

## **Court's Injunction Prevents Full Implementation of the NLRB's New Union Election Rules**

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In December 2019, the National Labor Relations Board announced revised procedures for union elections that would extend certain pre-election deadlines and require certain disputes be resolved ahead of an election. (See our alert [here](#)). These procedures were slated to go into effect on June 1, 2020 (See our alert [here](#)). However, on May 30, 2020, the United States District Court for the District of Columbia issued an injunction in *AFL-CIO v. NLRB* that prevented five of the planned changes from going into effect, ruling that the NLRB failed to follow the proper administrative procedure in issuing the new regulation. As such, only certain of the Board's new rules went into effect on June 1, 2020.

In its decision, the District Court ruled that certain of the Board's rule changes are substantive rather than procedural in nature and cannot go into effect unless and until the Board engages in the proper rulemaking procedure. The changes that have been invalidated are:

1. Giving parties the right to litigate eligibility issues prior to an election, instead of after;
2. Instructing Regional Directors to normally not schedule an election prior to the 20th business day after the direction of election;
3. Serving the voter list within 5 business days, instead of 2 days;
4. Limiting election observers to those in the voting unit; and
5. Instructing Regional Directors not to issue certifications, if a request for review is pending or the time to file such request has not yet passed.

Because these changes were substantive rather than procedural rules, the Court ruled that the Board needed to follow the formal rule-making process, including soliciting public input, before instituting these changes. That process was not followed before the new rules were announced in December 2019.

The Court's injunction, however, will not halt implementation of the other rule changes announced by the Board. In general, these changes will lengthen the process, though not as much as if the full rule went into effect. On June 1, 2020, the Board and its General Counsel's Office issued a statement and memorandum confirming that the procedures not impacted by the Court's injunction would go into effect immediately, and that the Board intends to appeal the Court's order. Pending the appeal, employers should be aware of the following rules that are now in effect:

1. The Board's pre-election hearing will generally be scheduled 14 business days from the notice of hearing.
2. The Statement of Position is now due 8 business days from the notice of hearing, and the response (a new requirement altogether) is due 3 business days later.
3. Parties will be permitted to file post-hearing briefs for pre-election and post-election hearings as a matter of right.
4. Posting the notice of election must occur within 5 business days of service of the notice of hearing, instead of 2 calendar days.
5. All time periods will be in business days.

A full list of the election rule changes from the General Counsel's memorandum can be found [here](#).

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