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Employment Law Note

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The NLRB Marches on with Significant Changes to Its Election and Voluntary Recognition Regulations

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On April 1, 2020, the National Labor Relations Board (NLRB) finalized three significant changes to its rules and regulations regarding union election and recognition procedures. The purpose of the rulemaking was to "better protect employees' statutory right of free choice on questions concerning representation." Because of the COVID-19 pandemic emergency, the NLRB moved the effective date of these changes from May 31, 2020 to July 31, 2020.

NLRB Eliminates a Party's Ability to Block a Union Election by Filing Unfair Labor Practice Charges

As some employers that have experienced union representation elections well know, a party (which is usually the union) can block an upcoming union election by filing unfair labor practice charges with the NLRB. This can result in months-long, or even years-long, delays in achieving a vote by employees. It is an important weapon for unions that foresee an election loss—file a charge and delay the employee vote until the NLRB investigates and all appeals have run their course. This delay gives the union additional time to campaign aggressively to turn the election tide in its favor. Now, the NLRB has issued a final regulation stating that such charges will no longer delay an employee vote. In effect, the NLRB has blocked blocking charges.

The new election rule eliminates a party's ability to block an election merely by filing a charge. The rule calls for elections to proceed as scheduled with votes either impounded and not counted pending a post-election disposition of the charge or counted pending a post-election disposition of the charge, depending on the nature of the alleged unfair labor practice. Charges challenging the circumstances surrounding the petition or the showing of interest in support of the petition will be subject to vote-and-impound, as will charges alleging an employer unlawfully dominated a union requiring the dissolution of the union's representative status. All other charges will be subject to vote-and-count, meaning the election will occur and votes will be counted. In both vote-and-impound and vote-and-count situations, the NLRB will not certify the election results until the NLRB addresses and disposes of the charge. The new rules should lend greater efficiency to the NLRB's union election process. In vote-and-count situations, the vote's outcome may also cause the parties to consider the election outcome when dealing with the charge(s) and the ultimate question of the union's status with employees.

Greater Flexibility for Employers to File Election Petitions after an Employer Voluntarily Recognizes the Union

In its revised regulations, the NLRB overruled a 2011 NLRB decision and reinstated prior law addressing when employees can seek a secret-ballot election to determine their union status after their employer has voluntarily recognized a union. The NLRB's new regulation is meant to preserve the NLRB's policy favoring secret-ballot elections while allowing voluntary union recognition by employers in appropriate cases.

In 2011, the NLRB held that an employer's voluntary recognition of a union immediately barred the filing of an election petition for no fewer than six months and no more than one year after the parties' first bargaining session, no matter how employees felt about the voluntary recognition. Now, through its revised regulations, the Board overruled that case and reinstated prior case law which held that where an employer voluntarily recognizes a union under Section

9(a) of the National Labor Relations Act, it must post a notice to its employees informing them of its voluntary recognition of the union, and employees may challenge such recognition if they petition for a secret-ballot election within 45 days after they receive the employer's notice. If employees do not file a petition during the 45-day notice period, the voluntary recognition bar would operate for "a reasonable period of time" afterwards. The NLRB's new regulations specify the content of the notice and the manner of providing notice to employees. Significantly, the new rule applies only to an employer's voluntary recognition on or after the revised regulations' effective date of July 31, 2020.

Section 9(a) Construction Industry Bargaining Relationships Must Be Supported by Evidence of Majority Employee Support, Not Just Contract Language

In another amended regulation with prospective application only, the NLRB tightened the rules surrounding so-called "Section 9(a)" relationships between construction industry employers and unions.

In the construction industry, employers may enter into "pre-hire" (also known as "Section 8(f)") agreements with unions that last for the duration of the contract (or longer, if the parties agree to an extended term). The bargaining relationship ends when the contract ends, and it is not necessary for there to be a showing of majority support by employees for the union to represent employees. The purpose of such agreements is to address the unique nature of the construction industry where the size of an employer's workforce can fluctuate from project to project, where the duration of projects vary, and where employees move among different construction industry employers frequently. All other employer/union relationships, which are formed under Section 9(a) of the National Labor Relations Act, require a showing of interest by a majority of employees in the bargaining unit, and such agreements continue after a labor contract expires unless and until the union no longer maintains majority support of employees.

In prior case law, the NLRB has held that a union could convert a Section 8(f) agreement with a construction employer to a Section 9(a) agreement through contract language alone by including language in the labor contract that the contract is a Section 9(a) agreement and the union has majority support of the bargaining unit. Unions have insisted on such language in construction industry labor contracts to preserve their status as the employees' exclusive bargaining representative indefinitely. The Board's revised rule overrules that earlier case law and conditions Section 9(a) status on "positive evidence" that the union demanded recognition, the employer recognized the union, and recognition is supported by a majority of the employees. Contract language alone will not support Section 9(a) status. Construction industry employers must show the same majority support as for non-construction employers.

As noted above, this new "old" approach applies to Section 9(a) relationships entered into on or after the effective date of the rule – July 31, 2020. Those construction employers with existing Section 9(a) relationships cannot use this new rule to convert to Section 8(f) status.

Every month seems to bring with it NLRB initiatives to reign in changes made during the eight years of the Obama-era NLRB. With the 2020 Presidential election looming, we can expect more changes in the coming months, so stay tuned.

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