

# CLIENT ALERTS

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## NLRB Relaxes "Quickie Election" Rules Effective April 16, 2020

1.7.2020

In an effort to assist employees in union organizing, in 2014 the National Labor Relations Board adopted what are commonly known as the "Quickie Election Rules". These rules moved election petitions forward at a greatly accelerated pace and focused on conducting a representation election within 21 days after a petition was first filed.

The "Quickie Election Rules" have received considerable criticism from employer groups because the rules favored the goal of a speedy election over a thorough, reasoned analysis of the appropriate voting unit and voter eligibility issues by the Board. In the rush to conduct an expedited election, important issues such as the supervisory status of individual employees, and whether certain employees had a community of interest with the voting unit were often deferred until after the election. Moreover, certain other time periods involved with the election were expedited to the employer's prejudice, such as the requirement of compiling and filing an exhaustive list of contact information for prospective voters within only 2 business days; irrespective of whether the voter list contained 10 or 1,000 prospective voters.

In revised election rules, (which became final on December 19, 2019, and which will be effective on April 16, 2020), the NLRB substantially modified the "Quickie Election Rules". Where there are legitimate pre-election issues of unit-scope or voter eligibility to be determined, it is likely that the time period for the Board's processing of an election petition could almost double the 21 day target period that is currently in force. The revised rules represent a return to the Board's longstanding previous election time tables, under which an employer commonly had six weeks or more to lawfully exercise its rights under Section 8 (c) of the NLRB to communicate its opposition to union representation to prospective voters.

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Some of the major changes in the revised election rules may be summarized as follows:

- Extended Time for Pre-Election Hearings: Under current rules, a hearing on an election petition must be scheduled within only an 8-day period from the filing of the petition. This is normally insufficient time for an employer to secure counsel; closely evaluate prospective pre-election issues; gather documentary evidence in support of its legal position; and prepare an effective case presentation at hearing (if one is to be conducted at all). The modified rules expand the period for scheduling the hearing to 14 days.
- Modified Period For Filing Position Statements: The current rules require an employer to file a comprehensive Position Statement the day before a scheduled hearing; any issues not fully raised in the Statement are deemed waived and cannot be litigated thereafter, nor can such issues be raised if the Statement was untimely filed. In contrast, the petitioning union has no obligation to file any pleading but the one-page election petition prior to a prospective hearing.

Under the revised rules, the employer will have an expanded period of at least 8 business days to file the Position Statement, and regional directors have expanded authority to extend that period. The petitioning union will be required to file its own counter-Position Statement by noon 3 business days before the commencement of the pre-election hearing.

- Pre-election NLRB Determination of Unit Scope and Voter Eligibility Issues: Under the revised rules, all disputes concerning the scope of the voting unit and the voter eligibility of disputed employees will generally be litigated at the pre-election hearing, and will be decided by the regional director prior to the direction of an election. This resolves a significant criticism of the current procedures, where employers often have no pre-election direction from the NLRB whether a disputed employee is or is not a statutory “supervisor”, whose conduct during an election campaign may be the subject of unfair labor practices or election objections.
- Right To File Post-Hearing Briefs: Under the current rules, the Board generally declines to permit parties to file post-hearing briefs (when a hearing is conducted), in the interest of expediting the election. This impedes the presentation of reasoned legal arguments in favor of a party’s election position, including on significant legal and fact-intensive issues such as multi-facility bargaining units, joint employer status, community of interest analysis and professional or supervisory status. The revised rules permit a right to file a post-hearing brief within 5 business days from the close of the hearing, with the opportunity to request an extension of up to 10 business days for good cause.
- Scheduling Elections: When a hearing is conducted, under current rules an election is normally scheduled within days after the regional director decides the hearing issues in a Decision and Direction of Election. The revised rules provide that the regional director will not normally schedule an election before the 20<sup>th</sup> business day after the Decision and Direction of Election is issued. This permits the union and employer almost a full three weeks of campaigning after the pre-election issues are determined.
- Expedited Time to File Voter Lists: Under current NLRB procedures, the employer faces tremendous time pressure in compiling and filing an accurate Voter List within 2 business days of a regional director’s approval of a stipulated election agreement or Decision and Direction of an election. The

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Voter List must accurately state (in a designated format) an employee's name, address, home telephone number, cell phone number, e-mail address, job classification, working location and shift, and sufficient inaccuracies in the information may be grounds to rerun an election that the employer has won. The revised rules impose a more reasonable period to compile and file the Voter List of 5 business days.

Please note that these more reasoned and balanced election rules will not take effect until April 16, 2020, and that petitions filed prior to that date will be processed under the current rules.

Please feel free to contact Craig Schwartz or any member of Butzel Long's Labor and Employment Group if you have any questions about the new NLRB election rules.

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