von Briesen
von Briesen & Roper, s.c. | Attorneys at Law

National Labor Relations Board Final Rule: Protecting Employee Free Choice

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Practice Area: Construction Law and Litigation & Labor and Employment

On April 1, 2020, the National Labor Relations Board (the "NLRB" or the "Board") published a Final Rule, effective July 31, 2020, instituting changes to its election and recognition policies and procedures in order to better protect employees' statutory right of free choice. Under the National Labor Relations Act (the "NLRA"), incumbent unions have wide-ranging, exclusive authority to represent employees in the workplace. Employees seeking to remove or replace their unions generally must petition the Board for a secret-ballot election. Over time, certain impediments have arisen in NLRB procedures that have been determined to interfere with employee free choice. Under the Final Rule, employees will have greater and more equitable access to NLRB-conducted secret ballot elections. Moreover, employers in the building and construction industry will retain their traditional rights to engage in pre-hire agreements with unions while preserving the statutory rights of employees to petition the Board for an election.

An End to Election Delays Due to Blocking Charges

› *Most secret-ballot elections will now take place, and the votes will be counted immediately, despite "blocking charges" being filed.*

Under the NLRA, incumbent unions enjoy the status of the exclusive bargaining representative of employees. In a unionized workplace, employees may not negotiate directly with their employer about their wages, benefits, and all other terms and conditions of employment. Instead, they must go through the union. The union is not obligated to follow the instructions of the employees it represents – it retains broad discretion in dealing with employers. Unions also enjoy a continuing presumption – often irrebuttable – of majority support. This means that the law *assumes* that the unions have a continuing majority status. It can be very difficult for employees to remove an incumbent union based on this presumption of majority support. Therefore, a critical method for removing a union is to petition the Board to conduct a secret-ballot election.

Under the Board's prior blocking-charge policy, these elections could be delayed indefinitely by the filing of unfair labor practice charges by parties seeking to block the election from taking place. It could take years to get to an election, and in the interim, employees who no longer wished to be represented by the union would have their voices effectively silenced.

In the Final Rule, the Board found that the blocking-charge policy had an adverse impact on employee free choice, and was subject to abuse and manipulation by incumbent unions seeking to avoid a challenge to their representative status. The Board also noted concerns about the consistency in applying the prior policy.

Under the new Employee Free Choice Amendments:

- A party seeking to block an election must submit a written offer of proof in support of the unfair labor practice charge.
- In most cases, the representation election will be conducted despite the request to block, and the ballots will be promptly opened and counted at the conclusion of the election.
- The results of the election will await certification pending final determination of the charge and a determination of the effect, if any, the charge had on the election petition.
- In certain limited cases, such as where the charge challenges the circumstances surrounding the petition or the showing of interest submitted in support of the petition, the Final Rule calls for an impoundment procedure:
    - The election will be conducted, but the ballots will not be counted at the conclusion of the election. Instead, the regional director will impound the ballots for up to 60 days from the conclusion of the election if the charge has not been withdrawn or dismissed.
    - If a complaint is issued on the charge prior to the 60-day post-election period, the ballots shall continue to be impounded until there is a final determination regarding the charge and its effect, if any, on the election petition.
    - If the 60-day period ends without issuance of complaint, or if the charge is withdrawn or dismissed, the ballots will be promptly opened and counted.
    - The 60-day post-election period cannot be extended, even if additional charges are filed.

Voluntary Recognition Bar Policy Amended

› *Employees will still have access to critical secret-ballot elections even in circumstances of voluntary recognition*

Under the NLRA, employers may voluntarily recognize a union based on a union's showing of majority support without a Board-conducted secret-ballot election, which is the preferred method of protecting employee free choice. Over time, the Board developed a rule that the employer's voluntary recognition of a union would immediately and automatically bar the filing of an election petition for an undefined, "reasonable" period of time following recognition. Then, if the parties reached a collective-bargaining agreement during this period, the Board's contract-bar doctrine would continue to bar an election petition for the duration of the agreement, up to a maximum of three years. As such, it could be years before employees could get to a secret-ballot election to determine whether they wished to be represented by the union.

In the Final Rule, the Board found that the voluntary-recognition bar policy should be modified to give greater protection to employees' statutory right of free choice and to give proper effect to the statutory preference for determining union representation based on secret-ballot elections.

Under the new Employee Free Choice Amendments:

- If an employer voluntarily recognizes a union, the employer and/or the union must notify the Regional Office of the Board that recognition has been granted.
- The Regional Office will provide the employer with an official notice informing employees that recognition has been granted and that they have a right to file an election petition during a 45-day "window period" beginning on the date the notice is posted.
- The employer must post the official notice in conspicuous places, including all places where notices to employees are customarily posted.
- The employer must also electronically distribute the official notice to employees if the employer customarily communicates with its employees electronically.
- If a petition is filed within the 45-day "window period," it will be processed according to normal NLRB procedures.
- If the 45-day "window period" closes without a properly supported petition, assuming all other requirements are met, only then will the recognition-bar be in effect.

Construction Industry Employers and Pre-Hire Agreements

› *Employee free choice will be honored in all industries, including the building and construction industry*

Congress created a narrow exception to the majoritarian principles that govern collective-bargaining relationships in the building and construction industry. Section 8(f) of the NLRA allows construction-industry employers and labor organizations to enter into "pre-hire" collective bargaining agreements in the absence of support from a majority of employees. However, Congress determined that these "pre-hire" collective-bargaining agreements would be lawful only because they would not bar a petition for a Board election.

Sometimes it is unclear under Board law whether the parties to an agreement in the building and construction industry intended to enter into a Section 8(f) agreement (which does not bar an election), or a Section 9(a) agreement (which would bar an election). The Final Rule provides clarity in this regard.

Under the New Employee Free Choice Amendments:

- Building and construction industry employers and unions may enter into Section 8(f) "pre-hire" agreements, and employees will retain the right to petition for a Board-conducted election during the term of these agreements.
- Collective-bargaining agreements in the building and construction industry will be presumed to be Section 8(f) agreements absent positive evidence.
- The positive evidence required is: (1) the union unequivocally demanded recognition as the section 9(a) exclusive bargaining representative; (2) the employer unequivocally accepted the demand; and (3) the demand was accepted based on a contemporaneous showing of majority support.
- Language in a collective-bargaining agreement, such as a "pre-hire" agreement, will not, standing alone, be sufficient to show majority support.

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