

Insights: Alerts

NLRB Finalizes Rule Restoring Expedited Election Rules

August 24, 2023

Written by John W. Alden, Christopher M. Caiaccio and Drew Williamson

Today the National Labor Relations Board (“Board” or “NLRB”) issued a [Final Rule](#) amending its procedures governing representation election. The new rule restores the 2014 “quickie” or “ambush” election rules, which will accelerate union representation elections and the certification process. The sped-up union election process will hinder employers’ ability to run effective campaigns and prevent employees from having the necessary time to make informed decisions on union representation.

Background

In 2014, the NLRB adopted a final rule (“2014 Rule”) significantly altering the Board’s longstanding union election procedures and tipping the scales of a union election in favor of unions by accelerating the election process. Among other things, the 2014 Rule:

- Required that elections be set “for the earliest date practicable.” Previously, elections were ordinarily conducted between the 25th and 30th days after the direction of the election.
- Required employers to provide the union and Board with an eligible employee voter list within two business days of the NLRB directing an election.
- Required the NLRB to certify the results of an election, requiring bargaining in good faith, and reviewing challenges to election conduct to be litigated after certification.

In 2019, the Board dialed back the 2014 Rule and replaced many of its most problematic aspects (“2019 Rule”). Notable changes effected by the 2019 Rule include:

- Extending the time between the filing of a representation petition and the pre-election hearing from 8 to 14 business days.
- Extending the employer’s deadline to provide the union and Board with an eligible employee voter list from two business days to five business days.
- Ensuring that elections could not take place fewer than 20 business days after the NLRB regional director issues the direction of election.
- Requiring questions of employee eligibility and unit scope to be litigated at the pre-election hearing rather than after the election as they were under the 2014 Rule.

- Requiring that the Board refrain from certifying election results until after challenges to election conduct had been resolved.

Earlier this year, several of the 2019 Rule's changes were invalidated by the District of Columbia Court of Appeals in *Fed'n of Lab. & Cong. of Indus. Organizations v. Nat'l Lab. Rels. Bd.*, 57 F.4th 1023 (D.C. Cir. 2023). Notably, however, the ruling upheld the 2019 Rule's 20-business-day waiting period before the regional director schedules an election.

New Election Rule

As expected, remnants of the 2019 Rule have officially been rolled back by the Democratic majority of the NLRB and replaced almost entirely by the 2014 Rule's procedures. According to the Board, the changes are designed to “restore fair and efficient procedures for union elections.” Changes effected by the new rule include:

- **Pre-Election Hearings:** Under the new rule, pre-election hearings must commence within 8 calendar days from service of the Notice of Hearing. The new rule also limits pre-election hearings to questions of whether representation exists. Disputes concerning eligibility or unit scope will now be resolved after elections.
- **Statements of Position:** The new rule shortens the non-petitioning party's deadline for submitting a Statement of Position (“SOP”). Previously, parties had up to 8 business days after service of the notice of hearing. Under the new rule, SOPs must be submitted by noon the business day before opening of the pre-election hearing, which must now be held within 8 calendar days from service of the notice of hearing. The new rule also eliminates the requirement for petitioners to serve written SOPs 3 business days prior to the pre-election hearing. Instead, they may now respond orally to the non-petitioning party's written SOP at the start of the hearing.
- **Extensions of Time:** The new rule provides regional directors with discretion to postpone the due date for the filing of a Statement of Position or to postpone the pre-election hearing up to 2 business days upon request of a party showing “special circumstances” and for more than 2 business days upon showing “extraordinary circumstances.”
- **Posting Notice of Petition for Election:** Employers must now post the Notice of Petition for Election in conspicuous places in the workplace and, if the employer customarily communicates with employees electronically, electronically distribute it to employees within 2 business days after service of the Notice of Hearing. Previously, employers had 5 business days to post.
- **Post-Hearing Briefs:** The new rule permits parties to file post-hearing briefs only with special permission from either the regional director (following pre-election hearings) or the hearing officer (following post-election hearings). Briefs are also limited to the subjects permitted by the regional director or hearing officer. The 2019 Rule entitled parties up to submit post-hearing briefs and gave them up to 5 business days following the close of a hearing to do so.
- **Notices of Election:** Regional directors will now specify the election details in the decision and direction of election and will simultaneously transmit the Notice of Election with the decision and direction of election. Under the 2019 Rule, regional directors were given discretion to convey the election details and later transmit the Notice of Election.
- **Election Dates:** The new rule eliminates the 20-business-day waiting period between the decision and direction of election and restores the 2014 Rule's requirement for regional directors to schedule elections

for “the earliest date practicable.”

Absent a successful legal challenge, the new election rules will take effect on December 26, 2023.

Key Takeaways

Employers should prepare for increased union-organizing activity as unions will be incentivized to attempt to organize workplaces given the truncated election procedures. Given the truncated election procedures, it is vital that employers evaluate their susceptibility to union organizing and act proactively to address potential weaknesses. Among other things, employers should consider enhancing efforts to train supervisors on detecting signs of union organizing and how to respond to those signs. Employers should also consider becoming more aggressive in educating employees on its position on unionization. Further, employers should review and, if necessary, update supervisor designations as needed to enhance the likelihood of certain employees qualifying as supervisors. Last, employers should update any campaign strategies to account for the shortened election time frame.

If you have any questions about this Alert, please contact one of the authors or the attorney(s) in our firm with whom you are regularly in contact.

Related People



John W. Alden

t 404.815.6058

jalden@ktslaw.com



Christopher M. Caiaccio

t 404.815.6203

ccaiaccio@ktslaw.com



Drew Williamson

t 404.815.6522

drew.williamson@ktslaw.com