



### **NLRB RESCINDS FOUR PROVISIONS OF ITS FORMER FINAL RULE ON REPRESENTATION CASE PROCEDURES**

On March 9, 2023, the Federal Register filed for public inspection of an NLRB notice rescinding four provisions of the Board's Final Rule on Representation Case Procedures. This Final Rule, which was originally published by the Trump NLRB in December 2019, was intended to slow down the timeline for the Board to conduct union elections and to make other employer-friendly changes to NLRB election procedures.

The Board's notice came following a January 2023 decision of the United States Court of Appeals for the D.C. Circuit, in which the Court vacated the four provisions at issue. In that decision, the Court ruled that three of the Rule's provisions made substantive changes to rights under the National Labor Relations Act ("NLRA"), and were improperly enacted without the required notice and comment: (1) allowing employers up to five business days to furnish the voter list following the direction of the election; (2) precluding Regional Directors from issuing certifications following elections if a request for review is pending or during the time in which a request for review could be filed; and (3) limiting a party's selection of election observers to individuals who are current members of the voting unit whenever possible. The Court ruled that the fourth contested provision, which allows for the automatic impoundment of ballots under certain circumstances when a petition for review is pending with the Board, violated the NLRA. The Board's rule rescinded all four provisions vacated by the Court.

The Board also issued a notice delaying the implementation of two other provisions of the Final Rule: (1) allowing parties to litigate disputes over unit scope and voter eligibility prior to the election, and (2) instructing Regional Directors not to schedule elections before the 20<sup>th</sup> business day after the date of the direction of election. These provisions were previously enjoined by the United States District Court for the District of Columbia and

have never gone into effect. The Court of Appeals found that the Board had the power to issue these provisions without notice and comment. However, the provisions were challenged on multiple grounds, so the case was remanded to the District Court to consider these other arguments. The Board will continue delaying the implementation of these provisions while litigation is pending and the Board considers whether to revise or repeal the remaining provisions of the 2019 Final Rule.

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