



Labor Board Finalizes Amendments To Union Election Rules

Insights

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The National Labor Relations Board just finalized its “Election Protection Rule,” amending regulations addressing “blocking charges” and certain aspects of the Board’s voluntary recognition doctrine. The final rule, published in the Federal Register on March 31, slightly modifies the proposed rule issued in August 2019. It revises the Board’s blocking charge policy, the voluntary-recognition bar rule, and rules related to union recognition in the construction industry. It will be effective on June 1, 2020. **[Ed. Note: On April 8, the Board announced that the rule’s effective date would be pushed to July 31, 2020 due to the ongoing national emergency caused by the COVID-19 coronavirus.]**

The final rule is one of several recent efforts by the current Board to shape the nation’s federal labor policy through administrative rulemaking. The efforts include clarifying the Board’s standards for joint employment, revisions to the so-called “quickie election” rule, and defining the employment status of student workers.

Blocking Charge Rule Revised

Historically, the Board’s blocking charge policy permitted parties — mostly unions — to file unfair labor practice (ULP) charges (regardless of the underlying merit) to strategically “block” representation and decertification elections. As a result, employees’ rights to make a free and fair choice were impeded. The proposed rule would have required a vote and impound procedure by which the vote occurred in the ordinary course and the ballots were impounded until a resolution of the alleged ULP.

While the proposed rule would have included a vote-and-impound procedure in all “blocking” cases, the final rule will impound ballots for 60 days only where a party alleges violations of Sections 8(a)(1), 8(a)(2), or 8(b)(1)(A) of the National Labor Relations Act (NLRA). For all other ULP charges, the final rule requires that all ballots will be promptly opened and counted. They will not be impounded. In all cases, the certification of the results will not occur until there is a final disposition of the ULP and its effect, if any on the election petition.

Voluntary-Recognition Bar

The final rule also reverts the Board’s voluntary-recognition doctrine back to a 2007 ruling in *Dana Corp.* which held that employees are entitled to a 45-day window after their employer’s voluntary-recognition of a union during which to file petitions to decertify the union or elect a rival union. While

the Obama-era Board overruled *Dana Corp.* In its 2011 *Lamons Gasket* decision, the final rule revives *Dana Corp.* and provides employees with more choice in their selection (or abstention) from union representation.

In the final rule, the Board clarified that its changes to the voluntary-recognition bar will only apply to an employer's voluntary recognition on or after the effective date of the rule (June 1, 2020), and to the first collective bargaining agreement reached after such voluntary recognition.

Majority-Based Recognition in the Construction Industry

The Board's final amendment overrules 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 final rule rejects *Staunton Fuel*, and instead creates a process through which the union has 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 is no longer enough. Like the voluntary-recognition bar changes, the Board clarified in the final rule that it will only apply to voluntary recognition extended on or after the effective date of the rule (June 1, 2020), and to any collective bargaining agreement entered into on or after the date of voluntary recognition extended on or after the effective date of the rule.

Takeaways

Notwithstanding pressure from Big Labor, the Trump NLRB continues to take proactive steps to protect employee rights and free choice. Through a robust rulemaking agenda, the Board is hoping to avoid the constant flip-flopping of key labor doctrine with every change in the presidency, and we can expect further developments going forward.

We will continue to monitor 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.

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