

December 16, 2019

## NLRB Targets Obama Election Rules

The National Labor Relations Board (NLRB) continues to take action to dismantle union-friendly Obama-era rules and regulations and replace them with Board decisions and rules that are more employer friendly and that in many cases return NLRB case handling procedures to the pre-Obama era. On Friday, December 13, 2019, the NLRB issued a final rule trimming a set of Obama-era regulations instituted in 2015 that sped up representation elections and limited pre-election challenges cases. The final rule, which was approved by the NLRB along party lines, is set for publication in the Federal Register on Wednesday, December 18, 2019 and will be effective 120 days after publication.

The Board's management-friendly final rule impacts several significant aspects of the representation case procedures, though it does not rescind the Obama-era regulations in their entirety.

In total, there are fifteen (15) amendments to the representation case procedure regulations. The following are some of the most impactful amendments:

- **Unit Scope and Voter Eligibility:** Disputes concerning these issues—including issues of supervisory status—will now normally be litigated at the pre-election hearing and resolved by the Regional Director **before** an election is directed. This is a departure from the Obama-era rules, which provided that disputes “concerning individuals” eligibility to vote or inclusion in an appropriate unit ordinarily were to be litigated and resolved **after** an election. Parties may now mutually agree to defer such issues until after the election, thereby maintaining some agreement with the Obama-era regulations. The Board's majority contends this change will promote “transparency by better defining the unit in question prior to an election.”

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- **Relaxed Deadlines:** One of the main objectives of the Board's final rule was to modify the representation case procedures to permit parties, mainly the employer, additional time to comply with various pre-election requirements. The following amendments are included to that end:
  1. The pre-election hearing will generally be scheduled to open **14 business days** from notice of the hearing compared to eight calendar days under the Obama-era regulations.
  2. The employer will now be required to post and distribute the Notice of Petition for Election within five business days after service of the notice of hearing compared to two business days under the prior rules.
  3. The employer now has five business days, rather than two business days, to furnish the required voter list following the issuance of the direction of election. This is a procedural change only. This Final Rule does not alter the necessary contents of the voter list, which remain the same.
- **Post-Election and Post-Hearing Briefs:** The right of parties to file a post-hearing brief with the Regional Director following pre-election hearings has been restored and extended to post-election hearings as well. Under the prior rules, parties could not file briefs as a matter of right. Rather, briefs were only permitted upon special permission from the Regional Director.
- **Election Observers:** In a very interesting change, the new rules now provide that in selecting election observers, whenever possible a party will **not** select a current member of the voting unit. When no such individual is available, a party should select a current nonsupervisory employee. Previously, the rules just provided that parties may be represented by observers, and both unions and employers often selected known partisans to serve the observer role.

Some other new pre-election procedures reflect more modest changes to the Obama-era regulations:

- **Time to Election:** Under the new rules, the Regional Director will continue to schedule the election for the earliest date practicable, but—absent waiver by the parties—normally will not **schedule** an election before the 20th business day after the date of the direction of the election. This change is closer to the prior normal 25 to 30 calendar day schedule pre-dating the Obama-era regulations.
- **Ballot Impoundment:** Upon the filing of a request for a direction of election within 10 business days of that direction, absent Board prior board action, ballots whose validity might be affected by the Board's ruling will be impounded. Impoundment is not required if a party files a request after 10 business days. This updated rule represents a partial return

to the pre- Obama-era requirements, which removed the provision for automatic impoundment.

[Click here](#) to review a complete list of changes and the actual text of rules.

Although the NLRB's stated rationale for these amendments is to "clarify" and provide "better balance" to the pre-election procedures, the rules do not come without controversy. The Board issued the new rules without engaging in the notice of proposed rulemaking process, thus eliminating the opportunity for outside input into the substance of the rules. As these rules reflect procedural changes, however, the Board's majority noted that federal law does not require that the Board issue a notice of proposed rulemaking to solicit input prior to making changes.

As with many recent 3-1 NLRB decisions, Lauren McFerran, the Board's sole Democrat and appointee from the Obama administration, voted against the amendments. Ms. McFerran, whose term ends on Monday, December 16, 2019—just two days before the amendments are published—touted the Obama-era regulations as increasing transparency, information sharing, and efficiency and uniformity in the elections process.

Please note that the Final Rule does not make changes to the Board's position on blocking charges. We anticipate changes to come in the near future as the Board included the topic on its rulemaking agenda. Michael Best will continue to monitor NLRB activity on this subject and communicate changes by a further alert.

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