

Small Entity Compliance Guide

Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction-Industry Collective-Bargaining Relationships

29 C.F.R. §§ 103.20, 103.21, and 103.22

Released April 1, 2020

This Guide is prepared in accordance with the requirements of section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It is intended to help small entities comply with the rule adopted in the above-referenced National Labor Relations Board (NLRB or Board) rulemaking docket (Rulemaking Identifier Number 3142-AA16). This Guide is not intended to replace or supersede that rule, but to facilitate compliance with the rule. Although we have attempted to cover all parts of the rule that might be especially important to small entities, the coverage may not be exhaustive. This Guide cannot anticipate all situations in which the rule applies. Furthermore, the Board retains the discretion to adopt case-by-case approaches, where appropriate, that may differ from this Guide. Any decision regarding a particular small entity will be based on the National Labor Relations Act (NLRA or Act) and any relevant rules.

The Board may decide to revise this Guide without public notice to reflect changes in the Board's approach to implementing a rule, or it may clarify or update the text of the Guide. Direct your comments and recommendations, or calls for further assistance, to:

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I. SUMMARY OF THE RULE AND ITS OBJECTIVES

The final rule referenced above makes three amendments to the Board’s existing procedures—not previously incorporated in the Board’s Rules and Regulations—regarding representation of employees by a labor organization. The Board made all three amendments to better protect employees’ statutory right of free choice on questions concerning representation.

A. Eliminating the “Blocking-Charge” Policy

The first amendment in the final rule modifies the Board’s procedures concerning representation elections. Specifically, under the prior procedures collectively termed the “blocking-charge” policy, an election could be “blocked”—in other words, delayed—if a charge was filed with the Board alleging that one or more unfair labor practices had been committed, and the party that filed the charge also requested that the election be blocked. This policy sometimes delayed petitioned-for elections for months or even years. Courts of appeals criticized the policy’s adverse impact on employees’ right to vote in Board-conducted representation elections and noted that incumbent unions could abuse the policy to avoid a challenge to their representative status. The Board determined that the policy improperly impeded employee free choice by unnecessarily delaying elections.

As a result of these concerns, through the first amendment in the final rule—codified as 29 C.F.R. § 103.20—the Board eliminated the blocking-charge policy. With certain exceptions, when a party to a representation proceeding files an unfair labor practice charge and a request to block the election process, ballots will be promptly opened and counted at the conclusion of the election, notwithstanding that unfair labor practice charges have been filed. However, a different process applies when charges are filed alleging violations of Section 8(a)(1) and 8(a)(2) or Section 8(b)(1)(A) of the Act (29 U.S.C. § 158(a)(1), 158(a)(2), and 158(b)(1)(A)) that challenge the circumstances surrounding the election petition or the showing of interest submitted in support of the petition, or alleging that an employer has dominated a union in violation of Section 8(a)(2) of the Act and seeks to disestablish a bargaining relationship. When such a charge has been filed, as well as a request to block the election process, and the charge remains pending when the election concludes, the regional director shall impound the ballots for up to 60 days from the conclusion of the election. If an unfair labor practice complaint issues with respect to the charge at any point before that 60-day period ends, then the ballots shall continue to be impounded until there is a final determination regarding the allegation in the complaint and its effect, if any, on the election petition. If the charge is withdrawn or dismissed at any time during that 60-day period, or if the 60-day period ends without a complaint issuing, then the ballots shall be promptly opened and counted. The rule further provides that the 60-day period will not be extended, even if more than one unfair labor practice charge is filed serially. And, for all types of unfair labor practice charges, the certification of election results—including, where appropriate, a certification of representative—shall not issue until there is a final disposition of the charge and a determination of its effect, if any, on the election petition.

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B. Voluntary Recognitions—“Window Period” and Notice

The second amendment in the final rule modifies the Board’s prior procedures concerning employers’ voluntary recognition of labor organizations. Under the prior procedure, if an employer voluntarily recognized a union as the majority-supported collective-bargaining representative of a unit of the employer’s employees, then the voluntary recognition would immediately bar an election petition for a reasonable period of time, up to 1 year, from the date of the parties’ first collective-bargaining session. Then, under the Board’s contract-bar doctrine, if a collective-bargaining agreement was reached during that insulated reasonable period, election petitions would be barred for the duration of the agreement, up to 3 years.

