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NLRB Finalizes Significant Changes to Union Election Procedures

On April 1, 2020, the National Labor Relations Board (NLRB) finalized [its prior Notice of Proposed Rulemaking from August 12, 2019](#), enacting several significant changes to its union election procedures. Generally, these changes target procedures that unions have previously used to maintain or implement union representation despite opposition from employees:

Unblocking the Blocking Charge

Under the prior rules, if a party filed an election-related petition, that petition could be “blocked” from proceeding by a pending unfair labor practice charge, upon the charging party’s request. The NLRB noted that most typically, the union would invoke this rule to block an employee’s petition to decertify the union as bargaining representative, which essentially worked to rob employees of their rights under the National Labor Relations Act (NLRA). Accordingly, under the new rule (which is somewhat different than in the prior Notice of Proposed Rulemaking), the election petition will be allowed to proceed and the ballots will be counted immediately, unless the ULP charge in question: (1) challenges the circumstances surrounding the petition or the showing of interest submitted in support of the petition; or (2) asserts that an employer has dominated a union and seeks to disestablish a bargaining relationship. Under these latter circumstances, the ballots will be impounded for 60 days or until there is a final determination regarding the ULP charge and its effect, if any, on the election petition or the fairness of the election, whichever is later.

Voluntary Recognition No Longer Equals Mandatory Recognition

Under the prior rules, an employer’s voluntary recognition of a union as its employee’s bargaining representative

created an immediate bar to any election petitions by employees. Thus, employees could not seek to undo an employer's voluntary recognition through a decertification petition. Under the new rules, election petitions can be filed for up to 45 days following an employer's voluntary recognition of a union.

Voluntary Recognition for Construction Employers Now Requires Proof Positive

Under the prior rule, employers in the construction industry could voluntarily accept a union as the employee's bargaining representative based on nothing more than certain contract language in the parties' prior collective bargaining agreement. Under the new rules, there must also be "positive evidence" of both a union demand for such recognition and employer acceptance, and the union must also make a "contemporaneous showing of support from a majority of employees in an appropriate unit." The Notice of Final Rulemaking also clarified that the traditional evidentiary showing for voluntary recognition would apply: "[S]igned authorization cards or petitions from a majority of bargaining-unit employees is adequate proof, as is the result of a private election conducted under the auspices of a neutral party pursuant to a voluntary pre-recognition or neutrality agreement."

All three of these revisions work to restore employee rights in the *actual* selection of a union as their bargaining representative, rather than as a mere default based on prior representation status or employer preference. Unions have largely decried these amendments as unduly prejudicing their interests, while employers have lauded them as consistent with the purpose of the NLRA.

The Final Rules will go into effect 60 days after publication in the Federal Register (May 31, 2020).

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