Legal Update Article

Labor Board New Fair Choice Rule Loophole for Construction Unions: What Employers Should Know

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The National Labor Relations Board's Fair Choice-Employee Voice Final Rule, codified at 29 C.F.R. 103.20-21, became effective on Sept. 30, 2024. The Biden Board's final rule rescinded portions of a Trump-era 2020 rule affecting employer recognition of unions in the construction industry, blocking charge procedures, and the voluntary recognition bar.

Board Member Marvin Kaplan dissented to the new 2024 final rule, finding the new rule to be "a needless policy oscillation that tends to upset the settled expectations" and "hardly fair at all."

Section 8(f) of the National Labor Relations Act applies only to employers in the construction industry. A Section 8(f) agreement allows the construction industry employer to withdraw from the bargaining relationship with the union when the collective bargaining agreement expires. The construction employer and the union can enter into the 8(f) agreement without majority employee support, without any election, and even before any employees have been hired. When the employer properly withdraws from the relationship, the employer is free to unilaterally set new terms and conditions of employment without any bargaining with the union.

In contrast, an employer does not have a right to withdraw from a Section 9(a) relationship. Section 9(a) of the Act applies to all employers including those in the construction industry. When a Section 9(a) agreement expires, the employer must bargain in good faith with the union about the terms of a successor agreement. What is more, the employer must maintain the existing terms and conditions of employment until a new agreement is reached or circumstances happen that allow the employer to lawfully implement changes that have been proposed during bargaining.

Typically, a union converts an 8(f)-construction industry relationship into a 9(a) relationship either by winning the majority of the votes at a Board-supervised election or by having the employer sign a document stating that the employer voluntarily extends Section 9(a) recognition to the union.

Under the Trump-era rule, Section 9(a) recognition in the construction industry required a contemporaneous showing of majority employee support for the union. By rescinding the Trump-era rule, the Board returned to prior Board precedent. That precedent allows unions to accomplish Section 9(a) recognition through language alone in the collective bargaining agreement without a showing of majority employee support for the union. It also contains a six-month limitation for challenging a construction industry union's majority status.

In his dissent, Member Kaplan explained that under Section 9(a) of the Act, "*employees*

chose union representation," while Section 8(f) allows an employer and union in the construction industry to establish a relationship even with no majority support by the employees. In his view, the reinstated Board precedent "causes employees to forfeit their rights" during the voluntary recognition and contract bar periods to have a Board election about whether majority support for the union exists.

Thus, it is critical for construction employers who do not wish to enter a Section 9(a) relationship to make certain that the union has not included Section 9(a) recognition language in any agreement to be signed by the employer. Above all, under existing precedent, such language alone could potentially create a Section 9(a) relationship with the union even when the majority of employees do not support having the union as their exclusive bargaining representative.

The other two changes in the new rule also affect construction industry employers. One allows a Board regional director to delay an election if a party to an election files an unfair labor practice charge while an election petition is pending. The other lengthens the period in which employees and competing unions could file an election petition challenging recognition.

In the end, member Kaplan suggested that the Board's new rule may be especially susceptible to challenge as a result of the U.S. Supreme Court's recent ***Loper Bright*** case, because "it is an open question to what extent reviewing courts must afford deference to" the Board's new rule.

Employers who have questions about these and other issues should reach out to the Jackson Lewis attorney with whom you regularly work.