September 11, 2019

NLRB Update: Proposed Election Rules Encouraging Employee Free Choice

The National Labor Relations Board (NLRB or Board) has issued a notice of proposed rule-making to enhance employees' free choice during elections to certify or decertify a union. The proposed changes to the current Board election rules involve three categories: (1) blocking charges; (2) the voluntary recognition bar; and (3) Section 9(a) recognition in the construction industry.

- **Blocking Charges**

  A blocking charge is when a union, or less frequently, an employer, files an unfair labor practice (ULP) charge for the purpose or effect of preventing the other party from pursuing an election to certify or decertify a union as employees' collective bargaining representative. Blocking charges date back to the inception of the National Labor Relations Act in 1937. The purpose of the blocking charge was to prevent an election from being tainted by ULPs committed by either an employer or a union. However, over the years, blocking charges have increasingly been abused by unions that file frivolous ULP charges for the sole purpose of blocking a decertification election. The Board has determined that such abuse of blocking charges should no longer be permitted. Therefore, the Board's proposed rule permits an election to be held, despite the existence of an unresolved ULP charge. In such case, employees' ballots would be impounded until a decision is issued on the ULP charge and its effect, if any, on employees' choice of representative.

- **Voluntary Recognition Bar**

  A voluntary recognition bar prevents an election to certify or decertify a union for a period after an employer voluntarily recognizes a union as its employees' collective bargaining representative. From 1966 through 2007, there could be an immediate voluntary recognition bar, but the time period of the bar would be reviewed on a case-by-case basis. Then in 2007, in *Dana Corp*., the Board concluded that employee free choice was best served through a Board-conducted secret ballot election. Under *Dana Corp.,* employees were provided with 45 days' notice of an employer's voluntary recognition and had the ability, within those 45 days, to file a petition to support or refute the allegation of majority support for such recognition (even if a collective bargaining agreement was reached in the interim). In 2011, this case was overruled by *Lamons Gasket Company*, which reinstated an immediate voluntary recognition bar. The Board now proposes a rule that returns to the *Dana Corp.* requirement that employees have 45 days' notice of the recognition and an opportunity to file a petition to contest that recognition before a union is established as their collective bargaining representative.

- **Section 9(a) Recognition in the Construction Industry**

  The Board also seeks to revise the current rule on recognition of a union in the construction industry. A "Section 8(f) relationship" exists when a union serves as a collective bargaining representative for a particular construction project. Under Section 8(f), due to the transitory nature of both the employees and construction projects, a collective

bargaining relationship is allowed to be recognized without the necessary showing of majority employee support. Under the current rule, a Section 8(f) relationship can turn into a Section 9(a) relationship, which serves to bar the filing of a petition for an election to certify or decertify a union during the period of a collective bargaining agreement (not to exceed three years). Certain factors are considered by the Board when a Section 8(f) relationship is alleged to have become a Section 9(a) relationship. One factor is whether collective bargaining agreement language signifies the intent of the employer and the union to convert to such a relationship. Under the current law, such an agreement alone precludes the filing of an election petition for the duration of the collective bargaining agreement, after such recognition is established, even if there is no evidence of majority support. Employers are often unaware of this consequence of making such an agreement, and such an agreement deprives employees of their free choice in selecting their bargaining representative. The Board, therefore, now proposes that a Section 9(a) relationship in the construction industry can be based only on extrinsic evidence showing that a majority of employees *actually support* the recognition of a union. Under the proposed rule, collective bargaining agreement language alone is insufficient.

Given the potential effects on their workplace, employers should stay tuned to determine the status of the Board's proposed rulemaking.

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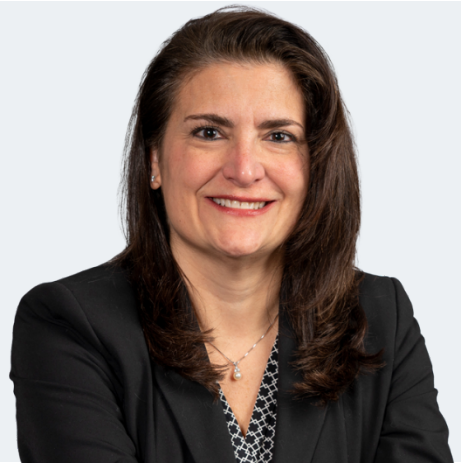

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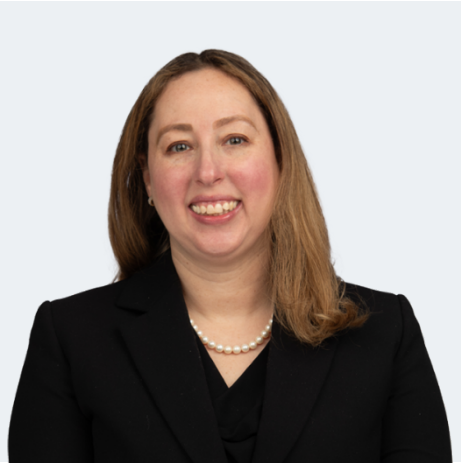

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