BURR ALERT 2019

NLRB Proposes Rulemaking to Protect Employee Free Choice

By Emily C. Burke August 2019

On Friday, August 9, 2019, the National Labor Relations Board ("NLRB" or "Board") issued its first set of proposed regulations in an effort to revamp current procedures related to the union election process. A three-member Board majority, over one objection, issued a 113 page proposed rule to better protect employees' right of free choice and remove unnecessary barriers to Board-conducted secret ballot elections.

First, the proposed rule sets out to amend the Board's "blocking charge" policy, which currently allows unions to block an election by filing a charge alleging an employer illegally coerced employees into voting a particular way. The proposed rule replaces the "blocking charge" policy with a "vote-and-impound" procedure, which would strip the charge of its blocking power and allow for an election to go forward. Under the vote-and-impound procedure, the ballots would be collected, but not counted until the charge is resolved and it is determined that there was no misconduct or the misconduct had no impact on the election.

Second, the NLRB proposed amending the Board's "voluntary bar" policy, which currently prevents employees from filing a decertification petition for a "reasonable period of time" after a union is voluntarily recognized by an employer. Friday's proposal suggests returning to the standard first announced in a 2007 NLRB decision, *Dana Corp.*, 351 NLRB 434 (2007), where the Board held an election petition can be filed and processed if filed within forty-five days following notice of voluntary recognition.

Third, the NLRB proposed a new standard of proof for forming Section 9(a) collective bargaining relationships in the construction industry. Specifically, the Board proposed that contract language alone is insufficient proof of a 9(a) bargaining relationship and instead, formation should be evidenced by extrinsic proof of contemporaneous majority support.

Following publication in the Federal Register on Monday, August 12, 2019, public comments are invited on all aspects of the proposed rule and must be submitted within sixty days. Therefore, employers facing issues related to or involving these proposed changes should not halt or alter their current labor strategies as these are merely proposed changes, which have yet to take effect. Employers are encouraged to consult with a labor attorney before reacting to any of the proposed changes described above.

To discuss further, please contact:

Emily C. Burke at eburke@burr.com or (205) 458-5126

or the Burr & Forman attorney with whom you normally work.