

NLRB CURTAILS “QUICKIE” ELECTION RULES

We previously wrote about the “quickie” election rules [here](#). On December 13, 2019, the NLRB released new election rules that significantly dialed back several previous amendments. Under the quickie election rules, or “Old Rules,” the median number of days from petition to election had decreased by a total of approximately 15 days.^[1]

UNION ELECTION BASICS AND THE 2014 AMENDMENTS

To start the election process, the union or employees who want a union must file a petition for election with the nearest National Labor Relations Board (“NLRB”) Regional Office showing interest in the union from at least 30 percent of employees in the proposed unit. The NLRB regional office then investigates the petition,^[2] after which the employer and the Union often negotiate the terms of the election in an election agreement. If the employer and the union are unable to agree on the election or its terms, depending on the subject of the disagreement, they proceed to what is called a “Representation” or “R-Case” hearing.

As a cumulative result of the “quickie” election rules, which were roughly 25 separate regulatory amendments, the median time between petition and election had gone from 38 to 23 days in the case of an election agreement, and 59 days to as low as 36 days where there was a contested hearing.^[3] The changes were seen as particularly unfavorable to employers since they had far less time to prepare for elections, educate employees and handle their election-related obligations.

THE NEW RULES

The New Rules were released in response to concerns that the time frame created under the “quickie rules” was too short for employers to meet various obligations while educating employees before the election. The New Rules addressed this issue by creating more time between the filing of the petition and the actual [contested] election. Here are some of the most significant changes:

1. Under the New Rules, elections can be set no fewer than 20 business days after the direction of an election. The Old Rules had eliminated the pre-2014 requirement of a 25-day gap between the day the board ordered an election and the day it was conducted. The New Rules reinstate a modified version of the gap by further providing “unless a waiver is filed, the regional director will normally not schedule an election before the 20th business day after the date of the direction of election.”^[4]
2. Under the New Rules, issues of unit scope and employee eligibility should be litigated before the election. Under the Old Rules, “[d]isputes concerning individuals’ eligibility to vote or inclusion in an appropriate unit ordinarily need not [have been] litigated or resolved before an election [was] conducted,” and pre-election testimony was limited to items “relevant to the existence of a question of representation.” This is in great contrast to the New Rules, which suggest that disputes concerning unit scope, voter eligibility and supervisory status will normally be litigated and resolved by the regional director *before* an election is directed.
3. The New Rules reinstate the right of the parties to submit post-hearing briefs after pre-election hearings. Under the Old Rules, post-hearing briefs were not allowed absent “special permission” from the regional director.
4. Under the New Rules, the pre-election hearing will be scheduled to open 14 business days from the notice of hearing. Under the Old Rules, this was only 8 calendar days.
5. Under the New Rules, the employer will now be required to post and distribute the Notice of Petition for Election within 5 business days after service of the notice of hearing. The Old Rules required posting and distribution within 2 business days.
6. Under the New Rules, non-petitioning parties are now required to file and serve their Statement of Position within 8 business days after service of the notice of hearing, and regional directors will have the discretion to permit additional time for filing and service for a good cause. Under the Old Rules, non-petitioning parties were formerly required to file and serve the Statement of Position one day before the opening of the pre-election hearing (typically 7 calendar days after service of the notice of hearing).
7. The New Rules require the employer to provide voter lists within 5 business days; under the Old Rules, they had only 2 business days.

PRACTICAL TAKEAWAYS

The New Rules are a considerable step back from the “vote now, decide later” framework that characterized the 2014 quickie election rules that were more focused on the need for speed in elections. Despite the New Rules being welcome news, celebrations may not yet be in order:

- The New Rules are not expected to take effect until July 31, 2020.
- Under the New Rules, particularly where there are contested issues, employers will have more time to educate their employees.
- Since the NLRB issued the final rule without going through the full notice and comment rulemaking process, “pursuant to its authority to change its own representation case procedures,” the controversial changes may nevertheless be subject to further judicial review.
- Time will tell whether the additional time before an election will significantly alter election outcomes.

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[references]

[1] <https://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/median-days-petition-election>

[2] The investigation typically entails making sure the NLRB has jurisdiction over the employer, the union is qualified to represent employees, and that there are no existing labor contracts that would bar an election.

[3] <https://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/median-days-petition-election>

[4] <https://www.federalregister.gov/documents/2019/12/18/2019-26920/representation-case-procedures>

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