Legal Update Article

Labor Board Proposes Modifications to Union Election Procedures

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The National Labor Relations Board's (NLRB) proposal to amend its union representation procedures regarding blocking charges, voluntary recognition bar, and construction industry collective bargaining relationships was published in the *Federal Register* on August 12, 2019.

The Notice of Proposed Rulemaking (NPRM) is the first installment of expected changes to the Board's election rules and procedures under the National Labor Relations Act (NLRA). Chairman John Ring and Members Marvin Kaplan and William Emanuel voted to approve the proposed rule for publication. Member Lauren McFerran dissented. The Board majority calls the proposal the "Election Protection Rule." The Board is expected to address the "quickie" aspect of the NLRB's 2015 election rule in a future NPRM.

Blocking Charges

The proposal would modify the Board's blocking charge policy. Currently, if a party to an election (typically, a labor organization) files an unfair labor practice charge while an election petition is pending, the election is stayed (or "blocked"), unless the NLRB regional director promptly issues a preliminary determination that even if the alleged violation is true, it would not interfere with employee choice. Such a block often results in election delays that can stretch over years.

The proposed rule would direct that elections be held as scheduled, irrespective of a pending charge. The ballots would be impounded until the charge is disposed of as without merit, or a determination made that the unlawful conduct occurred and was sufficient to warrant voiding the election (without counting the votes) and rerunning it. Although voiding and rerunning an election may be seen as wasteful, delaying the vote often means the employees who were most involved in the organizing process may have moved on, and thus never get a chance to vote. The proposal would ensure those employees will have a chance to be heard. Member McFerran argues in her dissent that this would require an unreasonable amount of participation and oversight by the Regional Directors.

Voluntary Recognition

The proposal addresses whether, and to what extent, employees may file a petition for an NLRB election following an employer's otherwise-lawful voluntary recognition of a union based on an authorization card majority.

If a union proffers signed cards from a majority of the bargaining unit, an employer may lawfully recognize the union. When this occurs, however, the employees have no opportunity to participate immediately in a secret ballot election. If and when employees may seek a vote has been the subject of changing caselaw. In 2007, the Board, in *Dana Corp.,* 351 NLRB 434, ruled that employees (or a competing union) would have a 45-day open period following voluntary recognition to file an election petition. However, four

years later, in *Lamons Gasket Company,* 357 NLRB 739 (2011), the Board overruled *Dana,* implementing an elastic rule that allowed the recognized union a "reasonable amount of time" to negotiate an agreement with the employer without disruption by an election petition. If a contract is reached within the 45-day period, no petition can be filed during the term of the contract in most cases. The Board majority noted in the NPRM that this result could frustrate employee free choice for up to four years.

The NPRM would codify the 45-day rule from *Dana Corp.* Given that the current rule (issued by case decision and not by formal rulemaking) has been subject to several variations, the Board majority believes a formal rule will protect employees' rights without subjecting them to an abrupt change by a Board decision. The majority reiterates the holding in *Dana Corp.:*

> [T]he current recognition bar policy should be modified to provide greater protection for employees' statutory right of free choice and to give proper effect to the court- and Board-recognized statutory reference for resolving questions concerning representation through a Board secret-ballot election.

Construction Industry Recognition

In most industries, §9(a) of the NLRA requires that union recognition be supported by certification following a secret ballot election or by the employer voluntarily recognizing the union based on an affirmative review of signatures from a majority of employees. However, exclusively in the construction industry, §8(f) of the NLRA allows an employer and labor organization to establish a collective bargaining relationship even in the absence of majority support. Recognition granted under §8(f) does not bar any subsequent petition for a Board election. But, in *Staunton Fuel & Materials, Inc.,* 335 NLRB 717 (2001), the Board held the mere recitation (without a showing of evidence) in a collective bargaining agreement that the employer recognized the union based on a card majority would constitute proof of lawful — and binding — recognition. This created a bar to employee petitions.

The Board majority noted in the NPRM that this "would reduce the requirement of affirmative employee support to a word game controlled entirely by the union and employer. Which is precisely what the law forbids."

The NPRM would mandate that §9(a) recognition in the construction industry (and its concomitant bar to elections) be based upon a contemporaneous showing of majority employee support. The Board majority stated that a formal rule codifying its view affords employees protection against reversal through case decision without notice.

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For more information on the NPRM, or for any assistance with filing comments (due October 18, 2019), please contact a Jackson Lewis attorney.