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Labor Board Finalizes Rule Changes to Enhance Employee Free Choice

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The National Labor Relations Board has finalized a series of rules it proposed back in August to "better protect employees' statutory right of free choice on questions concerning representation." The new rules, scheduled to be published in the Federal Register on Wednesday, April 1, revamp three parts of the election process.

The NLRB's Blocking Charge Policy

The change that is likely to have the most widespread impact is the elimination of the so-called "blocking charge," a tactic often used by unions to delay elections simply by filing a charge with the NLRB alleging conduct that might impact employee votes. The mere allegation was sufficient to delay the conduct of the election until the charge was resolved.

Now, charges filed by a party (usually unions) will not "block" the election from occurring. Rather, the Board will conduct the election and either count or impound the ballots, based on the nature of the charges. If the ballots are impounded and the Board's subsequent investigation reveals that the employer did not violate the National Labor Relations Act, then the ballots are counted.

In any event, unions will no longer be able to delay elections until the most favorable time for the union merely by filing a charge alleging the employer violated the NLRA in some way that might impact a fair election.

The Voluntary Recognition Bar

Employees will now have a 45-day window within which to petition for decertification when their employer voluntarily recognizes a union (i.e. without an election). Previously, employees were not allowed to challenge their employer's voluntary recognition of a union by petitioning for decertification until a "reasonable time" had elapsed after recognition. Now, employees will have an immediate time frame of 45 days to petition the Board for an election in such a scenario.

Section 9(a) Recognition in the Construction Industry

The Board has amended its standard for the formation of a Section 9(a) bargaining relationship in the

construction industry. Section 9(a) governs most collective bargaining relationships, but in the construction industry, Section 8(f) is presumed to govern the relationship. Importantly, due to the realities of the industry, unions and employers in the construction industry are permitted, under Section 8(f), to establish a collective bargaining agreement without an election. However, the Section 8(f) relationship does not enjoy the same protection that a Section 9(a) relationship does. Under Section 9(a), when a collective bargaining agreement is in place, no election petition of any kind can be processed for a maximum of three years. Section 8(f) agreements enjoy no such protection.

However, prior Board law permitted unions and employers in the construction industry to convert their 8(f) relationship into a 9(a) relationship. This could by done merely by reciting language in the collective bargaining agreement that the union requested recognition as the Section 9(a) representative of the employees and at least offered to show evidence of its support, and that the employer agreed to so recognize the union (whether it took the union up on its offer to show majority support or not).

Now, however, the Board has amended this rule to require the union to have “extrinsic evidence” of majority support in order to validly convert an 8(f) relationship into a 9(a) relationship—complete with its three year election bar protection. In other words, a mere recitation of language in an agreement is no longer enough.

Stay tuned for further updates as the NLRB continues its project of revamping election procedures.

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