

# NLRB Finalizes Three Amendments to Election Procedures, Continuing Rulemaking Agenda

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On the heels of [guidance](#) regarding when the duty to bargain may be suspended or modified during the COVID-19 pandemic, the National Labor Relations Board (“NLRB” or “Board”) finalized rulemaking [today](#) that changes three aspects of the Board’s representation election procedures ([“Final Rule”](#)).

The Final Rule overhauls the handling of unfair labor practice charges commonly referred to as “blocking charges” when a petition for an election is pending, revamps the Board’s voluntary recognition bar doctrine, and changes the evidentiary requirements for barring elections in the construction industry when an employer has voluntarily recognized or entered into a collective bargaining agreement (“CBA”) with a union. Originally proposed on August 12, 2019, the Final Rule is scheduled to be published on April 1, 2020, eight days after the Board [announced](#) it would be [delaying implementation of broader changes to other representation case procedures](#).

## An End to Voting Delay via Blocking Charges

The first, and potentially most impactful, amendment in the Final Rule modifies the Board’s current practices that permit a party to a representation proceeding to block an election, including a decertification, based on pending unfair labor practice (“ULP”) charges. Such ULP charges, known as blocking charges, are typically filed before an election by a union that is seeking to represent a new bargaining unit of employees, or by an incumbent union facing a decertification vote. Under the Board’s current procedures, the party filing blocking charges may ask that the election be deferred until after the Board resolves the charges. Observers of the election process have often viewed blocking charges as a delay tactic by unions seeking to shore up waning support as election day approached, or as a means of avoiding or delaying employee attempts to remove a union through decertification, sometimes for years.

The Final Rule changes the Board’s procedure to allow the election to proceed despite pending ULP charges. This change effectively ends the ability to block employees from voting in an election

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through the filing of ULP charges. In the rule the Board initially proposed, ballots would have been impounded in all cases with pending ULP charges. Under the Final Rule, election ballots will be either counted or impounded until after the charges are resolved, depending on the nature of the charges.

Ballots will be impounded only where the party filing ULP charges requests to block the election process and the charges filed:

- Allege violations of Section 8(a)(1) and 8(a)(2) or Section 8(b)(1)(A) of the National Labor Relations Act (“Act”) and challenge the circumstances surrounding the petition or showing of interest; or
- Allege violation of Section 8(a)(2) through employer domination of a union and that the employer seeks to disestablish the bargaining relationship.

For all other ULP charges, the ballots cast in an election will be opened and counted at the conclusion of the election.

In cases that trigger the impounding of ballots, the Regional Director will impound ballots for up to 60 days from the conclusion of the election if the ULP charge has not been withdrawn or dismissed prior to the conclusion of the election. If a complaint issues within the 60-day period, the ballots will remain impounded until the charge is resolved. If the ULP charge is withdrawn or dismissed within the 60-day period, or the 60-day period expires without issuance of a complaint, the ballots will be opened and counted. Significantly, the serial filing of additional ULP charges will not serve to extend the 60-day period.

Under the Final Rule, regardless of the type of ULP charges involved, the Board will not issue a certification of the results until the charges are resolved. The overall impact of the Board’s modification of its practices is that a blocking-charge request may only delay the vote count or certification of results, but will not delay the Board conducting a representation election. The Final Rule is scheduled to be published on April 1, 2020, and will become effective 60 days after publication.

## **Voluntary Recognition Bar**

The second amendment in the Board’s Final Rule reworks how the Board handles representation petitions after an employer has voluntarily recognized a union. Under current Board practices, when an employer voluntarily recognizes a union under Section 9(a) of the Act, the union is insulated from any challenge to its majority status for “a reasonable period of time” to allow for collective bargaining. The Board has defined a reasonable period of time as “no less than 6 months after the parties’ first bargaining session and no more than 1 year.” [Lamons Gasket Co.](#), 357 NLRB 739, 748 (2011). When parties reach agreement on a CBA during this insulated period, the Board generally bars elections for up to 3 years of the new contract’s term under the contract bar doctrine, which can effectively serve to bar subsequent petitions for a total of up to 4 years.

Under the Final Rule, for voluntary recognition of a union to serve as a bar to a subsequent representation petition, unit employees must receive notice that voluntary recognition has been granted and be provided with a 45-day open period to file a decertification or for a rival union to file a petition to represent the unit. The notice must be posted in conspicuous places where notices to

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employees are customarily posted, and must be distributed to employees electronically if the employer customarily communicates with employees through electronic means.

Correspondingly, agreement to a first contract with a voluntarily recognized union will not serve to bar petitions for up to 3 additional years if the notice and open-period requirements of the Final Rule have not been met. The Final Rule applies prospectively to the voluntary recognition of a union on or after the effective date of the Final Rule.

## Recognition of Unions in the Construction Industry

The last amendment in the Board's final rule pertains to recognition of unions in the construction industry. Under Section 8(f) of the Act, employers and unions in the construction industry may enter into pre-hire agreements without any vote by employees. Such pre-hire agreements, however, do not serve as a bar to subsequent petitions for a Board election.

Nonetheless, under the Board's current standards, employers and unions that have entered into such agreements may convert the 8(f) pre-hire relationship into a traditional collective bargaining relationship under Section 9(a) of the Act, and may do so absent a Board-conducted election or a demonstration of majority support. Under a 2001 decision, [Staunton Fuel & Material](#), 335 NLRB 717, the Board held that construction unions could establish Section 9(a) collective bargaining relationships by entering into a contract with language stating that: (1) the union requested recognition as a majority or Section 9(a) bargaining representative of employees; (2) the employer recognized the union as the majority or Section 9(a) representative; and (3) the recognition was based on the union showing, *or offering to show*, evidence of majority support.

The Final Rule provides that contract language alone cannot create a Section 9(a) bargaining relationship in the construction industry. Instead, the Board will require positive evidence that proves a union demanded recognition from an employer and the employer granted recognition *based on a demonstration of majority support*. The Final Rule's amendment concerning the recognition of construction unions applies to voluntary recognition extended on or after the effective date of the Final Rule, and to any CBA entered into on or after the date of voluntary recognition extended on or after the effective date of the Final Rule.

## The Board's Continuation of its Rulemaking Agenda

Despite the indefinite postponement of all representation [elections](#) and the limitations imposed on the operations of [NLRB Regional Offices](#) due to the impact of COVID-19, the Board issued the Final Rule within the general timeframe expected for the rule, given the extension of deadlines for comments to the initial proposal for the rule. Notably, in the Final Rule, the Board specifically references its broader changes to other representation case procedures that were scheduled to become final on April 16, 2020, but which are currently postponed until at least May 31, 2020 due to legal challenges filed by organized labor earlier this month. In this Final Rule, the Board notes that those broader changes to representation election rules are still "scheduled to take effect in Spring 2020." For now at least, the Board appears positioned to continue its planned rulemaking changes despite the uncertain times.

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