



Return to the Expedited Election Rules

Article

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On August 24, 2023, the U.S. National Labor Relations Board (“NLRB”) rolled back several Trump-era rules regarding how elections are conducted. More specifically, the new rules re-implement a series of Obama-era rules that speed up the union election process, and in so doing, may make it more difficult for companies to prepare for union elections. The NLRB asserts that the new rules will “meaningfully reduce the time it takes to get from petition to election in contested elections and will expedite the resolution of any post-election litigation.” However, the time after a petition is filed is critical for employers to consult with qualified legal counsel and other advisors, train its supervisors and communicate with its employees about the upcoming election. The Board’s election rule limits the ability of employers to legally prepare for union elections, and gives workers as little as 11 days (as compared with the current median time of 31 days) to consider all the facts about joining a union before casting their ballots.

The new rules further the NLRB’s agenda to erase certain policies and laws set by the 2019 Board. Highlights of the new rules are as follows:

Pre-Election Hearings: By way of summary, the amended pre-hearing election rules provide:

- Pre-election hearings will generally be scheduled to open approximately 10 days sooner than under the 2019 rule.
- Regional Directors will have more limited and defined discretion to postpone pre-election hearings than under the 2019 rule.
- A non-petitioning party’s written response to the petition will generally be due approximately 3 days sooner than under the

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Allison C. Hawkins

Thomas W. “Tom” Scroggins

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2019 rule.

- Regional Directors will have more limited and defined discretion to postpone the due date for filing of the Statement of Position than under the 2019 rule.
- Petitioners will respond orally to the non-petitioning party's Statement of Position at the start of the pre-election hearing rather than, as under the 2019 rule, delaying the opening of the pre-election hearing to allow them to file and serve a responsive written Statement of Position.

Disseminating Important Information: The new rule requires an employer to post and distribute the Notice of Petition for Election to employees approximately 3 days sooner than under the 2019 rule.

Hearings Procedures: The new rule limits pre-hearing issues to those necessary to determine whether an election should be conducted. The 2019 rule allowed the parties to litigate issues of eligibility and inclusion at the pre-hearing stage. The new rules require these issues be pursued post-election, if those issues do not have to be resolved to determine if an election should be held.

Further, the new rules allow parties to participate in oral argument before the close of the hearing. Written briefs will be allowed only if the Regional director (following pre-election hearings) or the hearing officer (following post-election hearings) determines they are necessary. The now rescinded 2019 rule allowed parties to file briefs at least 5 business days following the close of hearings.

Election Timing: By way of summary, the amended election timing rules provide:

- Regional Directors should ordinarily specify the election details (the type, date(s), time(s), and location(s) of the election and the eligibility period) in the decision and direction of election, and should simultaneously transmit the Notice of Election with the decision and direction of election. This newly amended rules remove the Regional Director's discretion to convey election details later in the process as provided for by the 2019 rule.
- Regional Directors will schedule elections for "the earliest date practicable" after issuance of a decision and direction of election, rather than observing the 20-business day waiting period imposed by the 2019 rule.

Because the new rules will shorten the period for union elections, employers need to be proactive in ensuring they are properly equipped to respond should the need arise.

The new rules will become effective December 26, 2023.