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# NLRB Issues “Fair Choice-Employee Voice” Final Rule

**Labor Relations Update** on **August 5, 2024**

On July 26, 2024, the National Labor Relations Board (“NLRB” or “Board”) issued a final rule (the “2024 Rule”), codified at 29 C.F.R. 103.20–22, rescinding an earlier rule the Board issued in April 2020 (the “2020 Rule”) that amended representation election procedures.

As we previously reported, the Board issued its Proposed Rule on this topic in November 2022, and then received a number of comments during the comment period that ended on February 2, 2023. The 2024 Rule marks a return to the blocking-charge policy and immediate voluntary-recognition bar in place before the 2020 Rule, and eliminates a rule that unions in the construction industry must show affirmative evidence of majority support to convert from an 8(f) to 9(a) relationship. The effective date of the 2024 Rule is September 30, 2024, and the 2024 Rule will only be applied to cases filed after the effective date.

**Implications of the 2024 Rule**

Blocking Charge: When effective on September 30, 2024, Regional Directors will again have the authority to delay an election indefinitely when a party to a representation proceeding requests that its unfair labor practice (“ULP”) charge block an election, as they had the authority to do prior to the 2020 Rule. In practice, this policy often allows an incumbent union to use a ULP charge to delay a decertification election.

Voluntary Recognition Bar: The 2024 Rule is a return to voluntary-recognition bar law and jurisprudence as it existed under *Lamons Gasket, Co.*, 357 NLRB 739 (2011). In *Lamons Gasket*, the Board overruled *Dana Corp.*, 351 NLRB 434 (2007), and established that an employer's voluntary recognition of a union immediately barred the filing of an election petition for between 6 months to one year after the parties' first bargaining session. The 2020 Rule reinstated *Dana Corp.* challenges to voluntary recognition, under which employees receive 45 days to petition for a Board-conducted, secret-ballot election after their employer gives notice of voluntarily recognizing a union under National Labor Relations Act ("NLRA") Section 9(a).

Construction Industry: Finally, the 2024 Rule entirely eliminates 29 C.F.R. § 103.22, and returns to the Board's application of the voluntary-recognition and contract bars in the construction industry per *Staunton Fuel & Material*, 335 NLRB 717 (2001) and *Casale Industries*, 311 NLRB 951 (1993). In the construction industry, NLRA Section 8(f) allows employers and unions to form a collective bargaining relationship through what are often called "pre-hire" agreements, even absent the support of a majority of employees. This means that employers in 8(f) relationships could withdraw recognition from the union after expiration of the collective-bargaining agreement. Under typical Section 9(a) bargaining relationships, employers and unions remain obligated to continue negotiating after expiration of a CBA.

Under prior case law, a union could convert a Section 8(f) agreement with a construction industry employer to a Section 9(a) agreement through contract language alone—*i.e.,* by evidencing in the contract that parties intended the relationship to be a permanent one. Prior to the 2020 Rule, many construction-industry unions insisted on including this language to maintain their foothold in the relationship.

**Kaplan's Dissent**

Board Member Kaplan issued a dissent critiquing the 2024 Rule, stating that the 2020 Rule made "well-advised changes" to the NLRA, and that the 2024 Rule is "unnecessary and counterproductive." He also noted that "in the wake of the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244 (2024), it is an open question to what extent reviewing courts must afford deference to [the majority's] decision to repeal the 2020 Rule and promulgate a new rule in its place."

It remains to be seen whether litigation is initiated to block implementation of the final rule, as we have recently seen (see here). As always, we will keep you updated on any further developments.

View original.

**Related Professionals**

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