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INFORMATION MEMO
LABOR AND EMPLOYMENT LAW

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The NLRB Publishes Proposed Rules Amending Procedures in Representation Cases

On August 12, 2019, the National Labor Relations Board ("NLRB" or the "Board") published proposed rules with the goal of protecting "employees' statutory right of free choice on questions concerning representation." The proposed rules would amend three Board policies and practices that are not currently set forth in its rules and regulations: (1) the "blocking charge policy"; (2) the "voluntary recognition bar"; and (3) the standard of proof required to convert a Section 8(f) collective bargaining relationship into a Section 9(a) bargaining relationship in the construction industry.

The Board's current "blocking charge policy" allows a union to effectively derail an election by filing an unfair labor practice charge that allegedly creates doubt as to the validity of a decertification petition or as to the ability of employees to make a free choice concerning representation. Unions commonly file meritless unfair labor charges to delay decertification elections and certification elections they lack the necessary support to win. This tactic may delay the petitioned-for election for months, or even years. The NLRB's proposed rule would impose a "vote and impound procedure" under which the election process continues despite the unfair labor practice charge, the ballots are impounded after the election, and then counted after the charge has been resolved. The rule would also require a party requesting to block an election to file a written offer of proof that includes names of the witnesses who will testify in support of the charge and a summary of each witness' anticipated testimony. With this rule, the NLRB hopes to prevent unions from filing meritless charges as a strategy to delay elections.

The Board also proposed a rule that would implement its 2007 *Dana Corp.* decision. In *Dana Corp.*, the Board majority held that there would be no bar to an election following an employer's grant of voluntary recognition unless: (1) affected unit employees receive adequate notice of the recognition and of their opportunity to file a decertification petition or rival union election petition within 45 days; and (2) 45 days pass from the date of the notice without the filing of a petition. The Board's *Dana Corp.* decision was overruled by a new Board majority in its 2011 *Lamons Gasket Company* decision. In *Lamons Gasket*, the Board returned to an immediate voluntary recognition bar policy, without the 45-day notice and opportunity to file a decertification petition or rival union election petition. The Board's proposed rule would overrule *Lamons Gasket* and codify its holding in *Dana Corp.*

Finally, the Board proposed a rule to change the standard of proof required to convert a Section 8(f) bargaining relationship into a Section 9(a) bargaining relationship in the construction industry. The significance of the distinction between these two different types of bargaining relationships is that a bargaining relationship under Section 9(a) bars subsequent decertification and rival union election petitions for three years, while a Section 8(f) bargaining relationship does not preclude the filing of a subsequent petition for a Board election. Current Board case precedent permits employers and unions to convert a Section 8(f) bargaining relationship into a Section 9(a) relationship as long as there is language in the collective bargaining agreement that the union requested Section 9(a) representative recognition and offered to show evidence of its majority support. The Board's proposal, if implemented, would raise

the standard of proof. Under the proposed rule, the union must be able to present "positive evidence" – apart from contractual language – that the employer unequivocally accepted the union's demand for Section 9(a) recognition based on a contemporaneous showing of support from a majority of employees in the bargaining unit. In the absence of such evidence, the parties' relationship will remain a Section 8(f) relationship and there will be no bar to subsequent decertification or rival union election petitions.

The NLRB's proposed rule is open to public comments until October 11, 2019. Comments can be submitted through the Federal eRulemaking Portal.

If you have any questions about this Information Memo, please contact Justin A. Reyes, any of the attorneys in our Labor and Employment Law Practice, or the attorney in the firm with whom you are regularly in contact.

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