

## NLRB Issues New Election Rule

On April 1, 2020, the National Labor Relations Board (NLRB or Board) published a new rule concerning union representation elections, which is scheduled to take effect on May 31, 2020, and makes significant changes to the representation case procedures that have been in effect since 2015. Notably, the new rule is in addition to and separate from the numerous procedural amendments the Board made to the “ambush election” rules in December 2019, all of which are currently on hold pending litigation.

Specifically, the new rule fundamentally changes the current representation process in the areas of: (1) blocking charges, (2) voluntary recognition, and (3) evidentiary issues in construction industry cases.

### Blocking Charges

Under the final rule, elections will no longer be delayed by blocking charges. Thus, a pending unfair labor practice (ULP) charge will neither postpone nor suspend the start of an election. In such a circumstance, the election may proceed pursuant to a “vote-and-impound” procedure, in which the election ballots will be impounded pending a final determination on the ULP charge and the effect of that determination, if any, on the nature of the ULP charge, such as issues involving the election petition or the fairness of the election. However, the vote-and-impound procedure will not apply in all cases — rather, impoundment will occur only where the ULP charge alleges (1) violations of Sections 8(a)(1) or Section 8(b)(1)(A) of the National Labor Relations Act (the Act) (prohibiting an employer or the union from interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by the Act) and 8(a)(2) (prohibiting an employer from dominating or interfering with the formation or administration of any labor organization). For all other types of ULP charges, election ballots will be promptly opened and counted at the conclusion of the election. In short, although the filing of a blocking charge may delay the vote count or certification of the election result, unions can no longer file ULP charges to thwart decertification elections.

### Voluntary Recognition Bar

With respect to voluntary recognition, the current rule is that employers may voluntarily recognize a union without an election and based only on a showing of majority support. This will immediately bar the filing of an election petition for a “reasonable” time following recognition. The new rule, however, marks a substantial shift away from this procedure and reestablishes a decade old Board precedent. Under this new rule, unions are no longer protected from challenges to their majority support for a reasonable period of time after an employer’s voluntary recognition. Employers choosing to voluntarily recognize a union must notify the affected employees of the voluntary recognition and of their right to file, within 45 days, an election petition with the NLRB challenging the voluntary recognition. If an election petition is filed within the 45-day window, it will be processed by Board. Conversely, if a petition is not filed, the voluntary recognition bar controls and will be in place for a reasonable amount of time.

In modifying the recognition-bar policy, the Board expressed its belief that the “immediate imposition of a voluntary-recognition bar is an overbroad and inappropriate limitation on the employees’ ability to exercise their fundamental statutory right to the timely resolution of questions concerning representation through the preferred means of a Board-conducted election.”

This change could impact many collective bargaining relationships as a large majority of organizing occurs through voluntary recognition. In addition, it applies prospectively to the voluntary recognition of a union on or after the effective date of the new rule (likely May 31, 2020).



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### Related Practice Areas

- Labor & Employment

## Evidence in Construction Industry Cases

The third amendment to the Board's representation case procedures redefines the evidence required to prove that an employer and union in the construction industry have established a voluntary majority-supported collective-bargaining relationship that could bar an election. Under the new rule, "positive evidence of majority employee support" is required for converting a Section 8(f) agreement (allowing a construction-industry employer and union to establish a collective bargaining relationship in the absence of support from a majority of employees, also known as a "pre-hire agreement") into a Section 9(a) agreement (requiring that a union have the support of a majority of employees in the bargaining unit to be the exclusive representative for collective bargaining purposes) in the construction industry. Accordingly, a Section 8(f) relationship cannot become a Section 9(a) relationship based solely on language in the parties' collective bargaining agreements. Instead, the Board will now require positive evidence demonstrating that a union demanded recognition from an employer and the employer granted recognition based on a demonstration of majority support.

According to the Board, these three amendments to its representation case procedures will "better protect employees' statutory right of free choice on questions concerning representation by removing unnecessary barriers to the fair and expeditious resolution of [elections]."

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