News & Publications

NLRB Issues Notice of Proposed Rulemaking on Fair Choice and Employee Voice

Office of Public Affairs
202-273-1991
publicinfo@nlrb.gov
www.nlrb.gov

November 03, 2022

The proposed rule addresses Election-Blocking Charges, Voluntary Recognition, and Construction Industry Bargaining Relationships

Today, the National Labor Relations Board released a Notice of Proposed Rulemaking (NPRM) inviting public comment on a proposed rule that would rescind a final rule adopted by the prior Board majority on April 1, 2020. That rule, now in effect:

(1) allows representation elections to proceed despite pending unfair labor practice charges alleging coercive conduct that would interfere with employee free choice and require a re-run election;

(2) allows challenges to the representative status of a union that has been voluntarily recognized based on a showing of majority support among employees before there has been a reasonable period for collective bargaining; and

(3) permits election challenges to the long settled representative status of unions representing construction industry employees, despite undisputed evidence of the union's majority support in detailed language in a collective-bargaining agreement making clear that the employer voluntarily recognized the union based on a showing of majority support.

The proposed Fair Choice and Employee Voice rule would restore the Board's prior law, including the longstanding principles reflected in the traditional "blocking charge" policy first adopted by the Board in 1937; the Board's "voluntary recognition" bar doctrine first established in 1966 and refined in *Lamons Gasket Co.*, 357 NLRB 934 (2011); and the Board's approach to voluntary recognition in the c

Back to top

industry as reflected in *Casale Industries*, 311 NLRB 951 (1993), and *Staunton Fuel & Material*, 335 NLRB 717 (2001).

"The Board believes, subject to comments, that these proposed changes will better protect workers' ability to make a free choice regarding union representation, promote stability in labor relations, and more effectively encourage collective bargaining," said Chairman Lauren McFerran.

The proposed rule has three parts, each rescinding a corresponding portion of the Board's April 2020 final rule.

First, the proposed rule would return to the Board's long-established "blocking charge" policy as most recently reflected in a 2014 rule. Under that approach, when unfair labor practice charges are filed while an election petition is pending, a Regional Director may delay the election if the conduct alleged threatens to interfere with employee free choice. The Board's view, subject to public comments, is that the proposed rule promotes employee free choice and conserves the Board's resources, and those of the parties, by ensuring that the Board does not conduct elections—that might well have to be re-run—in a tainted environment.

Second, the proposed rule would eliminate the required notice-and-election procedure triggered by an employer's voluntary recognition of a union based on a showing of majority support among employees. In the NPRM, the Board explained its preliminary view that a voluntary-recognition bar, preventing challenges to the status of a newly recognized union until a reasonable period for collective bargaining has passed—and as reflected in the *Lamons Gasket* decision—better serves the policies of the National Labor Relations Act by vindicating employee free choice, encouraging collective bargaining, and preserving labor relations stability. The Board noted that under the 2020 rule, employees almost never file election petitions to oust recognized unions, suggesting that voluntary recognition almost always accurately reflects employee free choice.

Finally, the proposed rule would return to the Board's prior approach to voluntary recognition in the construction industry, as reflected in its case law. This would include restoring a six-month limitations period for election petitions challenging a construction employer's voluntary recognition of a union under Section 9(a) of the Act (as established in *Casale Industries*). It would also include the principle (established in *Staunton Fuel*) that sufficiently detailed language in a collective-bargaining agreement can serve as sufficient evidence that voluntary recognition was based on Section 9(a) of the Act. The Board explained its preliminary view, subject to comment, that the 2020 rule had injected uncertainty and unpredictability into construction-industry labor relations.

Chairman McFerran was joined by Board Members Gwynne A. Wilcox and David M. Prouty in proposing the new rule. Board Members Marvin E. Kaplan and John F. Ring dissented.

Public comments are invited on all aspects of the proposed rule and should be submitted either electronically to regulations.gov, or by mail or hand-delivery to Roxanne L. Rothschild, Executive Secretary, National Labor Relations Board, 1015 Half Street S.E., Washington, D.C. 20570-0001.

Back to top

Comments on this proposed rule must be received by the NLRB on or before January 3, 2023. Comments replying to comments submitted during the initial comment period must be received by the Board on or before January 17, 2023.

Established in 1935, the National Labor Relations Board is an independent federal agency that protects employees from unfair labor practices and protects the right of private sector employees to join together, with or without a union, to improve wages, benefits and working conditions. The NLRB conducts hundreds of workplace elections and investigates thousands of unfair labor practice charges each year.

Most Popular Pages

Who We Are
National Labor Relations Act
Cases & Decisions
Recent Charges & Petitions Filings
The Law
The Right to Strike
Case Search
Contact Us
Frequently Asked Questions

Connect With NLRB

NLRB Subscription Updates

Download NLRB Mobile App