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New NLRB Majority Issues Notice of Proposed Rulemaking to Reverse Several Rules Enacted by the Prior Board

PUBLISHED ON
November 9, 2022

On November 3, 2022, the National Labor Relations Board (NLRB) released a Notice of Proposed Rulemaking to effectively rescind 2020 rules adopted by the prior Board majority two years ago. Generally speaking, those rules altered the representation election process and made it easier to secure votes to remove the unions.

The current rule under the 2020 promulgation:

- Allows decertification petitions and elections to proceed even though there are pending unfair practice charges against the employer alleging coercive conduct interfering with free choice;
- Allows union decertification petitions to proceed before a reasonable time period has passed even though the bargaining unit was previously voluntarily recognized; and
- Requires construction industry unions to present affirmative evidence of majority union election support before the bargaining unit transitions to full-union status.

The new NLRB-proposed rule would restore the pre-2020 rule. It would have three parts:

- The "blocking charge" policy. When unfair labor practice charges are filed in response to a pending decertification petition, the rule would allow an NLRB Regional Director to delay the election if the employer's conduct allegedly threatens employee's free vote choice.
- According to the NLRB, this better promotes free choice and prevents elections from having to be re-run.
- Voluntary-recognition bar. If an employer voluntary recognizes the union based on a showing of majority support among employees, the rule would eliminate the required notice-and-election procedure and allow the union six months for bargaining before a decertification petition could be filed.
- Accordingly, to the NLRB, this better promotes free choice, encourages collective bargaining, and preserves labor stability.
- Construction industry. The rule would return voluntary recognition in the construction industry. There also would be a six-month limitations period for election petitions challenging a construction employer's voluntary recognition of a union. It also would allow sufficiently detailed language in a CBA to serve as independent, sufficient evidence of full-union status without any evidence of majority election support.
- According to the NLRB, this removes uncertainty and unpredictability in the construction industry.

This Notice of Proposed Rulemaking continues the NLRB's recent trend of easing union election

proceedings. The NLRB consists of five individuals-three Democrats (two of whom were appointed by President Biden) voted in favor of the proposed rules while the two Republicans dissented. When the current rule was promulgated in 2020, the Republicans were in the majority. This new NLRB has also said it wants to revisit other 2020 rules, such as procedural changes to the election process, which they believe unfairly disfavor unions. On September 6, 2022, the NLRB issued a Notice of Proposed Rulemaking revising the joint-employer status under the NLRA. There, the same three-to-two, majority-to-dissent split occurred.

Public comments must be received by the NLRB before January 3, 2023. Reply comments must be received by January 17, 2023. Unless the rules are halted by litigation, they should be implemented and enforceable within a month or two thereafter. Public comments are invited on all aspects of the proposed rule and should be submitted either electronically to www.regulations.gov, or by mail or hand-delivery to Roxanne Rothschild, Executive Secretary of the National Labor Relations Board located at 1015 Half Street S.E., Washington, D.C. 20570-0001.

If you have any questions regarding these NLRB updates, recent NLRB general counsel memorandums, or specific labor inquiries, please contact Caleb Setlock, Kevin Moore or any member of the Barley Snyder Labor Law Team.

DISCLAIMER: The information in this alert should not be construed as legal advice to be relied upon nor to create an attorney/client relationship. Please note that the reader's or an industry's specific situation or circumstances will vary and, thus, for example, an approach that is advisable in one industry may not be appropriate in another industry. If you have questions about your situation or about how to apply information contained in this alert to your situation or industry, you should reach out to an attorney.

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