

NLRB ISSUES FINAL RULE ON ELECTION PROCEDURES

On August 24, 2023, the NLRB adopted a Final Rule amending election procedures that will drastically reduce the time it takes from the filing of the petition to the date of the election and also expedite the resolution of any post-election litigation.

Highlights of the new rule's changes include:

- 1) Pre-election hearings will begin approximately 10 days sooner than under the present rule and Regional directors will have more limited discretion to postpone them;
- 2) Shorter time for employer to file Statement of Position and less discretion for Regional Directors to postpone the due date;
- 3) Union's Response to the Employer's Statement of Position to be made orally at the start of the pre-election hearing rather than in writing and prior to the hearing, as is required now;
- 4) Less time for Employer to post and distribute the Notice of Petition for Election;
- 5) Ordinarily, litigation regarding eligibility and inclusion issues will be deferred to the post-election stage;
- 6) Written briefs following Pre- and Post-Election Hearings will only be allowed if deemed necessary; and
- 7) Regional directors will specify the election details in the decision and direction of election and will schedule the election for the earliest practicable date without a waiting period.

The new rule will become effective on December 26, 2023 to ensure adequate time for the NLRB's Regional offices to implement the new procedures.

NLRB ISSUES DECISION ANNOUNCING NEW FRAMEWORK THAT WILL FACILITATE CERTIFICATION OF UNIONS AS REPRESENTATIVES OF EMPLOYEES WITHOUT THE NEED FOR AN ELECTION IF UNION HAS MAJORITY OF SIGNED EMPLOYEE CARDS

On August 25, 2023, the Board issued a decision in Cemex Construction Materials Pacific, LLC announcing a new framework for determining when employers are required to bargain with unions without a representation election. The new rule applies to on-going and future election procedures.

Now, if a union requests recognition on the basis that a majority of employees in an appropriate bargaining unit have signed cards designating the union as their representative, an employer must either recognize and bargain with the union or file a representation (“RM”) petition seeking an election promptly (within 2 weeks of the union’s demand for recognition). If an employer who seeks an election commits **any** unfair labor practice during the critical period prior to the election that would require setting aside the election, the Board will order the employer to recognize and bargain with the union instead of ordering a re-run election.

If the employer neither recognizes the union nor promptly files a petition, the union may file a charge against the employer. If majority support (signed employee cards) is proven in an appropriate unit, the Board will find that the employer violated the National Labor Relations Act, will certify the Union as the employees’ exclusive representative and order the employer to bargain in good faith.

Member Kaplan, dissenting in part, noted that in NLRB v. Gissel Packing, 395 U.S. at 602, 603 (1969) the Supreme Court stated that elections were the “the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support,” and union-authorization cards are “admittedly inferior to the election process.”

Employers have criticized the decision, stating that it will result in limiting secret-ballot elections while increasing card-based bargaining orders. Employer groups have noted that the "card check" process is prone to abuse and lacks the protections of secret ballot elections. The new doctrine is expected to be challenged in appropriate cases in the U.S. Circuit Courts and, eventually, the U.S. Supreme Court.

RECOMMENDATIONS

The changes promulgated by the Board have the intended effect of (a) limiting the right of employees and employers to insist on a secret vote election and instead favoring certification based on union card checks, and (b) minimizing the time an employer has, once it is given notice that (i) a union is seeking to represent its employees and (ii) before the date of the election, to inform the employees of their right not to be unionized, make them aware of the reasons why they do not need a union, and that it is contrary to their best interests to be unionized.

Therefore, employers should consider taking steps such as:

1. Training managerial and supervisory staff on awareness of union activity and employee restlessness.
2. Issuing, or revising and reissuing, a legally valid employer's union-free policy.
3. Issuing, or revising and reissuing, a legally valid no-solicitation, no-distribution rule.
4. Including in routine employee training a summary of the employer's union-free and open-door policies.
5. Not accepting a union representative request that the employer check union authorization cards, not recognizing voluntarily the union as the representative of the employees and calling immediately labor counsel.

If you have questions or need assistance, please reach out to one of our attorneys.

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