

BALANCE RESTORED: THE NLRB CURTAILS “QUICKIE ELECTION” RULE

Insights

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At the end stages of lone Democrat Board Member McFerran’s term, the National Labor Relations Board (NLRB) today issued the first of what may be a number of rulings in the form of a procedural regulation rolling back some of the onerous requirements of the agency’s [“quickie election” rule](#). That rule, which took effect in April 2015, removed long-standing due process rights that had been available to employers served with a union representation petition. It dramatically shrank the election campaign timeframe and disadvantaged employers desiring to educate workers on the facts surrounding union representation, while leaving employees with less time to consider those facts and less of a chance to make an informed choice at the ballot box.

In words that will be music to employers’ ears, Chairman Ring describes today’s rule as “common sense changes to ensure expeditious elections that are fair and efficient.” The rule –which is “final” in nature and thus slated to take effect within 120 days – is a welcome move toward equipoise of power between employers and labor organizations. Although not a complete return to the pre-2014 landscape, the rule scales back many of the onerous election timelines, while allowing for resolution of many representational issues prior to an election.

[ED. NOTE: AFTER PUBLICATION IN THE FEDERAL REGISTER ON DECEMBER 18, THE FINAL RULE WILL OFFICIALLY BECOME EFFECTIVE ON APRIL 16, 2020.]

NEW RULE RESOLVES PROBLEMS WITH 2014 QUICKIE ELECTION RULE

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Although the ostensible objective of the quickie election rule was to expedite the period between petition and election, the NLRB has concluded that the shortened election period came at the expense of other fundamental interests. This new rule represents an adjustment intended to “improve upon” the quickie election rule.

Notable changes include:

- **Notice of Petition for Election.** Petitioned employers will now have five business days in which 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.
- **Statements of Position.** Employers will now have eight business days in which to file and serve their Statements of Position, up from the current standard of seven calendar.
- **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 is generally precluded from scheduling an election less than 20 business days from the date the NLRB directs an election, absent mutual consent of the parties.
- **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.
- **Request for Review.** Once the new rule takes effect, the agency will have greater latitude at the Regional level to extend deadlines for good cause shown.

Most significantly, the new rule restores the NLRB’s practice of resolving questions of representation, unit scope, and voter eligibility (including supervisory status) *before* an

election is scheduled. Under the 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.

WHAT DOES THIS MEAN FOR EMPLOYERS?

Without question, this is welcome news to employers. Practically speaking, the rule will 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 had reduced the period of time between petition and election from a median of 38 days in 2014 to only 23 days over the years that followed. This shortened election cycle effectively allowed labor organizations to “ambush” employers with petitions, leaving some scrambling to communicate with employees over a shorter time period. Not surprisingly, union win rates (particularly within smaller bargaining units) increased after the quickie election rule went into effect.

Unfortunately, employers and their workers will not reap the benefit of these improvements until the new rule takes effect in mid-April. Between now and then, it does not impact any pending — or soon-to-be-filed — petitions for election.

As this is a final “procedural” rule, there will be no Notice of Proposed Rulemaking, and it will take effect 120 days after anticipated publication in the Federal Register next week. 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.

Upon implementation, however, the rule will likely place you 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. This additional due process will have the added benefit of extending time to utilize “free speech” rights for purposes of educating employees on the facts surrounding unions, and the corresponding risks that may flow from union representation.

We expect more activity from the Labor Board in the near future, so you should ensure you are subscribed to [Fisher Phillips' alert system](#) to gather the most up-to-date information. If you have questions about this procedural rule, please contact your Fisher Phillips attorney or any member of our [Labor Relations Practice Group](#).

This Legal Alert provides an overview of a specific federal rule. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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