



## NLRB changes union election procedures

April 10, 2020

The National Labor Relations Board (NLRB) recently changed its election procedures. The new rules contain three important amendments designed to allow employees greater freedom to determine which unions will represent them and unions greater freedom to compete for members.

The first change modifies the NLRB's current "blocking-charge" policy. This policy previously permitted a party to block an election indefinitely by filing unfair labor practice charges that create doubt as to the validity of an election petition, which could preclude the holding of the petitioned-for election for months or even years. The policy came under criticism for its adverse impacts on employee decertification petitions and the potential for abuse and manipulation by incumbent unions seeking to avoid a challenge to their representative status.

In response, the NLRB adopted a "vote-and-impound" procedure, in which representation petitions and elections would continue to be processed even if an unfair labor practice charge and blocking request had been filed. If the charge is not resolved prior to the election, ballots would be seized or "impounded" until the Board makes a final determination regarding the charge.

The second amendment modifies the NLRB's "voluntary recognition" bar standard, which prohibits challenges to whether a union has majority support for a "reasonable period of time" after the union is voluntarily recognized by an employer. If the parties reached a collective bargaining agreement during that reasonable period of time, the NLRB's "contract bar" doctrine would continue to bar election petitions for the duration of the agreement, up to a maximum of three years.

The NLRB is eliminating the "voluntary recognition" bar standard because of the potential to deny employees an initial

opportunity to vote in elections for several years. Going forward, the Board is reestablishing a notice requirement and a 45-day open period for filing an election petition following an employer's voluntary recognition of a labor organization. This gives workers or challenging unions a 45-day post-recognition window for filing a decertification petition.

The third amendment modifies the evidence required to show that an employer and a labor organization in the construction industry have established a voluntary majority-supported collective bargaining relationship that could bar an election. Generally, Section 9(a) of the National Labor Relations Act (NLRA) governs the collective bargaining relationship when unions form after a majority of workers decide to organize. However, in the construction industry, such relationships are presumed to be covered by Section 8(f) of the NLRA, which allows unions and businesses to set work terms in a contract absent majority support. Previously, the Board held that a construction industry union could prove Section 9(a) status based on contract language alone, without any other "positive evidence" of a contemporaneous showing of majority support simply by having certain contract language in the agreement.

In the interest of restoring protection of employee free choice in the construction industry, the NLRB will now require positive evidence of majority support before a collective bargaining agreement or voluntary recognition between employers and unions in that industry would bar a petition to an election.

These new election procedures become effective July 31, 2020.

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