CLIENT ALERTS & INSIGHTS

NLRB Continues Its Rollback of Trump-Era Union Election Changes

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Over the past several years, the National Labor Relations Board (the "Board") under the Biden administration has taken several measures to make union election procedures more union-friendly. Last Friday, July 26, the Board signaled that it is not yet finished dismantling Trump-era election rules in favor of union-friendly procedures when it issued a Final Rule (the "2024 Rule") to roll back three Trump-era election rules.

Blocking Charge Policy

Prior to 2020, the Board generally declined to process election petitions with pending unfair labor practice charges that, if proven, would interfere with employee free choice, until a determination on the merits could be reached. These charges were referred to as "blocking charges."

With blocking charges perceived as a tool used by unions to delay certification or decertification elections that they did not expect to win, the Trump-era Board's "2020 Rule" largely eliminated the blocking charge practice, opting instead to require that an election be administered, with the ballots counted immediately thereafter in most cases. In certain cases, however, the 2020 Rule adopted a "vote-and-impound" system under which an election would be administered, with ballots impounded for up to 60 days, during which time the Board could make a determination as to the merits of the unfair labor practice charge.

Dissenting Board member Marvin Kaplan, the sole Republican on the Board, admonished this change as the 2020 Rule "modified the blocking charge policy to facilitate the timely exercise of employees' electoral rights, while at the same time ensuring that no election results can or will be certified where unfair labor practices have interfered with the free exercise of those rights." The new process, however, exploits the system to frustrate the timely exercise by employees of their right to vote and permits unions to block pending petitions, regardless of whether an unfair labor practice charge is meritorious."

Voluntary Recognition Bar

In lieu of a certification election, employers have historically been empowered to voluntarily recognize a union as the collective bargaining representative of its employees based on a showing that a majority of employees supported the union's representation. In 1966, the Board instituted the "voluntary recognition bar doctrine," which, according to the 2024 Rule, "insulat[ed] a recognized union from challenge to its representative status for a reasonable period for collective bargaining and so protect[ed] the newly formed bargaining relationship."

The voluntary recognition bar doctrine persisted relatively unchanged until the Board issued its decision in *Dana Corp.*, 351 NLRB 434 (2007), which conferred power to employees by requiring employers to inform employees of their right to file a decertification election petition, or to support a rival union's representation petition, within 45 days of voluntary recognition. Thereafter, any petition to challenge voluntary recognition would lead to an election. *Dana Corp.* was overturned by the Obama-era Board in *Lamons Gasket*, 357 NLRB 739 (2011), which defined the "reasonable period of bargaining" as between six months and 12 months following the parties' first bargaining session. However, the 2020 Rule rejected *Lamons Gasket* and codified *Dana Corp.* The 2024 Rule marks the latest shift in this back-and-forth, returning to the voluntary recognition bar from *Lamons Gasket*.

Dissenting again, Member Kaplan reasoned that an election is superior to union authorization cards and that eliminating the 45-day waiting period permitting employee challenges "strikes the wrong balance, at the expense of employee free choice" by protecting unions' interests over employees'.

Section 9(a) Recognition in the Construction Industry

The National Labor Relations Act (the "Act") permits unique treatment of unions in the construction industry. While voluntary recognition of a union ordinarily requires majority support among the employees in the unit (under Section 9(a)), the Act provides an alternate path to union recognition (Section 8(f)) that permits a construction employer and a union to enter into a prehire agreement establishing the union as the exclusive collective bargaining representative, even without majority support. However, unions recognized under Section 9(a) enjoy certain benefits not conferred to Section 8(f) unions-including an irrebuttable presumption of majority support during the first three years of the contract and a rebuttable presumption of majority support otherwise. Since 1987, the Board has allowed Section 8(f) unions to be converted to Section 9(a) unions.

As the mechanism changed, the 2020 Rule required that recognitional language in the collective bargaining agreement is not itself sufficient to warrant the conversion, and instead required that parties retain additional positive evidence, beyond the parties' contract language, of the union's majority support at the time of its initial 9(a) recognition. The 2020 Rule also eliminated a prohibition barring challenges to a union's majority support if more than six months have elapsed since granting recognition.

The 2024 Rule abrogates both of these changes. Under the 2024 Rule, a union can be recognized under Section 9(a) representative through contract language alone, regardless of employee support, and even if the employer has no employees at all when it enters into that contract. Similar to the voluntary recognition bar, Member Kaplan criticized this standard, noting that "*unions, not employees, are protected*."

Impact on Employers

The 2024 Rule is scheduled for publication in the Federal Register on August 1, 2024 and is slated to go into effect on September 30, 2024. However, the 2024 Rule may face challenges that delay its effective date or prevent it from taking effect altogether, particularly in light of the Supreme Court's recent elimination of *Chevron* deference, which reined in the authority that administrative agencies like the Board can exercise in issuing rules that "interpret" the law. The 2024 Rule is also liable to be overturned in its entirety (along with a litany of the Board's other activities over the past four years) in the event of an administration change. The Board appears to be accelerating the rate at which it is

altering federal labor law in advance of the upcoming presidential election. 2025 will very likely bring a full overhaul or more of the same.

For more information on the 2024 Rule or how it can affect your business, contact a member of Benesch's Labor & Employment Practice Group.

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