



## New NLRB Published Rule Changes Union Election Procedures

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For the third time in a decade the National Labor Relations Board (NLRB or Board) has again changed the procedural rules that affect the processing of union election petitions and the length of time between the filing of a petition for election and the actual election. While many of these changes to the rules will seem familiar to employers and labor practitioners as they reverse the Trump NLRB 2019 Rulemaking and return the rules to the 2014 rule, the changes will result in uncertainty and contain pitfalls for the uninitiated.

On August 24, 2023, the NLRB issued a direct final Rule entitled "Representation-Case Procedures." By issuing a direct rule, the NLRB has determined that there is no need to go through the Administrative Procedure Act's requirements for rules to be sent out for a notice and comment period. The NLRB justifies this decision on the basis that Section 9 of the National Labor Relations Act provides that the NLRB will set the procedures for union elections and because its 2014 rulemaking as to election procedures, which the latest rule generally restores, was subject to extensive notice periods and comments and was upheld in several circuit court challenges. Accordingly, the NLRB has determined that its latest rule as to election procedures will become effective December 26, 2023.

The new rule makes the following amendments to the current election rules:

- Absent special or extraordinary circumstances, Pre-Election hearings where arguments and evidence are presented as to what is an appropriate voting unit for a union election in a workplace will be scheduled to occur within eight calendar days from the filing of an election petition instead of 14 business days.
- Absent special or extraordinary circumstances, an employer's required statement of position responding to the union's election petition will now have to be filed by noon the day before the pre-election hearing. In other words, within seven calendar days of being served with the Notice of Pre-Election Hearing, an employer must know all arguments it will make at the pre-election hearing and have those arguments documented or run the risk of waiving any such arguments. Currently, an

employer's statement of position is due within eight business days.

- No longer will a union have to file a responsive statement of position three business days before the pre-election hearing, but will only be required to respond orally to the employer's statement of position at the beginning of the pre-election hearing. Such a change appears to make it more difficult for employers to effectively respond to union counter arguments at a pre-election hearing.
- Two calendar days after service of a Notice of Pre-Election Hearing, an employer must post in the workplace, and email or text out to employees, the Notice of the Petition of Election. Currently such notice has to be posted and electronically delivered within five business days of receipt of the Notice of Hearing.
- At the pre-election hearing the only issues that will be litigated are whether the union has petitioned for an appropriate voting unit. No longer will issues of whether individual voters should be allowed to vote be litigated at the hearing. While this may not seem like a significant issue, when dealing with whether an individual is a Section 2(11) supervisor under the National Labor Relations Act a dispute between a union and an employer as to whether an individual is a supervisor and should be entitled to vote carries large consequences that will no longer be addressed before an election.
- Post-hearing briefs will no longer be guaranteed and the norm will be that they will not be filed. Such a stance by the NLRB seemingly raises procedural due process concerns that will likely be litigated in the future before the U.S. courts of appeals and perhaps the Supreme Court.
- NLRB Regional Directors should include in any decision and direction of election decisions issued after a pre-election hearing the date, location, and times of an election, instead of addressing the issue with the parties subsequent to the decision and direction of election.
- Finally, Regional Directors shall schedule elections for the "earliest date practicable" after the decision and direction of election. This means that instead of being scheduled 20 calendar days after the decision and direction of election, an election will likely be scheduled within seven to ten days.

The NLRB's new rule illustrates the need for employers to make sure that they get experienced counsel to help with the process when they are faced with a union election petition. Williams Mullen will continue to follow the rule as it makes its way through the expected court challenges.

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