NLRB Issues Proposed Rules Aimed to Give Employees Freedom of Choice

By J. Patrick Griffin / Aug 19, 2019

The National Labor Relations Board's proposed new rules provide employees with more free choice in regard to union activity. The National Labor Relations Board (the "Board") issued proposed rulemaking last week to address issues of employee free choice. The Board proposed three amendments to Part 103 of its Rules and Regulation, dealing with: (1) its handling of blocking charges; (2) its voluntary recognition bar; and, (3) collective bargaining relationships in the construction industry. These proposed rule changes are still subject to notice and comment, but signal the Board's shift to policies that promote greater freedom for employees to choose, or not choose, a labor organization to represent them.

The Board's first proposed rule deals with "blocking charges." Currently, if an unfair labor practice charge is filed by a union, any election to decertify that union is blocked and votes are not cast. The Board's proposed rule would eliminate this blocking mechanism and instead allow the ballots to be cast and held by the Board until the charges are resolved.

The second proposed rule would return to the standard articulated in *Dana Corp*., 351 NLRB 434 (2007), allowing workers or a rival union a 45-day period after voluntary recognition to file a decertification petition. Under the Obama administration, the Board's decision in *Lamons Gasket* 57 NLRB 72 (2011), prohibited challenges to whether a union has majority support for a "reasonable period" of six months to a year after the union is voluntarily recognized by the employer.

The Board's final proposed rule is specific to the construction industry. In order to allow unions and employers to set out work terms in a contract without actually holding union vote in the construction industry, collective bargaining relationships are presumed to be covered under Section 8(f) of the NLRA. Under the 2001 Board decision, *Staunton Fuel & Material,* 335 NLRB 717 (2001), this section 8(f) presumption could become a Section 9(a) relationship if the collective bargaining agreement stated that the union had requested and obtained recognition as a representative of the unit employees. The proposed rule would call for a heightened requirement of actual "extrinsic evidence" that demonstrates recognition based on a contemporaneous showing of majority employee support.

The Board stressed that all three proposed rules would benefit employee freedom of choice. Under the new proposed rules, employees, who do not want unionization, will have greater control and opportunity to challenge the union's representation. In light of the Board's proposed rules, employers who are facing union certification or decertification votes, or who have a union presence or are concerned that union activity could occur should pay attention to this changing landscape and consult with labor counsel to determine how their policies and practices would comply with the proposed rules.

Should you have any questions about the proposed rules or any other labor or employment-related matter, please feel free to contact Patrick Griffin at pgriffin@clarkhill.com or any other member of Clark Hill's labor and employment business unit team.

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