

Labor Board Renews 'Blocking Charge' Policy in Election Rule (2)

By Robert Lafolla and Parker Purifoy 2024-07-26T08:59:26000-04:00

- NLRB nixes three Trump-era policy amendments
- Regulation boosts voluntary recognition of unions

The National Labor Relations Board rolled back a trio of union election policies from the final year of the Trump administration covering blocking charges and rules related to voluntary recognition of unions absent a secret ballot election.

The NLRB's three Democratic members issued a [regulation](#) Friday that revived its blocking charge policy that allows for pausing an election—including a decertification vote to eject an existing union from a workplace—when unfair labor practices are alleged.

The rule also restored the full six-month bar on decertification petitions for voluntarily recognized unions by eliminating the 45-day window to challenge such recognition, and eased voluntary bargaining relationships in the construction industry.

The changes “will better protect employees’ statutory right of free choice on questions concerning representation, further promote industrial stability, and more effectively encourage the practice and procedure of collective bargaining,” the NLRB said in its final rule.

The regulation making those changes will take effect in late September.

NLRB member Marvin Kaplan, the board’s sole Republican, dissented from the measure.

Blocking Charges

Reinstating the blocking charge policy appears to be the most significant of the three changes in the NLRB’s election rule. That policy, which permits NLRB regional directors to halt an election upon a party’s request while the agency investigates the party’s unfair labor practice allegations, is designed

to protect workers from voting in an atmosphere tainted by coercion.

But critics say it permits unions to file frivolous charges to delay decertification elections. To address this, the board also reinstated a 2014 amendment to the rule which requires parties seeking a blocking charge to present a list of witnesses who can attest to the charge and make them available to testify.

Joshua Nadreau, partner and vice-chair of the labor relations group at Fisher & Phillips LLP, said this measure does little to abate fears that unions might “abuse and manipulate” the process to pause decertification efforts because it doesn’t allow the employer to cross examine named witnesses or present its own evidence.

“If the other party isn’t even involved in that process, that seems unfair to me,” he said. “There’s already a ton of suspicion around blocking charges in the first place but if we’re just hearing one side of the story and using that to hold up what I view as employees’ free choice, that doesn’t seem like a compromise.”

The NLRB’s now-defunct [2020 change](#) called for either counting or impounding ballots depending on the type of allegation, then certifying the election results after the charges are resolved.

Prior to restoring the blocking charge policy, the Biden board had weakened that Trump-era amendment with its 2022 decision in [Rieth-Riley Construction](#), which permits regional directors to dismiss decertification petitions if alleged labor law violations could taint the election. The *Rieth-Riley* decision has been used in the past year to [dismiss](#) nearly two dozen [decertification petitions](#) at Starbucks stores around the nation based on complaints that the coffee giant has [unlawfully stalled the bargaining process](#).

In the new regulation, the board states that *Rieth-Riley* only covers one part of the blocking charge policy and “does not adequately protect employee rights.” *Rieth-Riley* only allows regional directors to dismiss election petitions if the blocking charges undermine the petition itself. Examples of this include a union using unlawful coercion to obtain petition signatures or an employer’s unlawful participation in seeking a union’s ouster.

Friday’s rule would expand the type of blocking charges to include other types of unlawful behavior, including threats and promises of benefits.

The measure re-establishing a six-month bar on decertification petitions for voluntarily recognized unions comes at a fortuitous time for organized labor. The NLRB's 2023 decision in [Cemex Construction Materials Pacific, LLC](#) requires that employers either [voluntarily recognize](#) a union or file RM election petitions with the agency when unions come to them with proof of majority employee support. Since the ruling, the board has seen a [meteoric rise](#) in the number of [RM petitions](#).

The board said in its rule that the 45-day window for a worker to challenge a union's recognition "has little, if any, demonstrable benefit in promoting employee free choice, while imposing administrative costs on the board and compliance costs on employers."

Daniel Altchek, partner at Saul Ewing LLP, said that Friday's rule on top of the *Cemex* decision represent compounding set-backs for employers.

"The blocking charge rule allows regional directors to suspend the processing of decertification petitions and *Cemex* creates more opportunity for elections to never be held in the first place based on any unfair labor practices during the election period," he said. "You put those together and the result is strengthening the hand of unions in the election process."

Court Challenges

The rule will likely face litigation amid heightened scrutiny on federal agencies after the US Supreme Court overturned the *Chevron* doctrine [last month](#).

A panel on the US Court of Appeals for the Fifth Circuit stayed NLRB procedures against Elon Musk's SpaceX while the courts litigate the constitutionality of the agency's structure. The NLRB also recently [abandoned](#) its bid to challenge a district court's ruling that struck down its [2023 joint-employer rule](#).

Nadreau and Altchek both said they wouldn't be surprised to see court challenges to Friday's election rule.

"I think basically any action by this agency that's already seen as pretty political and partisan in nature will be challenged by Republicans and business leaders," Nadreau said.

(Updated to include additional reporting throughout.)

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