

**NLRB ADOPTS ANOTHER PRO-EMPLOYER RULE ON UNION ELECTIONS,
BLOCKING CHARGES, AND VOLUNTARY RECOGNITION, BUT
AGREES TO DELAY IMPLEMENTATION DUE TO CORONAVIRUS**

On April 1, 2020, the National Labor Relations Board (“NLRB” or “Board”) issued yet another final rule dealing with union representation elections, following up on its December 2019 rule that gave employers more tools to delay union elections. This latest final rule makes three major amendments to the Board’s election policies. First, the Board eliminated its “blocking charge” policy. Under the previous blocking charge policy, the filing of an unfair labor practice charge alleging employer misconduct related to an upcoming election would “block” the election until the charge was resolved and a fair election could be held. Under the Board’s new rule, the filing of such a charge will no longer put the election on hold. Instead, the election will go forward (even where it is alleged that the employer’s unlawful, coercive actions tainted the entire election). The votes will either be counted, or in some specific circumstances, impounded. The Board will then wait to certify the election results until after the charge is resolved. This new policy will give an air of legitimacy to elections that should have been delayed due to employer misconduct.

Second, the Board’s new change makes it easier for employees to decertify their union representative after voluntary recognition by the employer. Previously, an employer’s voluntary recognition would create a bar on the filing of any decertification petition for a reasonable period of time, in order to give the newly-recognized union an opportunity to successfully bargain a contract with the employer. Under the new rule, there is no protection against such petitions after voluntary recognition, or even during the life of the first contract, unless the employer posts a notice informing all employees of the voluntary recognition and advising them that they have 45 days to file a petition for an election to decide whether or not to reject the union. By creating this 45-day window in which employees can immediately challenge voluntary recognition and force an election, the Board returned to a short-lived rule that was created by the Bush Board and subsequently overturned by the Obama Board. This rule change will likely force unnecessary elections where an employer has already agreed to recognize the union upon a sufficient showing of interest by bargaining unit employees. Voluntary recognition saves time and money that would otherwise be spent on campaigning and conducting an election, and it encourages more productive, and less contentious, bargaining relationships. The Board’s new rule actively undermines the NLRA’s policy of promoting industrial peace.

Finally, the rule changes what is required in the construction industry in order to convert an 8(f) pre-hire arrangement into a full 9(a) bargaining relationship. Under the new rule, a voluntarily-created pre-hire bargaining

relationship cannot be converted into a full bargaining relationship based solely on language in a collective bargaining agreement. Instead, the union will be required to make some contemporaneous showing of majority support from the bargaining unit employees. Like the other aspects of the new rule, this change simply seeks to make it harder for employees to choose their bargaining representatives, and makes it easier for union opponents to challenge existing representation relationships.

When the Board adopted this latest rule, it had previously put all union elections nationwide on hold in response to the coronavirus pandemic. The Board's suspension of union elections lasted through April 3, 2020. On April 1st, in response to criticism over its complete ban on elections and refusal to consider mail ballot elections as an alternative, the Board announced that it would not extend that suspension beyond April 3rd. The Board has indicated that its various Regional Directors will have the discretion to decide whether an election should go forward as a mail-ballot or in-person election.

By insisting on pushing forward with these pro-employer rule changes and making voluntary recognition of unions more difficult, while at the same time preventing any union elections from moving forward, the Trump Board once again confirmed that it has no interest in protecting workers' statutory rights to select their bargaining representatives. Instead, the Board's clear goal is to strip workers of any ability to improve their working conditions (and it is willing to take advantage of a national health emergency to achieve that goal). After an outpouring of criticism from labor advocates, the Board agreed on April 8, 2020, to delay the implementation of its newest rule until July 31, 2020, citing the ongoing coronavirus emergency as the reason for delay. Like the Board's December 2019 election rule, this latest rule is likely to face legal challenges prior to its effective date.

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