

Court Restores More Union-Friendly Election Rules

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In a decision issued earlier this week, the District of Columbia Circuit Court of Appeals invalidated three employer-friendly rule changes implemented in 2019 by the Trump-era National Labor Relations Board (NLRB). Two other Trump-era rules were challenged but withstood court scrutiny. The court's decision has a nationwide scope.

The three successfully-challenged provisions involve provision of voter lists, delayed certification, and election observers, as follows:

- **Voter list:** Once the NLRB directs that a union election be held, the employer is required to provide both the union and the Board with a list of names, job details, and contact information for all eligible employee voters. The 2019 rule gave employers five business days to provide this list; **the court's decision restores the 2014 rule of two business days.**
- **Delayed certification:** If employees favoring the union win an election, the NLRB certifies the union as the employee's representative. The 2019 rule required that the NLRB wait to certify election results until any challenges to the decision and direction of election or objections to the conduct of the election had been resolved. **The court's decision restores the 2014 rule that the NLRB certifies the results regardless of any challenge,** requiring bargaining in good faith, though it allows challenges to be litigated after certification.
- **Election observers:** Finally, NLRB rules allow both employer-selected and union-selected observers to help ensure that elections are conducted fairly. The 2019 rule required that, for in-person elections, unions should use only current members of the voting unit, where possible, and if not possible, they could use a current nonsupervisory employee. **The court's decision restores the 2014 rule allowing parties to choose any representative, including a former employee or union staff member, as an election observer.**

The court based its decision on the fact that the 2019 rule changes were made without a notice and comment period, as is required under the Administrative Procedure Act for any substantive rule changes. The court held that they were substantive changes, fundamentally altering union rights. Therefore, the NLRB could not legally alter them without public notice and comment.

The two 2019 rule changes upheld by the court as "procedural" involve pre-election challenges to voter eligibility and unit scope and, relatedly, a 20-day waiting period before an election can be held. The pre-2019 rule had allowed elections to proceed notwithstanding ongoing challenges to the scope of the bargaining unit, while the 2019 rule provided that typically such challenges should be resolved before an election takes place.

The 2019 rule also provided for a 20-day buffer between an order for an election and the election itself, so such challenges could be litigated. These two rule changes had been invalidated by a lower court, but the circuit court restored and validated them.

Unions typically benefit from shorter election periods, so the restoration of the 2014 rules put employers at a disadvantage compared to the 2019 rules. Employers faced with a union organizing campaign will need to be prepared immediately to provide voter lists and should consider whether they have viable challenges to the scope of the proposed bargaining unit.

The court's decision is *AFL-CIO v. NLRB*, and can be found [here](#).

If you have any questions about the NLRB precedent or how it may affect your business, please reach out to [Josh Schwartz](#), [Kevin Moore](#) or any member of [Barley Snyder's Labor Law Team](#).

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