Legal Update Article

Labor Board Returns to Pre-Trump Board Union Election Procedures

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The National Labor Relations Board (NLRB) has issued its "Fair Choice-Employee Voice" Final Rule, rescinding portions of its April 2020 union representation procedures on blocking charges, the voluntary recognition bar, and construction industry collective bargaining relationships. The Final Rule reinstates the NLRB's pre-April 2020 rule in each area.

The Final Rule is set to be published Aug. 1, 2024, and scheduled to take effect Sept. 30, 2024. It will be applied only to cases filed after the effective date.

The Final Rule is another in a wave of changes to NLRB rules and procedures from the Biden Board. Chairperson Lauren McFerran and Members Gwynne Wilcox and David Prouty voted to issue the Final Rule. Member Marvin Kaplan dissented.

Blocking Charges

Previously, if a party to an election (typically, a labor organization) filed an unfair labor practice charge while an election was pending, the election was held as scheduled, irrespective of a pending charge. The Board impounded the ballots until finding the charge lacked merit or a determination was made that unlawful conduct occurred and warranted voiding the election (without counting the votes), followed by a rerun election.

Under the Final Rule, if a party to an election files an unfair labor practice charge while an election petition is pending, an NLRB regional director (RD) may delay the election if the RD finds the alleged conduct, if proven, would interfere with employee free choice. While the NLRB asserts this process has historically "preserve[d] the laboratory conditions that the Board requires for all elections," such blocked elections can result in election delays stretching over years. Delaying the vote also can mean the employees most involved in the organizing process may have moved on, losing the chance to vote.

Voluntary Recognition

Under its Trump-era voluntary recognition policy, the Board limited the period in which employees and competing unions could file an election petition challenging recognition to a 45-day period following recognition.

The Final Rule reinstates the pre-April 2020 Board policy, lengthening that window to a "reasonable period" following recognition. The Board defines a reasonable period as at least six months from the parties' first bargaining session. That window can extend to no more than one year from the parties' first bargaining session.

Construction Industry Recognition

The Final Rule also returns to the pre-April 2020 Board policy on employer

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recognition of unions in the construction industry. Most industries are covered by Section 9(a) of the National Labor Relations Act (NLRA), which requires that union recognition be supported by certification following a secret ballot election or by voluntary recognition based on signatures from a majority of employees.

Exclusively in the construction industry, Section 8(f) of the NLRA allows an employer and a labor organization to establish a collective bargaining relationship without proof of majority support. Recognition granted under Section 8(f) does not bar a subsequently filed election petition.

In its April 2020 rule, the Trump NLRB proposed mandating that Section 9(a) recognition in the construction industry (and its concomitant bar to elections) be based on a contemporaneous showing of majority employee support.

The new Final Rule dispenses with the requirement of majority employee support and reinstates the possibility of binding recognition through collective bargaining agreement language. It also reimposes a six-month limitations period for challenging the employer's recognition, thereby restraining employees' ability to conduct an election or challenge union representation, even with a majority vote, based on the contractual recognition language.

Impact Post-*Chevron*

The Fair Choice-Employee Voice Final Rule will likely face legal challenges as a result of the U.S. Supreme Court overturning *Chevron* deference in June 2024. Meanwhile, employers should be prepared for the changes in Board election procedures when facing a union representation proceeding at their organization.

Please contact a Jackson Lewis attorney with questions about the NLRB or the new rule.