

NLRB EASES ELECTION PROCEDURES

On Thursday, August 24, 2023, the NLRB issued a final rule governing representation case procedures that is intended to remove unnecessary barriers to the fair, efficient and expeditious resolution of representation questions. The new rule, which restores many of the procedures that were changed by the Trump-era Board, will apply to representation petitions filed on or after December 26 of this year. Rather than attempting to summarize all of the changes, attached is an explanation that the NLRB published explaining each of the amendments. In doing so, it makes reference to rules that were initially enacted in 2014, that eased the procedures that are now being restored, and to the 2019 Trump-Board modifications that are now being abandoned.

1. The pre-election hearing will generally be scheduled to open 8 calendar days from service of the Notice of Hearing. Under the 2019 rule, the pre-election hearing would generally be scheduled to open 14 business days from service of the Notice of Hearing. Restoring the 8 calendar days timeline established by the 2014 rule (which represented an effort to codify and make uniform preexisting best practices will help the Board to more expeditiously resolve questions of representation while still allowing adequate time ;for a nonpetitioning party to prepare a Statement of Position and otherwise prepare and make arrangements before the pre-election hearing.

2. Regional directors have discretion to postpone a pre-election hearing for up to 2 business days upon request of a party showing special circumstances and for more than 2 business days upon request of a party showing extraordinary circumstances. Under the 2019 rule, regional

directors could postpone a pre-election hearing for an unlimited amount of time upon request of a party showing good cause. Restoring the extension provisions established by the 2014 rule ensures that the pre-election hearing will not be unnecessarily delayed.

3. A nonpetitioning party's Statement of Position responding to the petition generally will be due to be filed by noon the business day before the opening of the pre-election hearing. Because the pre-election hearing will normally open 8 calendar days after service of the Notice of Hearing, the Statement of Position is normally due 7 calendar days after service of the Notice of Hearing. Under the 2019 rule, a nonpetitioning party's Statement of Position was due to be filed 8 business days (or 10 calendar days) after service of the Notice of Hearing. Restoring the timeline for production of the Statement of Position to the timeline established by the 2014 rule is consistent with the restored shorter timeline between service of the Notice of Hearing and opening of the pre-election hearing, and preserves adequate time for a nonpetitioning party to prepare a Statement of Position.

4. Regional directors have discretion to postpone the due date for the filing of a Statement of Position for up to 2 business days upon request of a party showing special circumstances and for more than 2 business days upon request of a party showing extraordinary circumstances. Under the 2019 rule, regional directors could postpone the due date for an unlimited amount of time upon request of a party showing good cause. Restoring the extension provisions established by the 2014 rule ensures that the Statement of Position (and the pre-election hearing) will not be unnecessarily delayed.

5. A petitioner shall respond orally to the nonpetitioning party's Statement of Position at the start of the pre-election hearing. Under the 2019 rule, a petitioner was required to file and serve a responsive written Statement of Position 3 business days prior to the pre-election hearing. Restoring the 2014 rule's requirement that the petitioner respond orally at the hearing—rather than in writing 3 business days in advance of the hearing—to the nonpetitioning party's Statement of Position eliminates an unnecessary barrier to the fair and expeditious resolution of

representation cases and preserves for the petitioner an adequate opportunity to respond to the nonpetitioning party's Statement of Position, thus continuing to facilitate orderly litigation.

6. An employer has 2 business days after service of the Notice of Hearing to post the Notice of Petition for Election in conspicuous places in the workplace and to electronically distribute it to employees if the employer customarily communicates with its employees electronically.

Under the 2019 rule, an employer had 5 business days for the requisite posting and electronic distribution. The restored shorter time frame ensures that the important information contained in the notice will be disseminated earlier to employees and employers alike, while preserving adequate time for employers to achieve posting and distribution.

7. The purpose of the pre-election hearing is to determine whether a question of representation exists. Accordingly, disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily do not need to be litigated or resolved prior to an election, and regional directors have authority to exclude evidence that is not relevant to determining whether there is a question of representation and thereby avoid unnecessary litigation on collateral issues that can result in substantial waste of resources. Under the 2019 rule, individual eligibility and inclusion issues were "normally" to be litigated at the pre-election hearing and resolved by the regional director prior to the election. Restoring the 2014 rule language more efficiently avoids litigating and resolving issues that are often mooted by the election results or amicably resolved following an election and permits fairer and more expeditious resolution of representation cases.

