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NLRB Announces Proposed Rule to Rescind 2020 Amendments to Representation Election Procedures

Labor Relations Update on **November 7, 2022**

As foreshadowed by the National Labor Relations Board's (the "Board") Spring 2022 rulemaking agenda (discussed in our prior post here), Chair Lauren McFerran, Member Gwynne A. Wilcox, and Member David M. Prouty published a Notice of Proposed Rulemaking ("NPRM") on Friday, November 4, 2022, proposing to rescind a final rule that the Board issued in April 2020 ("the 2020 Rule"), codified at 29 C.F.R. 103.20–22.

The 2020 Rule modified representation elections in three main ways (discussed in our prior post here): (1) replacing the so-called blocking-charge policy with a vote-and-impound procedure, (2) reinstating *Dana Corp*. challenges to voluntary recognition, and (3) requiring "positive evidence" of majority support for voluntary recognition in the construction industry.

The changes proposed to these three important representation issues are discussed in greater detail below. Now that the NPRM has been formally issued, the public has 60 days—*i.e.*, until January 3, 2023—to submit comments before the NPRM is implemented.

Proposal #1: Reinstate The Blocking-Charge Policy

The Board proposes to reinstate the blocking-charge policy, as most recently reflected in a 2014 rule, which would enable a party to block an election indefinitely by filing an unfair labor practice ("ULP") charge. In practice, this policy often allows an incumbent union to use a ULP charge to delay a decertification election.

By comparison, under the 2020 Rule, elections proceed as scheduled—even if a ULP is pending— and the votes are counted unless the charge challenges the circumstances around (or showing of interest supporting) the petition or alleges the employer dominated the union to disestablish a bargaining relationship—in such cases, the votes are impounded (*i.e.*, not counted).

Proposal #2: Reinstate The Immediate Voluntary-Recognition Bar As It Existed Under *Lamons Gasket*

The Board next proposes to return to voluntary-recognition bar law and jurisprudence, as it existed under *Lamons Gasket, Co.*, 357 NLRB 739 (2011), a decision in which the Board overruled *Dana Corp.*, 351 NLRB 434 (2007), and established that an employer's voluntary recognition of a union immediately barred the filing of an election petition for between 6 months to one year after the parties' first bargaining session.

The still-operative 2020 Rule reinstated *Dana Corp.* challenges to voluntary recognition, under which employees receive 45 days to petition for a Board-conducted, secret-ballot election after their employer gives notice of voluntarily recognizing a union under NLRA Section 9(a).

Proposal #3: Rescind Requirement Of Unions In Construction Industry To Show Affirmative Evidence Of Majority Support To Convert 8(f) To 9(a) Relationship

The Board proposes to rescind the 2020 Rule's requirements for establishing a voluntary-recognition bargaining relationship in the construction industry—and return to the Board's application of the voluntary-recognition and contract bars in the construction industry, per *Staunton Fuel & Material*, 335 NLRB 717 (2001) and *Casale Industries*, 311 NLRB 951 (1993).

In the construction industry, NLRA Section 8(f) allows employers and unions to form a collective bargaining relationship through what are often called "pre-hire" agreements, even absent the support of a majority of employees. 8(f) relationships last as long as the term of the contract, unless the parties agree to extend. All other employer/union relationships, which are formed pursuant to NLRA Section 9(a), last indefinitely, even after the CBA term expires, unless the union no longer maintains majority support of the workforce.

Under *Staunton Fuel,* a union could convert a Section 8(f) agreement with a construction industry employer to a "full" Section 9(a) agreement through contract language alone—*e.g.*, that the agreement was subject to Section 9(a) and/or that the union has majority support of the employees. Accordingly, before the 2020 Rule took effect, many construction-industry unions insisted on including such language to maintain their foothold in the relationship. And until the 2020 Rule overruled *Casale Industries*, the Board would not entertain a claim challenging a construction-industry union's majority-support if an election petition had not been filed within 6 months of the employer's voluntary recognition under 9(a).

As always, we will keep you updated on any further developments.

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