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NLRB Reveals Proposed Regulations Revamping Election Procedures

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On Friday morning, the National Labor Relations Board issued a set of proposed regulations that would revamp some of its current laws and procedures regarding the union election process. Championed by a three-member majority, over one objection, this set is the first of a planned series of regulations.

The proposed regulations target three areas of current Board law or policy that the majority claims unnecessarily hamper employee free choice and the preferred means of effectuating that choice – the expeditious secret ballot election.

The majority stated that the “proposed amendments will better protect employees’ statutory right of free choice on questions concerning representation by removing unnecessary barriers to the fair and expeditious resolution of such questions through the preferred means of a board-conducted secret ballot election.”

First, the proposed regulations amend the Board’s so-called “[blocking charge policy](#),” which allows unions to block an election merely by filing a charge alleging unlawful conduct by the employer that would affect employee votes. Unions often use this tactic to delay decertification elections and in situations where they do not believe they have the necessary support to win a certification election.

The newly proposed rule would change this procedure by not blocking the

election when a charge is filed. Rather, the election would go forward and the ballots would be impounded (i.e. not counted) until the charge is resolved and it is determined that there was no misconduct or that any misconduct that may have occurred did not impact the election. Thus, unions would no longer be able to prevent an election from taking place merely by filing a charge.

Second, the proposed regulations would amend the Board's "voluntary bar" standard, which prevents employees from filing a decertification petition for a "reasonable period" after a union is voluntarily recognized by an employer (that is, without an election). The "reasonable period" standard stems from a 2011 Board decision which overruled the prior standard permitting employees to petition to decertify the voluntarily-recognized union within 45 days of the recognition. The proposed rule would reinstate that 45-day window.

Finally, the Board proposes to overhaul its current standard for the formation of a Section 9(a) bargaining relationship in the construction industry. Section 9(a) governs most bargaining relationships, but in the construction industry, a special provision – Section 8(f) – is presumed to govern the bargaining relationship.

Section 8(f) allows unions and businesses in the construction industry to negotiate agreements to govern employees without actually holding a vote. However, Section 8(f) agreements, as they are called, do not enjoy the three-year election bar that their Section 9(a) counterparts do. This means that when a Section 9(a) agreement is in place, no elections (either decertification or rival petitions) can be processed during that time for a maximum of three years. No such bar exists in the Section 8(f) context.

However, current Board law provides an easy path for unions and employers to [convert an 8\(f\) relationship into a 9\(a\) relationship](#), complete with its three-year election bar. A 2001 Board case allows this conversion to take place merely by the recitation of language in the collective-bargaining agreement that the union requested recognition as the Section 9(a) representative of the employees and at least offered to show evidence of its support, and the employer agreed to so recognize the union (whether it took the union up on its offer to show majority support or not).

The newly proposed regulations would change that standard by requiring the union to have "extrinsic evidence" of its majority support, and requiring any conversion to a Section 9(a) relationship to be based on a "contemporaneous showing of majority employee support." Thus, the mere recitation of language in a collective-bargaining agreement would no longer suffice.

The Board's proposed regulations are not yet law, as they are subject to comment from the public. The Board must then consider the public comments before publishing its new regulations as final.