



## NLRB FACT SHEET

### Final Rule to Protect Employee Free Choice

## BACKGROUND

On August 12, 2019, the National Labor Relations Board published a [Notice of Proposed Rulemaking \(NPRM\)](#) proposing three amendments to the representation election regulations located at 29 CFR part 103 to better protect employees' statutory right of free choice on questions concerning representation. The amendments remove unnecessary barriers to the fair and expeditious resolution of such questions through the preferred means of a Board-conducted secret-ballot election under the National Labor Relations Act. Specifically, the NPRM proposed revisions to three of the Board's current discretionary bars to the timely processing of a validly supported election petition: the current blocking charge policy, the immediate imposition of a voluntary recognition bar, and the contract bar created by the establishment of a Section 9(a) relationship in the construction industry based solely on contract recognition language.

On April 1, 2020, the Board finalized the rule with some changes as articulated below.

## PROPOSED RULE OVERVIEW

As detailed in the NPRM, the Board proposed three amendments to the existing rule:

- **Blocking Charge Policy:** This amendment, as initially proposed, established a vote-and-impound procedure for processing representation petitions when a party has requested blocking the election based on a pending unfair labor practice charge.

**Why is it needed?** The previous blocking charge policy permitted a party to block an election indefinitely by filing unfair labor practice charges that allegedly create doubt as to the validity of the election petition or as to the ability of employees to make a free and fair choice concerning representation while the charges remain unresolved. This policy can preclude holding the petitioned-for election for months, or even years, if at all. Therefore, in order to prevent this delay in the holding of a Board-conducted secret-ballot election, the NPRM proposed a vote-and-impound procedure whereby an election would be held regardless of whether a blocking charge and blocking request are pending and the ballots would be impounded until there is a final determination regarding the charge and its effect, if any, on the election petition or fairness of the election.

- **Voluntary Recognition Bar:** This amendment proposed modifying the current recognition bar policy by re-establishing a notice requirement and 45-day open period for filing an election petition following an employer's voluntary recognition of a labor organization as employees' majority-supported exclusive collective-bargaining representative under Section 9(a).

**Why is it needed?** Under the previous policy, an employer's voluntary recognition of a union immediately barred the filing of an election petition for no less than six months after the date of the parties' first bargaining session and no more than one year after that date. The imposition of an immediate recognition bar, followed by the execution of a collective-bargaining agreement, can preclude a Board-conducted secret-ballot election contesting the initial non-electoral recognition of a union as the majority-supported exclusive bargaining representative for as many as four years. This is despite the court- and Board-recognized statutory preference for resolving questions concerning representation

through a Board-conducted secret-ballot election. Therefore, this amendment requires the employer to post a notice to employees that it has voluntarily recognized a union and provides the employees a 45-day open period to petition for a Board-conducted secret-ballot election.

- **Proof of Majority-Based Recognition in the Construction Industry:** This amendment, as initially proposed, states that in order to prove the establishment of a Section 9(a) relationship in the construction industry and the existence of a contract bar to an election, extrinsic evidence is required to demonstrate that recognition was based on a contemporaneous showing of majority employee support.

**Why is it needed?** Section 8(f) of the Act addresses the unique characteristics of employment and bargaining practices in the construction industry and permits an employer and labor organization in the construction industry to establish a collective-bargaining relationship in the absence of majority support, an exception to the majority-based requirements for establishing a collective-bargaining relationship under Section 9(a). Yet, current Board law also permits an employer and labor organization representing employees engaged in the construction industry to prove Section 9(a) recognition based on contract language alone without any other evidence of a contemporaneous showing of majority support and, thus, triggering the three-year contract bar against the processing of election petitions filed by employees and other parties. Therefore, in order to restore the protections of employee free choice to those employees engaged in the construction industry, the amendment states that an employer and labor organization representing employees engaged in the construction industry can only establish a Section 9(a) bargaining relationship based on positive evidence, apart from contract language, of the labor organization's majority support.

## CHANGES FROM THE PROPOSED RULE IN FINAL RULE

- **Blocking Charge Policy:** The final rule does not retain the proposed rule's vote-and-impound procedure in all cases. Rather, it requires impoundment only for cases where the unfair labor practice charge, filed by the party that is requesting to block the election process, alleges (1) violations of Section 8(a)(1) and 8(a)(2) or Section 8(b)(1)(A) of the Act that challenge the circumstances surrounding the petition or the showing of interest submitted in support of the petition; or (2) that an employer has dominated a union in violation of Section 8(a)(2) and seeks to disestablish a bargaining relationship. For cases that involve all other types of unfair labor practice charges, the final rule requires that the ballots be opened and counted, rather than impounded. Regardless of the nature of the charge, the certification of results (including, where appropriate, a certification of representative) shall not issue until there is a final disposition of the charge and its effect, if any, on the election petition.
- **Voluntary Recognition Bar:** The final rule clarifies that it will apply only to an employer's voluntary recognition on or after the effective date of the rule, and to the first collective-bargaining agreement reached after such voluntary recognition. Additionally, the final rule clarifies that the employer "and/or" (rather than "and") the labor organization must notify the Regional Office that recognition has been granted. The final rule also specifies where the notice should be posted ("in conspicuous places, including all places where notices to employees are customarily posted"); eliminates the proposed rule's specific reference to the right to file "a decertification or rival-union petition" and instead refers generally to "a petition"; adds a requirement that an employer distribute the notice to unit employees electronically if the employer customarily communicates with its employees by such means; and sets forth the wording of the notice.
- **Proof of Majority-Based Recognition in the Construction Industry:** The final rule clarifies that it shall apply only to voluntary recognition extended on or after the effective date of the rule and to any collective-bargaining agreement entered into on or after the date of voluntary recognition extended on or after the effective date of the rule.