National Labor Relations Board Proposes Three Amendments To Protect Employee Free Choice

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On August 9, 2019 the National Labor Relations Board (NLRB) announced that it would be proposing three amendments to its regulations which govern the filing and processing of representation petitions. The first amendment would replace the current blocking charge policy with a vote-and-impound procedure.

Currently, a party (usually a union facing a decertification petition), can block an election for months or even years by filing an unfair labor practice charge that questions the validity of the election petition or creates some question as to the ability of the employees to make a fair and free choice concerning representation until the charge has been resolved.

According to the NLRB, this policy has an adverse impact on the employees and employers as the employees are thwarted in exercising their choice as to the representation and the employers are left with the uncertainty of whether the union has majority support. If implemented, a vote-and-impound procedure would be the new procedure whereby an election would be held regardless of whether a blocking charge was pending. If the merits of the charge had not been resolved prior to the election, the ballots would be impounded until the charge was resolved.

The second amendment would modify the immediate voluntary recognition bar and reinstate the *Dana* notice and open-period procedures set forth in *Dana Corp.*, 351 NLRB 434 (2007). Under current NLRB precedent, a reasonable period of time (not less than six (6) months, but no more than

one (1) year) must pass before representation may be challenged.

If implemented, the Board would enact the precedent set forth in *Dana Corp.*, wherein the NLRB held that employees represented by a union through a voluntary recognition agreement have a period of 45 days after receiving notice where they may reject union representation through a secret ballot election.

The third amendment applies to the construction industry and would require a union to provide positive evidence of majority employee support, rather than just contractual language, in order to transition an initial Section 8(f) bargaining relationship to a Section 9(a) bargaining relationship. Under Section 9(a) of the National Labor Relations Act (Act), a union will not be recognized as the exclusive bargaining representative unless they have majority support of the employees in the proposed bargaining unit. However, due to the uniqueness of the construction industry, an employer and union can establish a collective bargaining relationship in the absence of majority support pursuant to Section 8(f) of the Act.

The difference between Section 8(f) and 9(a) recognition is that under 8(f) either party can unilaterally terminate the relationship when the collective bargaining agreement ends, which is not allowed under Section 9(a). Based upon current Board precedent, a collective bargaining relationship can be converted to Section 9(a) recognition with the execution of a collective bargaining agreement. The NLRB's proposed amendment would require a union to provide proof of majority support to obtain Section 9(a) status.

In a press release, the NLRB hailed these amendments as necessary to protect employee free choice. If these amendments are implemented, it appears employers will also receive the benefit of more certainty as to their employees' collective bargaining representative without unnecessary delays. The proposed amendments were posted on August 12, 2019, with the sixty (60) day period for comments ending October 11, 2019. The proposed amendments will not be finalized until after the NLRB has reviewed the comments received.