

New NLRB Election Rules Partially Invalidated

Alert

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By Matt Tews and Anne Marie Buethe

The National Labor Relations Board (NLRB) faces yet another road block to fully implementing its [new election rules](#). The final rule, issued at the end of 2019, is set to restructure some of the more controversial 2014 “quickie” election rules. The effective date was originally scheduled for April 16, 2020, but the Board [pushed it back](#) to May 31, 2020, in the wake of the COVID-19 pandemic. The rule’s implementation was already likely to be delayed pending the AFL-CIO’s lawsuit against the NLRB alleging that the Board violated the Administrative Procedure Act by foregoing public notice and comment before issuing the final rule.

With the rule’s effective date just around the corner, Judge Ketanji Brown Jackson of the U.S. District Court for the District of Columbia issued her decision in the AFL-CIO’s lawsuit, enjoining certain aspects of the rule and remanding the rule to the NLRB for reconsideration. Judge Jackson found that “the challenged portions of the regulation at issue are not procedural rules that are exempted from the notice-and-comment rulemaking requirements of the APA . . . and because each of these specific provisions was promulgated without notice-and-comment rulemaking, each one must be held unlawful and set aside.” In other words, Judge Jackson ruled that many of the most important parts of the new NLRB election rules should have gone through the full administrative rulemaking process and, since they did not, could not go into effect.

Judge Jackson’s [order](#), soon followed by a detailed [memorandum opinion](#), enjoined the following aspects of the rule:

- Expanding pre-election litigation and resolution timelines for election issues
- Increasing the time available prior to elections to communicate with employees about election issues

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- Increasing the timeline for an employer to serve the union and the NLRB Regional Office with a list of eligible voters
- Narrowing the categories of employees eligible to serve as election observers
- Delaying election certifications while requests for review of could be filed or are still pending

The NLRB has stated that it intends to file an appeal, though it may instead decide to put the enjoined parts of the new rules through the full administrative rulemaking process. In the interim, the Board implemented the remaining, untouched portions of the rule, which include:

- Scheduling initial hearing dates at least 14 business days from the Notice of Hearing
- Posting the Notice of Petition within five business days after service of the Notice of Hearing
- Filing the Statement of Position within eight business days after service of the Notice of Hearing
- Providing a Statement of Position to be filed by the Petitioner in response to the issues raised in any Statement of Position
- Allowing the filing of post-hearing briefs
- Allowing ballot impoundment procedures when an appeal is pending on the date the election is held

A Proactive Approach to Positive Employee Relations

The NLRB's path toward election rule reform has been anything but straightforward, and the landscape is continually evolving. As employers follow these developments, it is crucial for non-union employers desiring to stay union-free to take a proactive approach to labor relations. Maximizing positive employee relations and understanding how to prevent conditions susceptible to a union election petition will make it less likely that an employer is faced with a petition, regardless of the outcome of the NLRB's election rules reform.

For more information on the NLRB election rules, please contact [Joel Abrahamson](#), [Anne Marie Buethe](#), [Dominic Cecere](#), Nicole Faulkner, Kyle Malone, [Richard Pins](#), [Matthew Tews](#), Johnny Wang or the Stinson LLP contact with whom you regularly work.

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