

NLRB Announces New Union Election Procedures

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In 2014, the Obama-era National Labor Relations Board made over two dozen changes to the union election rules that effectively shortened the time period between the filing of the petition and the election and limited the types of issues that could be resolved in a pre-election hearing. On December 13, 2019, the Board, now controlled by a Republican majority, announced a new rule scaling back the 2014 changes. The new rule is anticipated to slow down the election process and give parties and the Board time to resolve key issues prior to an election.

Rather than rescind the 2014 changes altogether, the Board is implementing several specific procedures that modify certain deadlines and timeframes for resolving particular disputes. The new rule includes the following changes:

1. The Board's pre-election hearing will generally be scheduled 14 business days from the notice of hearing. Under the current rule, this hearing is normally scheduled 8 calendar days from the notice of hearing. The added days are designed to give parties more time to accurately complete early procedural requirements and to prepare for a hearing, if necessary.
2. The Statement of Position is now due 8 business days from the notice of hearing, and the response to it is due 3 business days later. Under the current rule, the non-petitioning party (usually the employer) is required to file a Statement of Position the day before the pre-election hearing (usually 7 calendar days from the notice of hearing) outlining issues to be contested, and the petitioning party (usually the union) could respond live at the hearing. This change enables both parties to prepare for the issues in advance of the hearing.
3. Unit scope and voter eligibility issues, such as supervisory status, will now be resolved at the pre-election hearing, unless the parties agree to defer the matter until after the vote. This change marks one of the biggest rollbacks to the 2014 amendments, which postponed nearly all eligibility disputes to after an election. The Board has explained that resolving these questions prior to the vote will give more clarity to the parties and employees as to who will be in the bargaining unit and will help parties avoid conduct that could later give rise to unfair labor practice charges.
4. Parties will be permitted to file post-hearing briefs for pre-election and post-election hearings as a matter of right. Under the current rule, the Board rarely allowed briefs for pre-election matters, and permission for briefs for post-election matters varied. The Board acknowledged that this change will extend the time period between the petition and the election, since now there will be a hearing and then a brief-submission period of 5-to-15 business days.
5. The employer's voter list is now due 5 business days after the direction of election. The current rule requires that this list be served within 2 business days. The extra time allows employers to prepare this list once an election is actually ordered; whereas before the very quick deadline effectively required employers to create this list before it even knew who needed to be included.
6. Under the new rule, elections should normally not be scheduled before the 20th business day after the direction of election, unless the parties agree to an earlier date. The current rule requires that elections be scheduled as early as practicable. The Board has adopted a starting date to encourage early resolution of disputes before an election, if possible, rather than regional offices feeling rushed to schedule elections as quickly as possible.
7. All time periods will be in business days. The prior rules had a mix of deadlines based on business and calendar days. This change will likely have its biggest impact when the petition is first filed, since the pre-election hearing will now be 14 business days from when the Board serves its hearing notice, as opposed to the 8 calendar days that it was before. Commonly stipulated election agreements are reached just before the scheduled pre-election hearing, so this change will give parties more time to negotiate these

agreements.

The Board also announced changes relating to the process for requesting a review of a direction of election and handling challenged votes.

The Board issued these modifications pursuant to its unilateral authority to make procedural changes to the election process. This means there will not be a notice and comment period, and the new procedures will go into effect 120 days after publication, which should be early April 2020. Thereafter, employers will likely no longer face the fast-paced union elections seen since 2014.

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