Podcast

Language Matters: How the New Fair Choice Rule Is Shaping the Construction Industry

By Brian P. Lundgren & M. Christopher Moon

November 12, 2024

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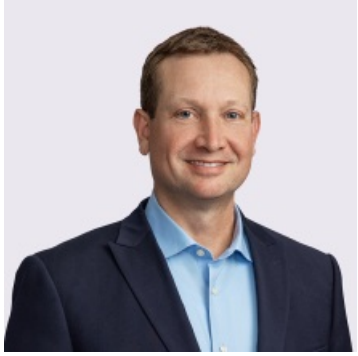

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The National Labor Relations Board's Fair Choice-Employee Voice Final Rule was enacted on September 30, 2024, significantly changing union elections.

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INTRO

The National Labor Relations Board's Fair Choice-Employee Voice Final Rule was enacted on September 30, 2024, significantly changing union elections.

On this episode of We get work™, we discuss the implications of the 2024 rule for construction employers and why a Section 8(f) agreement allows for the withdrawal from a bargaining relationship with the union when the collective bargaining agreement expires.

Today's hosts are Brian Lundgren, principal in Jackson Lewis' Seattle office, and Chris Moon, of counsel in the firm's Salt Lake City office, and members of the Labor Relations and Construction groups.

Brian and Chris, the question on everyone's mind today is: For construction employers who want to ensure they can withdraw from a bargaining relationship with a union when a collective bargaining agreement expires, why is it critical to make sure the language in their agreements does not create a Section 9(a) relationship, and how does that impact my business?

CONTENT

M. Christopher Moon
Of Counsel

We're happy to be here today to talk about the NLRB's new Fair Choice Employee Voice Final Rule, which became effective on September 30, 2024. That final rule changed the rules at the NLRB in three different areas related to union elections. In this podcast, we're going to be looking at its impact on one particular part of the NLRB's rule that impacts the construction industry. To understand the impact of this new rule, we first have to look at the two different types of union recognition that is available under the National Labor Relations Act.

Brian, why don't you talk to us about Section 8F recognition, which only applies in the construction industry.

Brian P. Lundgren
Principal

Thank you, Chris. Section 8F agreements are a special sort of labor agreement that construction industry employers can enter into. They differ from the standard agreements that you see in other industries in a couple of key ways:

- One is withdrawal. If you have a Section 8F agreement and you're a construction industry employer, you can withdraw from the bargaining relationship with the union upon expiration of the agreement.
- Another key way they differ is in formation. The construction industry has long been recognized to have a transitory workforce because the size of projects grows and shrinks, so the size of the workforce grows and shrinks. So, in a Section 8F relationship, you can enter into that agreement with the union without a majority support of your employees, without any election, and even without any employees having yet been hired.

You see these sometimes in project labor agreements, or in some areas of the country, they call them community workforce agreements. And this has a benefit to a construction industry employer because when the employer withdraws from the relationship upon expiration, they are free to unilaterally set new terms and conditions of employment for the workforce without any bargaining with the union.

Now, I'll turn it to Chris. Could you tell our listeners a little bit more about how a Section 9A agreement differs?

Moon

A Section 8F agreement, as you mentioned, Brian, is *specific* to the construction industry. And the vast majority of employers in the United States — private employers who are covered by the National Labor Relations Act — aren't construction industry employers. So, most employers are covered by Section 9A of the National Labor Relations Act.

Now, unlike a Section 8F agreement, an employer doesn't have a right to withdraw from a Section 9A relationship. Now, construction employers *can* be covered by a Section 9A relationship but they can also be covered by a Section 8F relationship. Now, the distinction is: When a Section 9A agreement expires, the employer needs to bargain in good faith with the union about the terms of a successor agreement. And, the employer needs to maintain the existing terms of employment until a new agreement is reached or circumstances happen that allow the employer to lawfully implement changes that have been proposed during bargaining.

The new final rule that the NLRB has implemented impacts the way that an 8F relationship can be transformed into a Section 9A relationship. Isn't that right, Brian?

Lundgren

That's exactly right. Typically, a union can convert what is otherwise a Section 8F agreement into the 9A relationship that Chris has been describing in sort of two ways:

- One, they could win NLRB-supervised election by winning the majority of the vote of the employees, or
- Two, they could convert it to a Section 9A agreement by having the employer voluntarily recognize or extend 9A recognition to the union. That's where the new fair choice rule comes into play.

Tell our listeners about that Chris.

Moon

That's exactly how it works, Brian, in the 9a context with non-construction industry employers, too. If you wanted to represent employees, you would need to win a union election. The union would need to win an election or an employer can voluntarily recognize a union after they're provided with proof that the union represents a majority of employees. But under the prior rule that was implemented during the Trump administration, Section 9A recognition in the construction industry followed this general understanding that there needed to be a contemporaneous showing of majority employee support for the union. Now, in rescinding that rule that was implemented during the Trump administration, this new board rule has returned to prior board precedent that allowed unions to accomplish Section 9A recognition through language *alone* in the collective bargaining agreement without a showing of majority employee support for the union. It also contains a six-month limitation for challenging a construction industry union's majority status.

Brian, why would that be an issue for a construction industry employer that is currently in an 8F relationship? Or, why don't I ask it in this way? Why would this be an issue for an employer that thinks it's in an 8F relationship?

