# PUBLICATION

## Is It Really About Employee Voices? The National Labor Relations Board Continues its Union-Friendly Trend

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**The National Labor Relations Board (the Board) is the federal agency tasked with administering the National Labor Relations Act (the NLRA). Chief among its responsibilities is governing the union recognition process in the private sector. On Friday, July 26, 2024, the Board issued new regulations. In them, the Board reversed its own 2020 rule related to "blocking charges," voluntary recognition of a union, and recognition of a union in the construction industry. Styled as the "Fair Choice – Employee Voice Final Rule,"[1] it is set to take effect next month, on September 30, 2024.**

### Blocking Charges

A "blocking charge" is an unfair labor practice charge (ULP) filed (most often by the union) during a representation or decertification election before or after ballots are cast and counted, but before the election is certified. Traditionally, unions have filed blocking charges after predicting that the employer might win an impending election. For many years, the Board would suspend the election process while the ULP was investigated. This often gave the union time to shore up lost support among voters. A common complaint by employers was that unions employed "blocking charges" that were baseless and a way to silence, rather than amplify, employee voices and free choice in an election. The Board effectively eliminated blocking charges in regulations issued in early 2020. Under the current rule, the Board's Regional Director (RD) will allow voting to proceed but will order ballots to be impounded pending the outcome of the ULP. Thus, under the current rule, the Board will not delay the casting of ballots when a blocking charge is filed. This, practically speaking, defeated the main reason for unions (and occasionally employers) filing a ULP during an election campaign.

The new regulations reinstate the blocking charge rule of old. As of September 30, the Board's regional directors will have the authority to delay voting while they investigate and decide whether the blocking charge can be substantiated. This may seem, on its face, like a small difference, but the impact is substantial due to the likelihood that employees' right to vote in a secret-ballot election may be delayed while a union is given additional time to run a campaign.

The most glaring example of how this new rule disadvantages the employer is in the case of a decertification election. When employees in a unionized workplace petition to decertify a union, there is a vote very similar to that in a representation election. Employees generally decertify unions when they are dissatisfied with that union's representation. It is worth noting that under NLRB rules the employer cannot offer help to employees in connection with a decertification. Employees are expected to take it upon themselves to research the applicable rules and contact the Board themselves. Under the current rule, even if the union files a blocking charge during the campaign, the decertification vote will go forward but may be nullified based on the outcome of the RD's investigation. Crucially, after September 30th, the union's blocking charge may (and often will) result in the election being postponed while the RD investigates what may be a baseless ULP charge. And just as in the case of a representation election, while the RD investigates, the union has a chance to reignite pro-union sentiment among the bargaining unit in the hopes of swinging the vote in its favor.

### Voluntary Recognition

The new regulations also reinstate the "voluntary recognition bar," which has been the subject of debate at the Board for decades. In a 2007 case, the Board held that if an employer voluntarily recognized a union without an election (most often by inspecting signed union authorization cards), employees would have a 45-day period following that recognition to file a decertification petition. The Board reversed course in 2011, holding in another case that no decertification petition (or petition from a rival union) could be processed for six months to a year after recognition. The Board's early 2020 regulations revived the 45-day decertification period. Unsurprisingly, the upcoming regulations re-adopt the 2011 rule. As of September 30, 2024, voluntary recognition will mean that employees will not be able to decertify a union (and a rival union cannot file a petition) for a "reasonable period" after recognition (again, defined as six months to a year, depending on the circumstances).

The new regulations should be examined in light of two bombshell 2023 Board decisions, *Cemex* and *Stericycle*. Under the *Cemex* decision, if a union presents the employer with proof of majority support (usually by presenting signed cards), then the employer must either voluntarily recognize the union or petition for an election. If the employer agrees to voluntarily recognize, the new rule abolishes the employees' right to petition for an election within 45 days after an employer voluntarily recognizes a union.

