Proposed NLRB Rule-Making Aimed at Unions and Decertification Elections

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The National Labor Relations Board ("NLRB") announced last week that it was proposing a series of rule changes. The first and most important focuses on updating its "blocking charge" policy, as well as revising the rules surrounding the "voluntary recognition bar" and when pre-hire arrangements with construction companies become a full bargaining relationship.

In general, all three proposed rules focus on providing employees with the ability to be heard regarding unionization and representation.

Blocking Charges

Blocking charges are unfair labor practice allegations that a party to a union vote illegally coerced workers. Filing a blocking charge delays the election until NLRB proceedings on the blocking charge run their course. The delay can last years. Blocking charges are typically filed by unions to pause elections to decertify the union. Blocking charges provide a delay that gives a union more time to change workers' minds and avoid a decertification election that they feel they would lose. In practice, the benefit of blocking charges is not prevailing on the underlying charge, but simply buying enough time to reinstitute majority representative status prior to the NLRB actually conducting the election.

The proposed rule replaces the current blocking charge policy. Instead of delaying a decertification vote while a blocking charge is pending, the NLRB would conduct the vote, but impound the ballots until the blocking charge is resolved. Thus, the employees would be able to timely voice their opinion, pending investigation and resolution of the blocking charge. If the union ultimately prevails and the unfair labor practices are found to have merit, the election would either have to be rerun or a new decertification petition would have to be circulated, both free from any taint of the unfair labor practices. Under the new rule, the frequency of blocking charges may decrease as the delay tactic will no longer provide a benefit. Theoretically, only unfair labor practice charges with plausible underlying merit should be filed.

If implemented, the new rule would remove an impediment to decertification elections and drastically weaken one of the biggest weapons a union has in challenging a decertification petition.

In practice, if presented with a decertification election and a blocking charge under the new rule, any unilateral action by an employer taken before a union is actually decertified could result in liability where the union ultimately prevails.

Voluntary Recognition Bar

Historically, an employer could voluntarily recognize a union, which protected the union from challenges for a reasonable period of time, subject to a 45-day window for workers or rival unions to file a decertification petition. In 2011, the NLRB in *Lamons Gasket* decided the "reasonable period of time" was six months to a year. The NLRB also overruled a 2007 decision (*Dana Corp.*) that provided the 45-day window to file a decertification petition.

The proposed rule would repeal *Lamons Gasket* and reinstate the 45-day period provided by *Dana Corp.*

Construction

Finally, the NLRB addressed the presumption of certain collective bargaining relationships in the construction industry. Unique to that industry, there is a mechanism that allows an employer and union to set terms in a contract, absent majority support from the employees. This is covered by Section 8(f) of the National Labor Relations Act ("NLRA"). A 2001 NLRB decision allowed the parties to transition that Section 8(f) presumption into a Section 9(a) collective bargaining relationship based solely on the language of the contract. The contract would simply have to unequivocally indicate that the union showed or offered to show evidence of majority support. The contract language could trigger transition to a Section 9(a) contract whether or not the union ever enjoyed majority support or offered to demonstrate majority support.

The proposed rule would require a union to have "extrinsic evidence" that shows recognition was based on a "contemporaneous showing of majority employee support" with the NLRB requiring clear evidence that the workers themselves support shifting to a Section 9(a) bargaining relationship.

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