Lundgren

Sure. And take a step back. What Chris is telling us is that under the prior rule, you had to have a contemporaneous showing of majority support by the employees for the union before the union could convert an 8F relationship into a 9A. But under the *new* rule, you no longer need to have a contemporaneous showing of majority support by the employees. Rather, a union can convert a Section 8F to a Section 9A based upon language alone.

What does that mean? It means you can now convert a Section 8F relationship to a Section 9A relationship without any election by the employees *and* without any showing of majority support by those employees. Now, opponents to the new rule argue that this causes employees to forfeit their rights because you're now having the formation of a 9A relationship without having any contemporaneous showing of majority support.

So, Chris, tell us the key takeaway. What's critical here for construction employers

who think they're entering into an 8F relationship to be wary of?

Moon

Look, Brian, you and I would never accuse a union of deliberate lies or malfeasance. But when you're entering into an agreement with a union and the union says, “Hey, you know, this is just a short-term agreement. This is what we've used in the past. All you have to do is just sign here and we'll be able to supply you the number of employees you need for this particular project,” construction industry employers *need to* read the agreement. They need to make sure that the agreement does not contain stock language that the union might have just inadvertently included that says things like, “This is a section 9A relationship.” They need to make sure that there is no language in there that says that the employer acknowledges that the union represents a majority of the employees or that the employees have requested that the union represent them and that there is a showing of majority support.

The board's rule means that even if none of those things are true, the board is only going to look at the language that is included in the agreement to decide that question. And so, what you don't want to do is you don't want to place your employees in the position of being represented by a union when they actually didn't have the opportunity to vote for or against the union at any point.

For construction employers who don't want to enter into a Section 9A relationship, the critical takeaway is to make certain that the union hasn't included 9A recognition language in any agreement that would be signed by that employer.

And Brian, do you have any thoughts about ways that that can best be accomplished?

Lundgren

That's exactly right, Chris. This is an area where language absolutely matters. You may as an employer get handed [a document]: “Here's our standard agreement. We use it all the time. Just go ahead and sign and this is what everybody else is signing.” But here if there's language in there, language alone that says you are voluntarily recognizing the union as a Section 9A representative of your employees, you have now, unwillingly or unbeknownst to you, entered into a Section 9A relationship, which again carries the impacts that Chris and I have discussed earlier. You no longer can withdraw at the expiration. You have an obligation to maintain the status quo after its expiration, and you have an obligation to continue to bargain in good faith for a successor agreement — just purely based on that language alone.

The big takeaway is, as a construction industry employer, if you don't want to enter into a 9A relationship, you must read the language and understand and make sure that there isn't voluntary recognition language in any of the agreements you sign with the union. Because if you do, under the new rule, language alone is enough.

Chris, any additional parting thoughts for our listeners?

Moon

The other thing that I would point out is that the name of the agreement doesn't necessarily matter. You may think to yourself, “Well, I'm not entering into a collective bargaining agreement. This is a project labor agreement. And everyone knows that project labor agreements only apply for the terms of a specific project.” *Or* you may be provided with a master agreement. Or, Brian, I'm sure you've seen in the past a union will come up to a company with a one- or two-page document and will say, “Well, here's the most important terms of a master agreement that everyone is signing for part of this project. All you have to do is sign this one- or two-page document and then the master agreement will apply to you.”

Well, there might not be anything on that one- or two-page document. But if the one- or two-page document says that the master agreement's going to apply, you want to make sure that you're reviewing that master agreement for 9A language about recognition. Ideally, you would want language that specifically reiterates that this is a Section 8F relationship that you're entering into.

Lundgren

One hundred percent. These sort of short forms or “me, too” agreements as they are sometimes called [need to be treated carefully]. You think you're not binding yourself to something if you just read that document, but you've bound yourself to the underlying area-wide agreement, which may itself have the voluntary Section 9A language in it. And by signing the short form, you've now voluntarily recognized the union as a 9A representative of your workforce.

So that's the key takeaway here: Language matters and especially under the new rule. You don't have the argument that there wasn't a showing of majority support among our employees — we thought we were entering into a Section 8F — or we've always done it this way. We've always done seasonal agreements or one-time agreements. If that Section 9A language is in there, under this new rule, you can very well become without much defense a Section 9A bargaining relationship with the union. And so that's critical for construction employers who don't wish to voluntarily recognize the union as the Section 9A representative of their workforce.

Moon

Exactly, Brian. And the final takeaway is that this is now the law. This is now the rule that is in place as of September 30 [2024]. Now, board member Kaplan, who dissented from the issuance of this final rule, suggested that there might be a way to challenge this rule under the recent Supreme Court decision in *Loper Bright*, which suggested that you don't necessarily need to give deference to agency decisions and to agency regulations.

So, it does remain to be seen whether there will be challenges to this regulation. But at least as we sit here today, we're not aware of any challenges that are currently pending to this specific regulation. Construction employers should anticipate that they'll be covered by this new rule and need to comply with it. The

language matters and you should be sure to mind your P's and Q's.

Lundgren

Employers who have questions about this new rule and other labor issues should reach out to Jackson Lewis labor attorneys like Chris and me for assistance. I'd like to thank you for attending our podcast and I'll pass it to Chris for any closing remarks.

Moon

Thanks, Brian. Like you said, we have significant experience across our entire firm in the construction industry and have helped to navigate all of these different labor issues that construction employers might face, including this new rule. Feel free to reach out.

Thanks so much for joining us today.

OUTRO

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