In order to better protect employees’ free choice to select their representative through the preferred method of a Board-conducted, secret-ballot election, the second amendment in the final rule—codified as 29 C.F.R. § 103.21—provides that an employer’s voluntary recognition of a labor organization, and the first collective-bargaining agreement executed on or after the date of such voluntary recognition, will bar an election petition only if all of the following occur: (1) the employer and/or the labor organization notifies a Board Regional Office that recognition has been granted; (2) the employer posts, in conspicuous places, including all places where notices to employees are customarily posted, a notice of recognition (provided by the Regional Office) informing employees that recognition has been granted and that they have a right to file an election petition during a 45-day “window period” beginning on the date the notice is posted; (3) the employer distributes the notice electronically to employees in the petitioned-for unit, if the employer customarily communicates with its employees electronically; and (4) 45 days from the posting date pass without a properly supported petition being filed. The final rule also sets forth the wording that shall be included in the notice and states that this aspect of the rule will apply only to voluntary recognitions on or after the rule’s effective date.

C. Construction Industry—Proof of Support by a Majority of Employees

The third amendment in the rule applies specifically to the construction industry, where collective-bargaining relationships are presumptively governed by Section 8(f) of the Act (29 U.S.C. § 158(f)). Under Section 8(f), a construction-industry employer may lawfully enter into a collective-bargaining agreement with a union regardless of whether the union enjoys majority support among the employees covered by that agreement, but the agreement cannot bar those employees from petitioning for an election to reject that union or select a different union. In contrast, under Section 9(a) of the Act (29 U.S.C. § 159(a)), an employer may lawfully recognize a union as the bargaining representative of a unit of its employees only if a majority of those employees choose the union to represent them, and that recognition brings with it the recognition-bar and contract-bar consequences described above in Section I.B. A construction-industry employer may recognize a union as the Section 9(a) representative of its employees, so long as a majority of those employees choose the union to represent them.

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The question addressed in this section of the final rule is, What evidence suffices to demonstrate that a majority of employees of a construction-industry employer have chosen a union as their bargaining representative under Section 9(a)? Under the Board's prior precedent, a construction-industry employer and union could demonstrate majority-employee support simply by reciting certain language in their collective-bargaining agreement, including that the union showed or offered to show the employer evidence of such majority support. The Board would not look behind that language to see whether it was true; there was no requirement of positive evidence that a majority of unit employees actually supported the Union. If the language of the agreement met the Board's formal requirements, a Section 9(a) bargaining relationship was formed, and election petitions were contract-barred.

The United States Court of Appeals for the District of Columbia Circuit sharply criticized that precedent, and the Board agreed that it did not adequately protect employee free choice in the construction industry. For these reasons, the Board implemented the third amendment in the final rule, codified as 29 C.F.R. § 103.22. Under that amendment, a construction-industry voluntary recognition or collective-bargaining agreement based on such a recognition will no longer bar an election petition filed to decertify an incumbent union or select a different union unless there is positive evidence that the incumbent union unequivocally demanded recognition as the Section 9(a) (i.e., majority-supported) exclusive bargaining representative of the employer's employees, and that the employer unequivocally accepted the union as such a representative based on a contemporaneous showing of support from a majority of employees in an appropriate unit. Thus, the rule provides that collective-bargaining agreement language, standing alone, will no longer be sufficient to provide the showing of majority support. Finally, the rule provides that it applies only to construction-industry voluntary recognitions extended on or after the rule's effective date, and to any collective-bargaining agreement that is entered into on or after the date of a voluntary recognition that is extended on or after the effective date of the rule.

II. ENTITIES SUBJECT TO THE RULE

The Board does not have jurisdiction over all employers. Under Section 2(6) and (7) of the Act (29 U.S.C. § 152(6) and (7)), the Board has statutory jurisdiction only over private-sector employers whose activity in interstate commerce exceeds a minimal level. To this end, in general, the Board asserts jurisdiction over employers in the retail-business industry if they have a gross volume of business of \$500,000 or more per year. Shopping-center and office-building retailers have a lower threshold of \$100,000 per year. And the Board asserts jurisdiction over non-retailers generally where the value of goods and services purchased from entities in other states is at least \$50,000 per year.

Additionally, the following employers are excluded from the NLRB's jurisdiction by statute:

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- Federal, state and local governments, including public schools, libraries, and parks, Federal Reserve banks, and wholly-owned government corporations (29 U.S.C. § 152(2));
- Employers that employ only agricultural laborers, those engaged in farming operations that cultivate or harvest agricultural commodities or prepare commodities for delivery (29 U.S.C. § 152(3)); and
- Employers subject to the Railway Labor Act, such as interstate railroads and airlines (29 U.S.C. § 152(2)).

If the Board does not have jurisdiction over an employer, then none of the amendments in the final rule will apply to that employer or a labor organization that represents the employer's employees. Further, the third amendment in the final rule applies only to employers and labor organizations in the building and construction industry who enter into bargaining relationships that purport to be based on majority employee support. The following discussions regarding compliance, recordkeeping, and reporting requirements apply only to "covered entities"—i.e., employers and labor organizations to which the amendments in the final rule apply.

