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NLRB Proposes New Rules to Modify Union Election Policies

August 12, 2019

The National Labor Relations Board (the "NLRB" or "Board") issued a Notice of Proposed Rulemaking on Monday, August 12, 2019, which proposes amendments to certain interpretations of the National Labor Relations Act (the "Act"). Those changes included amendments to the:

- Blocking Charge Policy;
- Voluntary Recognition Bar under Section 9(a) of the Act; and
- Procedure for Recognition in the Construction Industry under Section 9(a).

Amendments to these provisions have been anticipated since May 2019, when the NLRB issued its 2019 agenda. The overall effect of the proposed rules, if enacted, will be limit the degree to which unions and employers can prevent elections through unilateral action or by agreement. The NLRB stated that collectively these amendments would have the effect of "protecting the freedom of employees to choose, or refrain from choosing, a labor organization to represent them."

Blocking Charge Policy Change

The first proposed amendment would modify a union's ability to file what is known as a "blocking charge." Currently, any party can "block" a Board representation election by filing an unfair labor practices charge alleging conduct would have an unfair effect on the vote. Most often, but not always, blocking charges are used by incumbent unions to ward off election challenges to their status either by unhappy member/employees or by a rival union. Under current law, a charge can block the holding of an election for extended periods of time, sometimes years.

Under the proposed amendment, merely filing this type of charge would no longer stop the election from taking place. Instead, the election would go forward as scheduled, but the ballots would be impounded, and not counted, until either the charge was resolved or there was a finding that the alleged misconduct would not have impacted the election.

Voluntary Recognition Bar under Section 9(a)

The second proposed amendment would modify the ability of employees opposed to a union and rival unions to challenge an employer's grant of voluntary recognition to a particular union. Currently, an employer may voluntarily recognize a union if it reasonably believes the union to have majority support amongst its employees. Once it does so, the union is protected from challenges to its majority status, either by the employees or by a rival union, for a "reasonable time" after the grant of recognition. This bars employees and rival unions from filing Board election petitions seeking to displace the recognized union during the "reasonable time." If the employer and union quickly agree to a contract, any challenge is then further barred for the duration of the contract.

The Board proposes to limit the protection given to voluntarily recognized unions. Before the voluntary recognition can bar a challenge, the employer must give the employees and the Regional Office of the Board notice that it has voluntarily recognized the particular union. The notice must advise employees that they have 45 days to challenge the union's status by filing an election petition. The 45-day period must elapse with no challenge being filed. The proposed amendment effectively reinstates the Board's ruling in *Dana Corp.,* 351 NLRB 434 (2007) as the law.

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Conversion from Section 8(f) to Section 9(a) Agreements in the Construction Industry

Section 8(f) permits employers in the construction industry to enter into "pre-hire" agreements with unions, regardless of whether the union has shown majority support or indeed whether the employer has any employees at all. Section 8(f) agreements can therefore be challenged at any time, either by employees or by a rival union claiming to have majority support. Current law allows an 8(f) agreement to ripen into a full-fledged collective bargaining agreement under Section 9(a) by insertion of appropriate language into the agreement by the employer and union. Once it becomes a 9(a) agreement, the union's status is protected from challenge during the life of the agreement.

The proposed rule would make it harder for employers and unions to convert an 8(f) agreement to a 9(a) agreement by requiring that the employer be able to show by evidence extrinsic to any agreement with the union that the union enjoyed majority support amongst its employees at the time of the conversion. This may be difficult for construction employers and unions to accomplish. Typically, the proof of majority support must be in an appropriate bargaining unit. In the construction industry, the appropriate bargaining unit is often a single job site due to the transitory nature of construction industry employment.

These changes are not yet in effect, but are proposals currently open for public comment through October 25, 2019. We will continue to track their development. In the meantime, if you have any questions about how these changes could affect you, please contact your Miller Canfield attorney.