Lawyer Insights

NLRB Union Election Rule Changes May Hamper Employee Free Choice

Hunton Andrews Kurth attorneys examine the NLRB's proposed rule changes governing how workers choose whether to be represented by unions. They say the rules could complicate the election process and deny workers a free and fair choice.

By Christy Bergstresser and Robert Dumbacher
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The National Labor Relations Board recently unveiled a plan to roll back three representation election policies established by the previous administration.

In November, the NLRB issued a notice of proposed rulemaking seeking public comment on its fair choice and employee voice rule, which seeks to completely rescind and replace the prior board's April 1, 2020, final rule. The new rule furthers the NLRB's agenda to undo certain policies and laws set by the Trump-era board, which was widely considered to be an employer-friendly body.

If enacted, the rule will add hurdles to the NLRB's representation election process while clearing the path for employers and unions to more easily enter into voluntary recognition agreements. These do not require a secret-ballot election for employees.

This rule could prolong and further complicate the representation election process, denying employees a free and fair choice about union representation through a secret-ballot election.

The new rule proposes three discrete amendments to th board's rules and regulations at Section 103.2, covering election-blocking charges, voluntary recognition bar doctrine, and voluntary election agreements in the construction industry. Practitioners should be aware of the window period to provide public comment on these proposals, and on their potential impact on future NLRB representation election procedures.

The Return of Blocking Charges

The NLRB's first proposal seeks to revive the board's "blocking charge" policy, as it was most recently reflected in the board's 2014 election rules. Under the policy, a party's unfair labor practices could "block" an election if they were egregious enough to cast doubt as to the validity of the election petition or voters' abilities to make a free and fair choice.

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In contrast, under the current rule, unfair labor practice allegations cannot block or delay a scheduled representation election. In the face of unfair labor practice allegations, the election will go forward as planned and the region will either count or impound the ballots. However, in all circumstances election results will not be certified until the related unfair labor practice allegations are resolved.

When enacting the current rule in 2020, the board criticized blocking charges because mere allegations, even if ultimately not established, could have the effect of delaying representation elections for months or even years.

Given the NLRB's current resource and staffing shortage, the investigation time for the pending unfair labor practices could be extensive and further exasperate an election delay. In light of this, if enacted, practitioners should be aware that a party's unfair labor practice allegations, even if ultimately non-meritorious, could lead to prolonged administrative processing and representation election delay.

Removal of Safeguards

The second proposal seeks to modify the voluntary recognition bar doctrine by removing the currently required procedural steps in favor of an immediate bar. Voluntary recognition is an alternative path to representation that does not require a secret ballot election.

Instead, the employer may voluntarily recognize the union as the exclusive bargaining representative of its employees after the union presents proof of majority employee support. Generally, a "voluntary recognition bar" provides that, for a period of time, no rival union or employee can file a representation petition to challenge the newly recognized union.

Currently, to obtain the protections of a voluntary recognition bar, the parties must follow certain procedural safeguards upon recognition, including notifying the NLRB of the new relationship, notifying employees of the arrangement, and providing them a 45-day window to file a petition before the recognition bar will take effect. The proposed rule seeks to remove these procedural notice and waiting-period requirements in favor of an instantly enforceable voluntary recognition bar.

This proposal marks an effort to ease the process of voluntary recognition and illustrates the current board's preference for such agreements. Practitioners should be aware of the board's signaled preference.

Further, although rival union and employee challenges to voluntary recognition agreements are generally rare, practitioners should keep in mind that the proposed rule will curtail the option.

https://youtu.be/1sExI8CiOAw

Rescission of Proof Requirement

The final proposal seeks to return to the board's prior approach to voluntary recognition in the construction industry by completely rescinding Section 103.22 of the board's rules and regulations. Enacted by the prior board, Section 103.22 provides requirements that must be met for a contract bar to take effect in the context of a voluntary recognition agreement in the construction industry.

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Further, it instructs that collective-bargaining agreement language, standing alone, is not sufficient to establish majority status for the purposes of voluntary recognition.

Upon recission, the previous common law standards will govern. Specifically, caselaw prior to 2020 established a six-month limitations period for election petitions challenging a construction employer's voluntary recognition of a union under Section 9(a) of the National Labors Relations Act.

Further, previous case precedent allowed detailed language in a collective-bargaining agreement to serve as sufficient evidence of voluntary recognition. The proposal further shows the current NLRB's inclination toward voluntary recognition.

Practitioners should be aware that the proposed amendment will lower the bar for a construction industry employer to become voluntarily unionized.

The proposed rule is still subject to comment and revision. The deadline to submit initial comments has been extended to Feb. 2, 2023, and reply comments must be received by Feb. 16, 2023.

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