Of course, most employers will opt to file a petition so that their employees can vote in a secret-ballot election. That's where the more significant holding in *Cemex* rears its head. That case also held that employer ULPs during a campaign will not result in a re-run election, but a "bargaining order." That is, even if the union loses the election, it still may gain certification if the employer is found to have committed ULPs.

The *Stericycle* decision is especially concerning when read in conjunction with the Board's new rule. Under *Stericycle*, the Board will find a broad array of rules commonly found in employer handbooks that impede an employee's Section 7 rights,[2] i.e., protected concerted activity. Under *Cemex,* it is possible that unlawful handbook rules could result in a bargaining order even after the employer wins the election. Now, under the new regulations, a union could file a blocking charge and avoid an election entirely by challenging an employer's handbook and arguing that under *Cemex,* the Board should issue a bargaining order due to employer ULPs.

### Construction Industry Recognition

The new regulations also contain a revision that will affect construction companies. Under the NLRA, an employer cannot recognize and bargain with a union lest the union has demonstrated that it represents a majority of the employees (through cards or an election, as noted above). Section 8(f) of the NLRA provides a limited exception to this rule, and it applies solely to the construction industry. Under Section 8(f), a construction industry employer can enter into a "pre-hire" agreement with a union and negotiate employment terms regardless of whether the employees support the union. Prior to 2020, the Board allowed an employer and union to convert an "8(f) agreement" into a normal collective bargaining agreement simply by stating that the union had demonstrated majority support to the employer. That language was sufficient to block a decertification petition or petition from a rival union during the so-called "contract bar" period (the term of the labor agreement, up to three years). No evidence would be examined to attack the contract language – this provision was enough.

The 2020 regulations allowed employees or a rival union to attack the "contract bar" status of an agreement and required the construction employer and union to retain actual proof of majority support at the time of recognition. If such evidence did not exist, a decertification or rival union petition could be filed during the term of a labor contract.

The 2024 regulations reinstate the pre-2020 rule. Thus, after September 30, 2024, contract language alone will be sufficient to block a decertification petition or petition from a rival union.

## Takeaways

The Board's new rule will encourage unions to file blocking charges. In light of the *Stericycle* decision, unions will undoubtedly attempt to point to some policy or handbook language that could be construed as violative of Section 7. If the Board agrees, under the new rule, the union will prevail not only in its blocking charge but also in the election without a single employee ever having cast a ballot.

The obvious trend here is that the Board, under the guise of giving employees fair choice, is silencing their voice by providing unions with multiple avenues to recognition, that deny employees the opportunity to ever cast a ballot. These avenues also deny employers the opportunity to campaign. In the past, one false step might cost an employer the election. Now, employers (and employees) may be lucky if there is an election at all.

Best practices for employers in light of these developments include the following:

1. Train your management team so that they are aware of Board rules during election campaigns, as well as on "warning signs" of unionization;

2. Conduct a workplace assessment to gauge employee sentiment so that issues may be addressed proactively – because if employees sign cards now, it is highly likely that the union will be certified. Under *Cemex* and the reinstated blocking charge policy, there may never be an election at all; and

3. Review and revise your handbook, because under *Cemex*, a union may gain recognition solely on the basis of unlawful handbook rules.

Further, construction employers should be wary of the language in a pre-hire agreement, because the union could gain long-term representation status if the "magic words" from the 2024 regulations are used.

It is important to note that the Board is likely to face challenges to both its rulemaking and decisions following the Supreme Court's overturn of *Chevron* deference in the landmark case of *Loper Bright Enterprises v. Raimondo* in June 2023. The 2024 regulations may well be challenged in court under the post-*Chevron* standard. We are monitoring the situation and will continue to keep our clients informed. If you have any questions regarding the current situation, please reach out to Gerald E. Bradner or any member of Baker Donelson's Labor Law Team.

[1] https://aboutblaw.com/be0k

[2] Section 7 of the National Labor Relations Act. (29 U.S.C. §§ 151-169).