding the charge and its effect, if any, on the election petition. If the charge is withdrawn or dismissed at any time prior to expiration of the 60-day post-election period, or if the 60-day period ends without a complaint issuing, then the ballots shall promptly be opened and counted.” Notably, the 60-day period will not be extended even if more than one unfair labor practice charge is filed serially.

For all other types of unfair labor practice charges, ballots will not be impounded, but rather, they will be opened and counted at the end of the election.

It is important to note that, regardless of the nature of the charge (and therefore, whether the ballots are to be counted or impounded), the election results will not be certified until final disposition of the unfair labor practice charge, and, if an unfair labor practice is found, a determination of the effect of any such violation on the election petition.

While the procedural change may not entirely eliminate the delay in the decertification process, it should allow employees to vote sooner and prevent unions from disrupting the process through blocking charges.

Section 9(a) Recognition in the Construction Industry

In the construction industry, collective bargaining agreements are presumed to be covered under Section 8(f) of the Act. A “Section 8(f) relationship” exists when a union serves as a collective bargaining representative for a particular construction project. Due to the transitory nature of both employees and construction projects, under Section 8(f), a collective bargaining relationship may be recognized without the necessary showing of majority support.

Under the existing election procedures, a Section 8(f) relationship can be transformed into a Section 9(a) relationship, which serves to bar the filing of a petition for an election to certify or decertify a union during the period of a collective bargaining agreement (not to exceed 3 years). The Board considers various factors when a Section 8(f) relationship is alleged to have become a 9(a) relationship. One factor is whether the collective bargaining agreement language signals the intent of the employer and union to convert to such a relationship. Under existing law, such an agreement alone precludes the filing of an election petition for the duration of the collective bargaining agreement, after such recognition is established, even if there is no evidence of majority support.

Under the new NLRB rule, proof of a Section 9(a) relationship requires there to be “positive evidence of majority employee support,” and it cannot be based just on language in the parties' collective bargaining agreement. The rule overrules the NLRB's earlier decision in *Staunton Fuel & Material*, which held that a Section 8(f) presumption can transition into a Section 9(a) bargaining relationship solely based on language in the underlying collective bargaining agreement.

Voluntary Recognition Bar

A voluntary recognition bar prevents an election to certify or decertify a union for a reasonable period of time

after an employer voluntarily recognizes a union as its employees' collective bargaining representative. In a 2007 decision called *Dana Corp.*, the Board held that workers and rival unions had a 45-day post recognition window for filing a decertification petition. Thereafter, in *Lamons Gasket*, the NLRB overruled its earlier decision in *Dana Corp.*, and defined a "reasonable period" as six months to a year.

The new rule returns the Board to the standard announced in *Dana Corp.* The new standard only applies to voluntary recognition given by employers after the NLRB's rule has taken effect, and to any collective bargaining agreements that are struck as a result of that recognition.

Key Takeaways

- The new rule makes it easier for employees to get a rid of a union by eliminating the blocking charge policy, which often delays the decertification process.
- In the construction industry, a union must present extrinsic evidence of continued majority support, in order to transform a Section 8(f) relationship into a Section 9(a) relationship.
- For the voluntary recognition bar to apply, an employer must notify employees in the bargaining unit that it voluntarily recognized the union, and employees have a 45-day window to file a decertification petition.

In addition to this rule, the NLRB finalized a separate rule in December 2019, which was designed to scale back the Obama NLRB's regulations meant to speed up the election process. Among other things, the NLRB's December 2019 rule expands the time frame for holding elections. That rule is being challenged in federal court by the AFL-CIO, and has yet to take effect.

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