



Labor Board Proposes Significant Amendments To Union Election Rules

Insights

8.09.19

The National Labor Relations Board (NLRB) announced today its intent to publish a proposed “Election Protection Rule” that would amend regulations governing the filing and processing of petitions for secret ballot union elections. A Board majority explained that the proposed amendments would “better protect employees’ statutory right of free choice on questions concerning representation by removing unnecessary barriers to the fair and expeditious resolution of such questions through the preferred means of a Board-conducted secret ballot election.” To that aim, the Board proposed amendments to its: (1) blocking charge policy; (2) voluntary recognition bar rule; and (3) recognition rules in the construction industry. It should be noted that this represents the first of what may ultimately be several forays into rulemaking to amend the current representation process.

Blocking Charge Policy

A change to the blocking charge policy should come as no surprise. On May 9, 2018, Board Members Kaplan and Emanuel expressed interest in revisiting the NLRB’s blocking charge policy by virtue of a footnote to an NLRB order.

The blocking charge policy was created shortly after the passage of the National Labor Relations Act (NLRA). The policy allows parties – mostly unions – to file unfair labor practice (ULP) charges (regardless of the underlying merit) as a tactical means by which to indefinitely delay representation and decertification elections that could ultimately go against them. In the process, employee rights to make a free and fair choice remain unresolved. The Board majority noted this policy is often abused by both would be and incumbent labor unions confronting the prospect of defeat at the polls.

The proposed amendment would require parties attempting to block an election to contemporaneously offer evidence to support the underlying ULP in the form of witnesses and a summary of their anticipated testimony. In the meantime, the NLRB Regional Directors would be instructed to continue processing and conducting the election. If the ULP is not withdrawn, dismissed, or settled prior to the closing of the polls, the ballots would be impounded until a final determination is reached on the charge and its effect (if any) on the validity of the election petition or the fairness of the ensuing election.

Voluntary Recognition Bar

In addition to representation elections, unions can also pursue authorized representative status by obtaining voluntary recognition from the employer upon a demonstrated showing of majority support (such as signed authorization cards). Issues arise, however, when a representation petition is subsequently filed with the Board. Pursuant to the agency's "voluntary recognition bar" doctrine, such petitions were traditionally barred until the passage of an unspecified "reasonable" period of time.

In 2007, the Board issued a decision emphasizing the inherent unreliability of signed cards as a showing of majority support. In so doing, the NLRB ruled that the voluntary recognition bar did not apply unless: (1) affected unit employees received adequate notice of recognition and of their opportunity to file a representation petition within 45 days thereafter; and (b) 45 days has subsequently passed without the filing of such a petition.

In 2011, the Obama-era Board overruled that case and reinstated the immediate voluntary recognition bar (*Lamons Gasket*). The majority reasoned that signed union authorization cards constituted a valid showing of majority support.

Earlier today, a Board majority proposed an amendment reinstating the 2007 standard. The proposed 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.

Section 9(a) – Construction Industry

The Board's final proposed amendment would overrule its 2001 decision in *Staunton Fuel*, which established the evidence needed to demonstrate majority employee support for unions in the construction industry. Under *Staunton Fuel*, a union could 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. In that decision, the Board found that the mere presence of language suggesting that the union obtained recognition in the 8(f) agreement was enough to confer majority status under Section 9(a).

The proposed amendment would overturn *Staunton Fuel*, substituting a process through which the union would have to demonstrate "positive evidence, apart from contract language" that its recognition was "based on a contemporaneous showing of majority employee support." Consequently, the mere presence of an 8(f) agreement would no longer be enough.

Takeaways

It is important to keep in mind that this represents the first step down the path of administrative rule making for the Trump NLRB. The proposed amendments will now be subject to public comment in the coming weeks, though significant deviation seems unlikely.

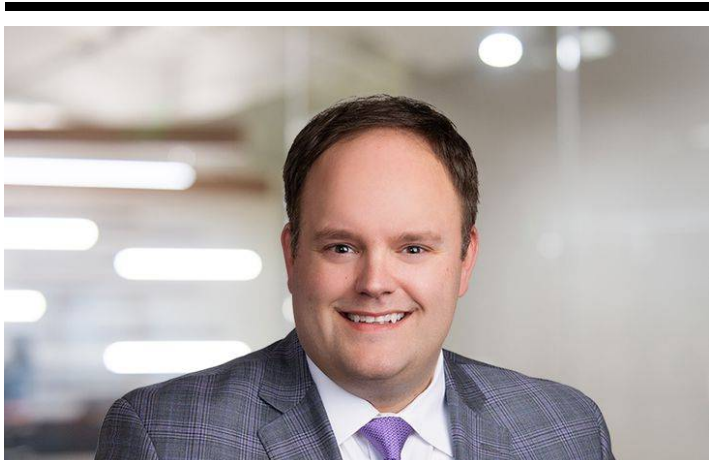
What is clear is that the NLRB is taking proactive steps to protect employee rights to directly impact their choice of representation status, and that we can expect to see further moves in that direction going forward. We will continue to monitor further developments regarding these issues, and we'll provide updates regarding matters of interest. Make sure you are subscribed to [Fisher Phillips' alert system](#) to gather 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.

This Legal Alert provides an overview of proposed agency rules. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

Related People



Benjamin Dudek
Partner
803.255.0000
Email





Joshua D. Nadreau
Regional Managing Partner and Vice Chair, Labor Relations Group
617.722.0044
Email

Service Focus

Labor Relations