NLRB Proposed Election Rule Presents Significant Changes to Election Procedures

By: John K. Baker and Rob Pettigrew
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On August 12, the National Labor Relations Board (the Board) published a Notice of Proposed Rulemaking to modify three parts of its election procedures. This rulemaking would amend the Board's blocking charge policy, voluntary recognition bar rule and recognition rules in the construction industry.

The change to the blocking charge policy is the most significant of the proposed changes. Created shortly after the National Labor Relations Act (the Act) was enacted, the blocking charge policy allows an employer or a union to block a representation or decertification election by filing an unfair labor practice charge. In such a case, the Board typically delays the election until the charge was resolved. This tactic enables a union to file a blocking charge and use the delay to solidify its membership prior to an election being held. The proposed rule, however, replaces the current policy with a 'vote-and-impound' procedure. Elections would no longer be blocked by pending unfair labor practice charges, but the secret election results would be impounded until the charges are resolved.

The proposed rule also changes the period of time that must elapse after a voluntary recognition by an employer prior to an employer or other union challenging a recognized union's majority support. Currently, employees are prevented from filing a decertification petition for a "reasonable period" after an employer has voluntarily recognized a union, typically deemed to be six months to one year. Under the new proposed rule, a subsequent decertification petition is barred only for 45 days after voluntary recognition by an employer.

Lastly, the final proposed amendment limits the voluntary recognition bar in the building and construction industry. Under Section 8(f) of the Act, building and construction industry employers may choose to negotiate agreements with unions without the usual showing of majority status or an affirmative vote. Current Board law states that a Section 8(f) presumption – that building and construction employees enjoy the same status as employees of unions that have been voted in – can be based merely on the language of the collective bargaining agreement. The proposed amendment, however, requires a union to show actual, contemporaneous proof of majority status and cannot rely solely on a contract that may recite the existence of majority status.

The Notice of Proposed Rulemaking gives employers, employees and other interested parties sixty days to submit comments. This proposal marks yet another recent attempt by the Board to utilize formal notice-and-comment rulemaking to shape labor law. Employers should become familiar with these proposals before the comment period is finalized on October 11, 2019.

If you have questions or would like more information, please contact John K. Baker (bakerj@whiteandwilliams.com; 610.782.4913), Rob Pettigrew (pettigrewr@whiteandwilliams.com; 201.368.7210) or another member of the Labor and Employment Group.