



NLRB ISSUES NEW REPRESENTATION RULE FOR PROCESSING ELECTION PETITIONS

On August 25, 2023, the NLRB issued a new rule for representation cases that rescinds the 2019 rule in a clear and meaningful effort to provide for fair, efficient, and expeditious elections. This new rule will become effective on December 26, 2023, and has been published in the Federal Register as 88 FR 58076.

The following list summarizes the ways in which this 2023 rule, will apply to representation petitions filed on or after December 26, 2023, and amends aspects of the prior 2019 rule that had added substantial time to the representation case procedures. In several very important ways, the 2023 rule restores provisions first adopted in 2014 but rescinded in 2019. For a number of years, the various Board members under several administrations have grappled with ongoing problems of delays in processing the representation and conducting elections. This new rule is a clear and courageous effort by the Biden Board to speed up the petition-election process and eliminate the problems of election delay.

The goal of the new rule is to allow pre-election hearings to commence quickly and to reduce the time from petition to an election. The following are the basic elements of the new rule:

1. Scheduling of Pre-Election Hearing – Pre-election hearings will generally be scheduled to open approximately 10 days sooner than under the 2019 rule. The Regional Director is authorized to set a hearing in eight days from the service of the Notice of Hearing, except in cases presenting unusually complex issues. The Regional Director may postpone the opening of a hearing upon the request of a party showing extraordinary circumstances. The Notice of Petition for an Election shall be posted by the employer within two business days after service of the Notice of Hearing.

2. Due to these provisions, the Regional Director will have more limited and defined discretion to postpone pre-election hearings than under the 2019 rule.

3. The due date for the non-petitioning party's statement of position is compressed from the prior rule. A non-petitioning party's written response to the petition shall be due at noon on the business day before the opening of the hearing, but the Regional Director may postpone the time for filing the statement of position for up to two days upon the request of a party showing special circumstances.

- 4(A). Postponement of the Statement of Position – Regional Directors will have more limited and defined discretion to postpone the due date for filing a Statement of Position than under the 2019 rule. The statement of position shall state whether the party agrees that the Board has jurisdiction over the petition, whether the proposed bargaining unit is appropriate or not and the basis for this position, the classification, location or other groupings that must be added or excluded from the proposed unit to make it appropriate, identify any employees whose

eligibility to vote will be contested by the employer and the basis for each such contention, raise an election bar, and state the employer's position concerning the type, dates, times, and locations of the election and the eligibility period. The employer is also expected to state any other issues that it intends to raise at the hearing.

4(B). The statement of position shall also include the list of full names, work locations, shifts, job classifications, of all individuals in the proposed unit and the names of the employees and their work locations whom the employer believes should be added to or excluded from the proposed unit.

5. Responsive Statement of Position – Petitioners will respond orally to the non-petitioning party's Statement of Position at the start of the pre-election hearing rather than filing a written response as under the 2019 rule, which caused a delay in the opening of the pre-election hearing.

6. Posting and Distribution of Notice of Petition for Election – An employer will post and distribute the Notice of Petition for Election to inform its employees approximately 3 days sooner than under the 2019 rule.

7. Litigation of Eligibility and Inclusion Issues – Generally, only issues necessary to determine whether an election should be conducted will be litigated in a pre-election hearing. Accordingly, a Regional Director will ordinarily defer litigation of voting eligibility and bargaining unit inclusion issues to the post-election stage, if those issues do not have to be resolved to determine if an election should be held. In many cases, those issues will become moot because they end up not impacting the results of the election. Thus, unnecessary and inefficient litigation that was required under the 2019 rule will be avoided.

8. Briefing Following Pre- and Post-Election Hearings – All parties will be provided with an opportunity for oral argument before the close of the hearing. Written briefs will be allowed only if the Regional Director (following pre-election hearings) or the hearing officer (following post-election hearings) determines they are necessary. This will save time and resources as compared to the 2019 rule, which entitled parties to file briefs at least 5 business days following the close of hearings.

9. Regional Directors will ordinarily specify the election details (the type, date(s), time(s), and location(s) of the election and the eligibility period) in the Decision and Direction of election and will ordinarily simultaneously transmit the Notice of Election with the Decision and Direction of Election. This will avoid unnecessary delay in setting the election details allowed under the 2019 rule, which emphasized Regional Directors' discretion to convey the election details later in the process.

10. Elimination of the 20-Business Day Waiting Period Between Issuance of the Decision and Direction of Election and the Election – Regional directors will schedule elections for "the earliest date practicable" after issuance of a Decision and Direction of Election, rather than observing the 20-business day waiting period imposed by the 2019 rule.

11. These new rules will also apply to the representation petitions (RC), RM petitions filed by an employer, decertification petitions (RD) and AC and UC petitions to amend and clarify bargaining units.

For many years, unions have been plagued by delays in the processing of their representation petitions in which employers have presented bargaining unit placement issues and supervisory issues in successful efforts to prolong the process of reaching the ultimate goal of conducting a representation election. This new rule has been issued to mitigate those delays.

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