III. COMPLIANCE REQUIREMENTS

Although not a compliance requirement under the rule, the Board expects that covered entities will review the rule and ensure that they correctly understand the substantive changes to the Board's existing practices made by all three amendments in the final rule.

Further, the first amendment in the final rule will apply only under certain circumstances—namely, when a party to a representation proceeding files an unfair labor practice charge and requests a delay in the count of ballots or the certification of results after an election. Because, under the prior blocking-charge policy, the election would have been delayed, the first amendment in the final rule may cause some elections to occur sooner than they would have before the rule, and it may also lead to some elections that would not have occurred at all before the rule. As a result, this amendment may require some employers and labor organizations to prepare for and participate in elections that may not have occurred but for the rule, and to comply with the Board's election processes. However, as discussed in greater detail in the Federal Register notice accompanying the final rule, the Board does not anticipate that this will affect a substantial number of small entities.

The second amendment in the final rule will apply only to covered employers and unions who enter into bargaining relationships based on voluntary recognition. If those employers and unions want to obtain recognition-bar and contract-bar insulation from decertification and rival union petitions, then the amendment requires the employer (or union) to notify a Board Regional Office of the grant of voluntary recognition, and it also requires the employer to open the notice sent from the Board, insert certain information specific to the parties to the voluntary

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recognition, post the notice physically (depending on where and how the employer customarily posts notices to employees), distribute it electronically (if the employer customarily communicates with employees electronically), and complete a certification-of-posting form to be returned to the Region at the close of the notice-posting period. Contact information for the NLRB's Regional Offices may be found here: <https://www.nlr.gov/about-nlr/who-we-are/regional-offices>. Because employees will have a 45-day "window period" following the posting of the notice to file an election petition, the second amendment in the final rule, like the first amendment, may require some employers and labor organizations to prepare for and participate in elections that may not have occurred but for the rule, and to comply with the Board's election processes. However, as discussed in greater detail in the Federal Register notice accompanying the final rule, the Board does not anticipate that this will affect a substantial number of small entities.

The third amendment in the final rule will apply only to construction-industry employers and unions that enter into bargaining relationships that purport to be based on majority employee support. Under the rule, those employers and unions may no longer rely solely on collective-bargaining-agreement language to demonstrate such majority support; they may rely only on positive evidence that the union unequivocally demanded recognition as the majority-supported exclusive bargaining representative of the employer's employees, and that the employer unequivocally accepted the union as such representative based on a contemporaneous showing of support from a majority of employees in an appropriate unit. As discussed in Section IV below, this may impose some recordkeeping requirements. But it does not directly impose any compliance requirements (other than the requirement to review and understand the amendment, as discussed above).

IV. RECORDKEEPING AND REPORTING REQUIREMENTS

The first amendment in the final rule does not impose any recordkeeping or reporting requirements.

As for the second amendment, the rule does not impose any recordkeeping requirements, and the only reporting requirements involve employers and unions that enter into bargaining relationships based on voluntary recognition. For those entities, if they want to obtain recognition-bar and contract-bar insulation from decertification and rival union petitions, the employer or union must notify a Board Regional Office of the grant of voluntary recognition, and the employer must complete a certification-of-posting form to be returned to the Region at the close of the notice-posting period.

Finally, the third amendment does not directly impose any recordkeeping or reporting requirements on construction-industry employers or labor unions. It is likely that construction-industry labor organizations will retain positive evidence that they did in fact enjoy majority employee support when they demanded recognition as the employees' Section 9(a) collective-bargaining representative and that the employer granted such recognition. However, there is no

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reason for a labor organization to implement a record-retention system that is more sophisticated than its normal-course-of-business records retention, so any additional recordkeeping will likely be de minimis.

V. IMPLEMENTATION DATE

The rules adopted in 29 C.F.R. §§ 103.20, 103.21, and 103.22, will become effective June 1, 2020.

VI. INTERNET LINKS

More information about this rule may be found on the NLRB's website at:

<https://www.nlr.gov/about-nlr/what-we-do/national-labor-relations-board-rulemaking/election-protection-rule>

The Federal Register notice publishing the final rule may be found here:

<https://www.govinfo.gov/content/pkg/FR-2020-04-01/pdf/2020-06470.pdf>

The NLRB press release announcing the issuance of the final rule may be found here:

<https://www.nlr.gov/sites/default/files/attachments/basic-page/node-7583/election-protection-final-rule-press-release.pdf>

A fact sheet accompanying the press release may be found here:

<https://www.nlr.gov/sites/default/files/attachments/basic-page/node-7583/election-protection-final-rule-fact-sheet.pdf>

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