

NLRB Makes Pro-Employer Changes to Ambush Rule

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An NLRB rule change last week eased the standards of an Obama-era rule and significantly lengthens the time between an NLRB regional director's order that there be an election and the actual election.

In a news release, the NLRB said the modifications "create a fairer and more-efficient election process."

The Obama-era rule was a broad revision to union election procedures and amended existing rules, significantly shortening the timeline between the NLRB regional director's order that there be an election and the election. Previous rules stipulated that there should be 25 to 30 days between the direction of an election and the election. However, the 2014 rule shrank the election campaign time frame and required elections be held as soon as possible. That left employers that wanted to educate workers on the facts surrounding union representation at a disadvantage and left employees with less time to consider those facts and less of a chance to make an informed choice at the ballot box. It also allowed unions to hold elections even if the employer had an objection with union eligibility of an employee or if there was a dispute over which workers should be included in a bargaining unit. The company and union would then litigate the matter after the election.

Under [the new rule](#), which takes effect April 16, 2020, the most significant change is a return to the NLRB's practice of resolving questions of representation, unit scope and voter eligibility (including supervisory status) *before* an election is scheduled. Under the 2014 quickie election rule, such matters were typically deferred until after the election and only resolved if they had a material impact on the results. As the NLRB noted, pre-election resolution safeguards fair and accurate elections by ensuring employees understand the ramifications of their decision.

The new rule also requires:

- **Notice of Petition for Election.** Petitioned employers will now have five business days to post and distribute the mandatory "Notice of Petition for Election," up from the current standard of two business days.
- **Pre-Election Hearing.** The pre-election hearing will generally be scheduled 14 business days from the service of the notice of hearing, up from the present standard of eight calendar days.
- **Statements of Position.** Employers will now have eight business days to file and serve their "Statements of Position," up from the current standard of seven calendar days.
- **Pre-Hearing Brief.** The rule reinstates the right of parties to file post-hearing briefs. The 2014 rule only allowed them upon special permission.
- **Election Date.** The regional director ordinarily will not schedule an election before the 20th business day after the date the NLRB directs an election, absent mutual consent of the parties. This is largely consistent

with NLRB procedures prior to the 2014 amendments.

- **Voter List.** Employers will now have five business days from approval of the stipulated election agreement or Decision and Direction of Election in which to file the mandatory Voter List, up from the current standard of two business days.
- **Extension of Deadlines.** Regions will now have greater latitude to extend deadlines for good cause shown.

"These are common sense changes to ensure expeditious elections that are fair and efficient," NLRB Chairman John F. Ring said. "The new procedures will allow workers to be informed of their rights and will simplify the representation process to the benefit of all parties."

The new timelines the rule change creates unquestionably favor the employer. The new rule significantly extend the timeline between the representation petition and election, thereby affording employees a more extensive opportunity to cast their ballots on an informed basis. The quickie election rule reduced the period of time between petition and election, effectively allowing labor organizations to "ambush" employers with petitions, leaving employers scrambling to communicate with employees over a shorter time period. Union win rates increased after the quickie election rule went into effect.

Once effective, the new rule will place most employers in a more advantageous position, affording more time to consider the composition of the proposed bargaining unit and to fully litigate those issues prior to election. It also allows employers to educate employees on the facts and risks surrounding union representation.

In the meantime, many employers may encounter an uptick in organizing activity, as unions attempt to accelerate the filing of petitions between now and the rule's effective date.

The board adopted the rule as final, instead of the customary process of garnering public feedback before making the rule final. Since it is a "procedural" change of its own rule, there will be no Notice of Proposed Rulemaking, and it will take effect 120 days after anticipated publication in the Federal Register on December 18.

If you have any questions on this rule change, please [contact me](#) or any member of the [Barley Snyder Employment Practice Group](#).