

# LABOR AND EMPLOYMENT LAW

## INFORMATION MEMO

NOVEMBER 30, 2022

### NLRB Proposes to Roll Back Union Election Rules

On Nov. 2, 2022, the National Labor Relations Board (NLRB) issued a [Notice of Proposed Rulemaking](#) seeking to strengthen protections for unions in the election process. Among other things, the proposal would alter the rules instituted by the Trump Board in 2020 that made it easier for employees to decertify incumbent unions. The proposed changes are purportedly intended to protect workers' ability to make free choices regarding union representation and to encourage collective bargaining.

If employees are dissatisfied with their existing union representation, they can start the process of removal through what is known as a "decertification petition." Before a decertification election can occur, however, at least 30% of employees in the relevant bargaining unit must sign a petition or sign cards asking the NLRB to conduct a decertification election. Then, unless a majority of votes cast in the election are in favor of the existing union, the union would be decertified. The three rules at issue in the Board's proposal all concern these decertification elections or the initial union elections.

#### 1. Blocking Charges

"Blocking charges" refer to unfair labor practice (ULP) charges that can halt or "block" the processing of a petition (for either the initial election or a decertification election). The 2020 rule change weakened these charges by requiring regional directors to conduct elections in the face of a blocking charge regardless of the severity or the apparent merit of the underlying ULP charge.

Under the proposed change to the rule, the Board's regional directors would be permitted to decline to process election petitions at the request of a party who has filed the ULP charge alleging conduct (1) that would interfere with employee free choice in an election or (2) that is inconsistent with the petition itself (and which is supported by a list of witnesses who will testify in support of the charge), until the merits of the charge can be determined. Under this rule, elections would be blocked by impounding the ballots that have been cast until the charges are resolved or by refusing to certify the election results until any charges are resolved.

#### 2. Voluntary Recognition

In general, a union that is voluntarily recognized by the employer enjoys a presumption of majority support. As a result, for a certain period of time after an employer agrees to recognize a union—based on evidence that a majority of employees want the union to represent them—all challenges of the union's majority status are prohibited. In other words, after voluntary recognition, (i) no party to the election can challenge whether the union has the support of the employees for a "reasonable period of time," and (ii) the employer is prohibited from making unilateral changes to employees' terms and conditions of employment.

The length of what constitutes a "reasonable period of time" is at issue in this rule change proposal. In 2020, the Trump Board reinstated a standard that gave workers or a rival union a 45-day post-

recognition window for filing a decertification petition. The Biden Board now seeks to dispose of the 45-day post-recognition window and define the “reasonable period” to be at least 6-months, and no longer than 1-year, from the first bargaining session.

### **3. Construction Industry Bargaining Relationships**

The last proposed rule change applies exclusively to the building and construction industry. Because of the transient and sporadic nature of many construction projects, unions and businesses are permitted to set work terms and conditions in a contract called a “pre-hire agreement” without proving the support of a majority of the workers in the bargaining unit (a practice that is prohibited in all other industries).

However, to obtain the various benefits of majority status, construction worker unions have to take some action to prove majority support. In 2020, for the first time, unions were required to provide “positive evidence of majority support,” which could be challenged at any point after the initial bargaining agreement. The 2022 proposed changes seek to return to the prior standard by (1) permitting sufficiently detailed contract language to prove majority support, and (2) reinstating the 6-month limitations period for decertification petitions in the construction industry.

The NLRB is seeking comment on all of these proposed changes over a 60-day public comment period. It therefore remains to be seen which of these proposed changes will go into effect. Employers—especially those with unionized workplaces—should continue to monitor the status of the NLRB’s proposal.

If you have any questions or would like additional information regarding the potential scope of exposure, mitigation or other legal developments arising in labor relations, please contact [Samuel Dobre](#) or any attorney in Bond’s [labor and employment practice](#).

*\*Special thanks to Associate Trainee Michael Kratochvil for assisting with researching and drafting this memo.*

