NLRB Makes It Harder to Decertify Unions in Latest Pro-Labor Move: 3 Key Takeaways for Employers

Insights
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The National Labor Relations Board just ditched three Trump-era rules that had made it easier for workers to undo union representation. In a long-anticipated move, the NLRB issued a new regulation today scrapping agency rules issued in 2020 that had cleared the path for more equitable decertification procedures. The prior rules allowed workers to vote on the issue even after unions alleged interference with the process (also known as "blocking" charges). Now, the NLRB can once again delay decertification procedures until the charges are resolved – which will inevitably result in a prolonged process to remove a union. The Board also reinstated a prior doctrine shielding voluntarily recognized unions from prompt decertification and once again eased the way for union recognition in the construction sector. What do employers need to know about these three developments before they take effect in September?

1. Bringing Back Blocking Charges

The first and most impactful result of the new regulation provides a boost to so-called "blocking" charges. Prior to 2020, the Board's blocking charge rule permitted parties — mostly unions — to file unfair labor practice (ULP) charges (regardless of the underlying merit) to automatically "block" representation and decertification elections (pending the outcome of the agency's investigation), unless the charging party requested to proceed despite the charge.

In 2020, the Trump-era Board adopted a rule requiring decertification votes to proceed in the ordinary course in such circumstances. In some cases, the ballots were impounded until a resolution of the alleged ULP, while in others they were promptly opened and counted. But in all cases, certification of the results did not occur until final disposition of the ULP and its effect, if any, on the representation petition. This allowed employees to cast their ballot while the issue was at the top of their minds, even if the ultimate ballot counting took place later.

The new regulation scraps these safeguards, allowing the strategic use of blocking charges once again. This change gives unions a tactical means by which to indefinitely delay representation and decertification elections that could ultimately go against them. It also means that employee ballots cast in a secret ballot election could remain unresolved for an indefinite period of time, thereby subjecting the will of the participants to a potentially protracted administrative process.

2. Eliminating 45-Day Window to Challenge Voluntary Recognition

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Under the Board's new regulation, if an employer voluntarily recognizes a union, the union will now be protected from decertification challenges for six months. During this time, other unions or employees are barred from filing a petition to challenge the union's status as the unit's representative. This is a stark departure from the Trump-era rule, which provided a 45-day window to immediately challenge such recognition.

The pendulum has swung back and forth on this rule depending on the administration. Most recently, the Trump-era rule stated that an employer's voluntary recognition would not bar the processing of an election petition unless:

- the employer and union so notified an NLRB regional office;
- the employer posted a notice of recognition informing employees that they had the right to file a decertification or rival union petition during an ensuing 45-day window; and
- the 45 days passed without a properly supported petition.

But the current Board's action means that the ping-ponging will once again take place and an immediate voluntary recognition bar – which was in place during the Obama administration – will take root again. The net effect potentially marginalizes the right of employees to make a free and fair choice concerning their representation.

Combined with the Board's August 2023 decision in *Cemex Construction Materials Pacific, LLC* – which created a new framework for determining when employers are required to bargain with unions without a representation election – this rule could serve as part of a very powerful one-two punch for unions in coming years to help boost membership rolls without ever winning a secret ballot election.

3. Lowering the Bar for Construction Industry Unionization

The Board's final amendment reinstates its 2001 decision in *Staunton Fuel*, establishing a low threshold for demonstrating majority union employee support in the construction industry. Under *Staunton Fuel*, a union can become a duly authorized representative under section 9(a) of the NLRA based solely on collective bargaining language – that the impacted employees may never see – negotiated under Section 8(f) (often referred to as a "pre-hire agreement").

Under section 8(f), construction industry employers may choose to become "union" without any showing of employee support. By readopting this standard, the Board concludes that the mere presence of language suggesting that the union obtained recognition in the 8(f) agreement is enough to confer majority status under Section 9(a).

What Should You Do?

Unless stalled by litigation, employers can expect the new rules to be the law of the land by the end of September. To the extent that your labor relations strategy includes actions based on the 2020 rules, you should now consult with your labor relations counsel to determine how best to adapt to the new era.

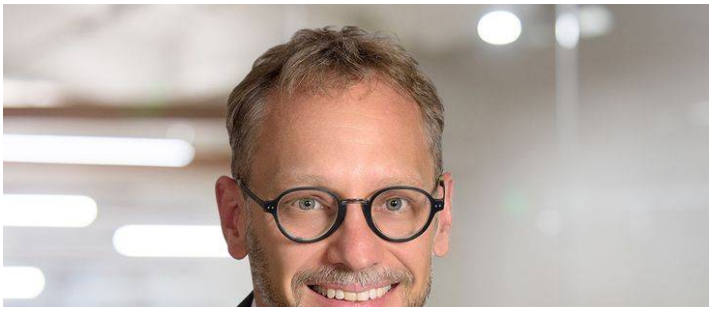
Moreover, the NLRB has clearly kept President Biden's promise of being the "most pro-union president you've ever seen." As a result, we've seen significant shifts in precedent from the NLRB recently, so you should consider adjusting your overall approach to labor relations in light of these changes. You can find more tips here on how to navigate these ever-changing waters.

Conclusion

We will continue to monitor these developments and provide updates as necessary. Make sure you are subscribed to Fisher Phillips' Insight System to receive the most up-to-date information. If you have questions on how these developments may impact your organization and workforce, please contact your Fisher Phillips attorney, the authors of this Insight, or any member of our Labor Relations Practice Group.

Related People

Steven M. Bernstein
Regional Managing Partner and Labor Relations Group Co-Chair
813.769.7513
Email



Todd A. Lyon
Partner
503.205.8095
Email

Joshua D. Nadreau
Regional Managing Partner and Vice Chair, Labor Relations Group
617.722.0044
Email

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