Labor Board Proposal Aims to Make it Harder to Remove Unions

Insights
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The National Labor Relations Board just took the first step towards scrapping Trump-era rules that had made it easier for workers to undo union representation, the next pro-labor move from an increasingly active federal agency. Thursday's proposal from the NLRB would formally scrap 2020 agency rules issued during the previous administration that cleared the path for easier decertification procedures – allowing them to vote on the issue even after unions allege illegal interference with the process (also known as "blocking" charges). The proposal would also reinstate a prior doctrine shielding voluntarily recognized unions from prompt decertification, and would once again ease the way for union recognition in the construction sector. What do employers need to know about this latest proposal, which could come into effect soon after the start of the new year?

Blocking Charges to be Boosted Once Again

The first and most impactful result of the new proposal would be to provide a boost to so-called "blocking" charges. Historically, the Board's blocking charge rule permitted parties — mostly unions — to file unfair labor practice (ULP) charges (regardless of the underlying merit) to automatically "block" representation and decertification elections (pending the outcome of the agency's investigation), unless they themselves request to proceed.

In 2020, the Trump-era Board adopted a rule requiring decertification votes to proceed in the ordinary course in such circumstances that remains the standard today. In some cases, the ballots are impounded until a resolution of the alleged ULP, while in others they are promptly opened and counted. But in all cases, certification of the results does not occur until final disposition of the ULP and its effect, if any, on the representation petition.

The new proposal would scrap these safeguards, allowing the strategic use of blocking charges once again. If adopted, this change will give unions a tactical means by which to indefinitely delay representation and decertification elections that could ultimately go against them. It would also mean that employee ballots cast in a secret ballot election could remain unresolved for an indefinite period of time, thereby subjecting the will of the participants to a potentially protracted administrative process.

Immediate Voluntary Recognition Bar to be Resurrected

As an alternative to representation elections, unions can also pursue authorized representative status by obtaining voluntary employer recognition upon a demonstrated showing of majority support (such as signed authorization cards). Issues arise, however, when a group of employees (or a rival union) subsequently file a representation petition with the Board. Pursuant to the agency's long-standing "voluntary recognition bar" doctrine, such petitions were traditionally barred until the passage of an unspecified "reasonable" period of time.

The Bush-era Board issued a 2007 decision emphasizing the inherent unreliability of signed cards as a showing of majority support and limiting the use of the voluntary recognition bar. Four years later, the Obama-era Board overruled that case, reinstating the immediate voluntary recognition bar by concluding that signed union authorization cards constituted a valid showing of majority support.

The pendulum swung again in 2020 when the Trump Board amended agency rules to reinstate the 2007 standard. That rule states that an employer's voluntary recognition will not bar the processing of an election petition unless: (1) the employer and union so notify an NLRB regional office; (2) the employer posts a notice of recognition informing employees that they have the right to file a decertification or rival union petition during an ensuing 45-day window; and (3) the 45 days pass without a properly supported petition.

But the current Board's action will mean that the ping-ponging will once again take place and the immediate voluntary recognition bar will take root once more. The net effect potentially marginalizes the right of employees to make a free and fair choice concerning their representation.

Combined with the impending revival of the *Joy Silk* doctrine – a standard that would potentially compel voluntary recognition of a union upon demonstration of a majority showing of interest (absent objective evidence supporting good faith doubt) – this rule could serve as part a very powerful one-two punch for unions in coming years to help boost membership rolls.

Lower Bar Set for Construction Industry Unionization

The Board's final proposed amendment would reinstate its 2001 decision in *Staunton Fuel*, establishing a low threshold for demonstrating majority union employee support in the construction industry. Under *Staunton Fuel*, a union can become a duly authorized representative under section 9(a) of the NLRA based solely on collective bargaining language – that the impacted employees may never see – negotiated under Section 8(f) (often referred to as a "pre-hire agreement").

Under section 8(f), construction industry employers may choose to become "union" without any showing of employee support. By readopting this standard, the Board concludes that the mere presence of language suggesting that the union obtained recognition in the 8(f) agreement is enough to confer majority status under Section 9(a).

What's Next?

The notice-and-comment period for this proposed rule will last until January 17, 2023, and you can be sure the Board will push for these changes to be formalized and take effect soon thereafter. Unless stalled by litigation, employers can expect the new rules to be the law of the land within a month or two after that period concludes.

What Should You Do?

To the extent that your labor relations strategy included actions based on the 2020 changes, you should now consult with your labor relations counsel to determine how best to adapt to the new era that is set to take hold in early 2023. Moreover, the NLRB is starting to make true on President Biden's promise of being the "most pro-union president you've ever seen." This notice of proposed rulemaking will not be the only doctrine to face flip-flopping in the coming year, joining the proposed joint employer rule issued in September. We also expect to see significant shifts in precedent in forthcoming NLRB decisions too, so you should be prepared to adjust your overall approach to labor relations in light of further anticipated changes.

Conclusion

We will continue to monitor this development and provide updates as necessary. Make sure you are subscribed to Fisher Phillips' Insight system to receive the most up-to-date information. If you have questions on how these developments may impact your organization and workforce, please contact your Fisher Phillips attorney, the authors of this Insight, or any member of our Labor Relations Practice Group.

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