

Practice Update

NLRB Proposes Employer Friendly Changes to Union Election Rules

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Employers may find it easier to remain union-free based on new rules proposed last week by the National Labor Relations Board for bringing unions into and out of the work place. Citing the National Labor Relations Act's (Act) purpose of safeguarding the freedom of employees to choose to unionize or to remain union-free, the NLRB proposed to change its rules on blocking charges, the voluntary recognition bar, and the way collective bargaining relationships are formed in the construction industry.

Blocking Charge:

When a union is attempting to organize employees in a workplace and it feels that support for the union is starting to decline, the union will often file an unfair labor practice charge with the NLRB. The charge – which alleges that the employer engaged in some type of unlawful conduct – “blocks” the NLRB from holding a union representation election until after the charge can be investigated and either remedied, dismissed, or withdrawn by the union. The union uses the time while the NLRB is investigating the charge to attempt to drum up additional employee support for the union. Unions also use these blocking charges when employees are attempting to get rid of their unions through the NLRB decertification procedure. The charge will block a decertification election so that the union can

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try to persuade employees to abandon the decertification process. Once the union senses that it has regained majority support, it will often withdraw the blocking charge allowing the election to proceed. Predictably, unions use these blocking charges strategically, often making frivolous and baseless accusations against employers, to manipulate the timing of elections so that they occur at a time when the union has maximum support.

The NLRB has proposed to change its “blocking charge” policy. Instead of halting the election process, the NLRB proposes that the election proceed as planned and the ballots be impounded until the charge has been resolved. Notably, if the NLRB later determines that the charge does indeed have merit and the employer engaged in some type of unlawful conduct that interfered with the outcome of the election, the NLRB can order that a new election be conducted after the unlawful conduct has been remedied. While this change would not prevent unions from filing charges during the organization or decertification process, it would rein in their ability to manipulate the timing of elections to match the time at which the union enjoys its greatest employee support. According to the NLRB, this change in the blocking charge policy will ensure that elections are conducted at a time that truly reflects employee free choice in accordance with the intent of the Act.

Voluntary Recognition Bar:

Prior to a 2011 NLRB decision, employees were afforded an opportunity to seek an election if their employer voluntarily recognized a union that the employees did not support. Under current NLRB law, an employer’s voluntary recognition of a union bars the employees from voting the union out for at least one year while the employer and union bargain over the terms of a union contract that sets the wages, benefits, and working conditions for those employees. If the employer and the union enter into a contract, the time period during which the union

cannot be voted out is extended until right before the contract expires. Employer are not required to notify employees that they have voluntarily recognized the union and the employees essentially have no recourse if they do not desire unionization.

Under the proposed change, employers would once again be required to notify employees when they have voluntarily recognized a union. Employees would then have 45 days in which to file a decertification petition if they did not want to be unionized. Again, this change is designed to allow employees to express their free choice on unionization through a prompt and impartial secret ballot election in accordance with the intent of the Act.

Construction Industry:

Generally, to enter into a collective bargaining relationship with an employer, a union is required to show that it has the support of a majority of employees in the bargaining unit. In the construction industry, however, bargaining relationships are presumed to be governed by a provision of the Act that allows construction industry employers and unions to set terms and conditions of employment in a collective bargaining agreement without a showing of majority support for the union from the employees.

Under the current rules, this initial contract can then form the basis of a full collective bargaining relationship. The union and the employer can simply enter into a contract containing language which states that the union requested and was granted recognition as the majority representative of the unit employees, based on the union having shown, or having simply offered to show, evidence of its majority support. Thus, a construction union can continue its status as the majority representative without ever having to show that it has support from a majority of employees.

Under the NLRB's rule change, contract language alone would not be sufficient to establish a full collective bargaining relationship. Rather, a union would have to have "extrinsic evidence" showing that its recognition by the employer "was based on a contemporaneous showing of majority employee support." In other words, the union would have to show that it has the actual support of a majority of the employees in the bargaining unit. This proposed change likewise displays the NLRB's efforts to protect employee free choice in accordance with the intent of the Act.

In Conclusion:

The NLRB's reasoning in amending these rules is to protect employees' freedom of choice regarding union representation. While these rules will ease the burden on employees who do not want a union or wish to rid themselves of a union, they may also help employers remain union-free. Although this is potentially good news for employers, as always it can be reversed by future NLRB rulemaking when the political party in power changes and appoints new Board members.

The proposed rules changes are scheduled to be published this week for public comment and could potentially be revised further based on the comments received. We will keep you updated on further developments that may impact your workplace.

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