LABOR AND EMPLOYMENT LAW
INFORMATION MEMO
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THE NLRB ISSUES NEW REGULATIONS - A NEW ASSAULT ON EMPLOYEE FREE CHOICE

On July 26, 2024, the National Labor Relations Board (NLRB) issued a new final rule concerning blocking charges, the voluntary recognition bar and union recognition in the construction industry that, in Orwellian fashion, it has misnamed, the "Fair Choice -- Employee Voice" rule. This new rule rescinds the 2020 rule known as the "Election Protection Rule," and is yet another initiative of this Board to enable unions to become or remain exclusive bargaining representatives of employees without affording employees the opportunity to exercise their choice by voting in a Board-run secret ballot election. The new rule takes effect on September 30, 2024.

The new rule makes three key policy changes:

1. Blocking Charges

A "blocking charge" is an unfair labor practice ("ULP") charge that is typically filed by a union when employees have filed a decertification petition requesting an election to decertify the union or a rival union files an election petition. Because, for many years, the Board had a policy of declining to process election petitions where a party objected to the election because of a pending ULP charge, unions were able to block elections that might result in their decertification for months, years or indefinitely by filing (usually, frivolous) ULP charges.

In the 2020 Election Protection Rule, the Board moved away from this policy in order to allow elections to proceed and employees to cast their vote, notwithstanding any pending ULP charges. Under the current 2020 rule, if a ULP charge has been filed, the Board will nevertheless proceed with the election and impound the votes, pending the results of its investigation of any ULP charges. If the ULP charges are found to be non-meritorious or not the type that would have affected the election, the votes are counted. This process permits employees to exercise their voice and choice through the election process and actually benefit from the results of the election much more quickly.

The new rule rescinds the Election Protection Rule, reinstating the old rule of aborting elections through the filing of blocking charges. As of September 30, 2024, regional directors may direct that voting be delayed until after they have investigated the blocking charge. Since the NLRB's investigation and determination can take months or years to conclude, a union that does not have majority support can indefinitely block its decertification.

2. Voluntary Recognition

When an employer voluntarily recognizes a union without an election, the Board has provided a "voluntary recognition bar" – a period of time immediately after union recognition during which a decertification petition or a petition by a rival union cannot be filed. The voluntary recognition bar lasts for a "reasonable period of time," which has been held to be six months to a year. In 2007, in the *Dana Corp.* case, the Board ruled that before the recognition bar went into effect, employees had 45 days to file a request for a secret ballot election after they received notice of the recognition. This holding was codified in the 2020 Election Protection Rule.

The new final rule eliminates the employee notice requirement and 45-day window for filing a decertification petition, and the voluntary recognition bar goes into effect immediately. Accordingly, employees will no longer have

the ability to challenge a union's claim of majority support through an election.

3. Section 9(a) Recognition in the Construction Industry

Under Section 9(a) of the National Labor Relations Act (NLRA), an employer may not recognize and bargain with a union, unless the union is supported by a majority of the employees it purports to represent. There is a limited exception to this rule for the construction industry under Section 8(f) of the NLRA. Under Section 8(f), an employer and a union may enter into a pre-hire agreement and negotiate terms and conditions of employment for the employees who are to be hired. For many years, the NLRB permitted that 8(f) relationship to be converted into the normal (and more permanent) Section 9(a) union relationship, if the union and the employer, in their collective bargaining agreement, stated that the union had demonstrated majority support to the employer. The Section 9(a) relationship receives protection from challenge by employees or another union through the voluntary recognition bar (discussed above) and the contract bar (the protection from challenge when there is a collective bargaining agreement in place). In the 2020 Election Protection Rule, the Board adopted a rule (29 C.F.R § 103.22), requiring that parties retain positive evidence, beyond the parties' contract language, of the union's majority support at the time of its initial Section 9(a) recognition in order to rely on the Board's voluntary recognition bar or contract bar in response to a challenge to the union's presumption of majority support. In the absence of such evidence, the regional director is required to schedule an election.

The new final rule rescinds 29 C.F.R § 103.22 and allows employers and unions to agree to convert the temporary Section 8(f) relationship to an indefinite Section 9(a) relationship, without evidence of majority support among affected employees. Thus, starting on September 30, 2024, the new rule will again allow contract language, standing alone, to support majority status under Section 9(a), even if a majority of employees never expressed support for the union.

Conclusion and Takeaways

The common thread in the 2020 Election Protection Rule was to provide employees with greater voice and free choice by giving them more opportunities to cast actual votes concerning representation, rather than having that choice made for them by agreements between employers and unions under recognition agreements. The common thread in the Fair Choice – Employee Voice rule is to take away those voting opportunities, thereby depriving employees of voice and free and fair choice in their selection, or non-selection, of a bargaining representative.

Of course, the new rule is likely to be challenged in court, and, in light of the recent U.S. Supreme Court decision in *Loper Bright Enterprises v. Raimondo*, which overturned *Chevron* deference to administrative agency rulemaking, it is possible that the effective date of the new rule may be delayed or that the rule may be overturned. In any event, it is important for employers to consult legal counsel before responding to or engaging with a union that is seeking recognition.

For any questions about this issue, please feel free to contact Alice B. Stock, Aarti Chandan or any attorney in Bond's labor and employment practice or the attorney at the firm with whom you are regularly in contact.

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