8. Parties may file post-hearing briefs with the regional director only with the regional director's special permission (following *pre*-election hearings) or hearing officer only with the officer's special permission (following *post*-election hearings) and within the time and addressing only the subjects permitted by the regional director or hearing officer, respectively. Under the 2019 rule, parties were entitled to file briefs up to 5 business days following the close of a pre- or post-election hearing, with an extension of an additional 10 business days available

upon a showing of good cause. Restoring only permissive post-hearing briefing permits regional directors and hearing officers adequate flexibility to request briefing in the rare complex case and eliminates redundant and repetitive briefing, and consequent delay, in the more commonplace straightforward cases.

9. Regional directors ordinarily should 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 should ordinarily simultaneously transmit the Notice of Election with the decision and direction of election. The parties will have already taken positions with respect to the election details in writing prior to the hearing and on the record at the hearing. Under the 2019 rule, regional directors were allowed to convey election details in the decision and direction of election (and to simultaneously transmit the Notice of Election with the decision and direction of election), but emphasis was placed on their discretion to convey them in a later-issued Notice of Election. By leaving no doubt that the ordinary course is to convey election details in the decision and direction of election and to simultaneously transmit the Notice of Election, the restored standard eliminates redundant and wasteful post-decision consultation regarding election details and, in turn, furthers the expeditious resolution of representation cases, while leaving regional directors free to engage in additional consultation where necessary.

10. Regional directors shall schedule elections for “the earliest date practicable” after issuance of a decision and direction of election. While the 2019 rule contained the same language, it also imposed a 20-business day waiting period between the decision and direction of election and the election that the 2014 rule had eliminated. The elimination of the mandatory waiting period language will reduce delay and eliminate an unnecessary barrier to the fair and expeditious resolution of questions of representation.



NLRB FACT SHEET

Representation Case Procedures

NLRB Representation Case Procedures – 2023 Final Rule

(Effective 12/26/2023)

The National Labor Relations Board's final rule governing representation case procedures is designed to remove unnecessary barriers to the fair, efficient, and expeditious resolution of representation questions. The amendments provide targeted solutions to discrete, specifically identified problems to enable the NLRB to better fulfill its duty under the National Labor Relations Act to resolve questions of representation appropriately.

Background on Representation Case Procedures

Representation petitions are filed by employees, unions, and employers seeking to have the NLRB conduct an election to determine if employees wish to be represented for purposes of collective bargaining with their employer. The NLRB will investigate these petitions to determine if an election should be conducted and will direct an election, if appropriate.

In most instances, parties agree on the voting unit and other issues. If parties do not agree, the NLRB's regional office holds a pre-election hearing to determine whether an election should be conducted. The NLRB's regional office conducts the election and, if necessary, holds a post-election hearing to resolve challenges to voters' eligibility and objections to the conduct of the election or conduct affecting the results of the election. Parties can seek review from the Board in Washington DC of regional determinations made before and after the election.

List of Amendments

The following list summarizes the ways in which this 2023 rule (which will apply to representation petitions filed on or after December 26, 2023) amends aspects of a prior 2019 rule that had added substantial time to the representation case process. In these ways, the 2023 rule restores provisions first adopted in 2014, but rescinded in 2019.

Allowing Pre-Election Hearings To Open More Quickly:

- 1. *Scheduling of Pre-Election Hearing*** – Pre-election hearings will generally be scheduled to open approximately 10 days sooner than under the 2019 rule.
- 2. *Postponement of Pre-Election Hearing*** – Regional directors will have more limited and defined discretion to postpone pre-election hearings than under the 2019 rule.

3. *Due Date for Nonpetitioning Party's Statement of Position* – A nonpetitioning party's written response to the petition will generally be due approximately 3 days sooner than under the 2019 rule.

4. *Postponement of the Statement of Position* – Regional directors will have more limited and defined discretion to postpone the due date for filing of a Statement of Position than under the 2019 rule.

5. *Responsive Statement of Position* – Petitioners will respond orally to the nonpetitioning party's Statement of Position at the start of the pre-election hearing rather than, as under the 2019 rule, delaying the opening of the pre-election hearing to allow them to file and serve a responsive written Statement of Position.

Disseminating Important Election Information More Quickly:

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.

Making Hearings More Efficient:

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 eligibility and 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.

Ensuring That Elections Are Held More Quickly:

9. *Specification of Election Details in Decision and Direction of Election; Notice of Election* – 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.