



NLRB Adopts Union-Friendly Election Procedures



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On August 24, 2023, the National Labor Relations Board (NLRB) announced a new final rule for representation election procedures that restores the prior “ambush” election rules from 2014.¹ The rules, which have been the subject of numerous legal disputes, represent yet another setback for employers. The new final rule sets aggressive deadlines for employers and forces regional directors to run elections as quickly as possible.

The 2014 “Ambush” Election Rules

As a brief history, in December of 2014, the NLRB issued final “ambush” election rules.² These rules reduced the amount of time between the filing of a petition and a union election.³ According to the NLRB, the 2014 rules removed unnecessary barriers to the fair and expeditious resolution of representation cases⁴ and assisted in “achiev[ing] timely, efficient, fair, accurate, uniform, and transparent resolution of representation cases.”⁵ The rules, which leaned in the unions’ favor, set aggressive deadlines for holding elections and implemented new procedures to be followed after a petition was filed. Essentially, the “ambush” rules placed additional burdens on employers and made it easier for unions to successfully organize.

The 2019 Election Rules

In December of 2019, the NLRB issued a final rule which amended the 2014 “ambush” election rules and granted additional time to the representation case process.⁶ These rules were more employer friendly than the 2014 “ambush” rules and eased the aggressive timeline for holding elections.⁷ However, in 2022, the United States Court of Appeals for the District of Columbia

Circuit struck down parts of the 2019 rule.⁸ What followed was a series of harmful rules to employers.

2023 Final Rule

On August 24, 2023, the NLRB announced a new final rule which essentially restores the 2014 “ambush” election rules.⁹ Like the 2014 rules, the new 2023 final rule shortens the time frame between filing a petition and holding a union election.¹⁰ According to the NLRB, the final rule is designed to remove unnecessary barriers to the fair, efficient, and expeditious resolution of representation questions.¹¹ The final rule will go into effect on December 26, 2023.¹²

Amendments

1. **Scheduling of Pre-Election Hearing** – Pre-election hearings will now generally be scheduled to occur eight calendar days from the service of the Notice of Hearing.¹³ This means that within eight calendar days from service, the employer must retain counsel, gather facts, research applicable law, secure witnesses, coordinate with regional personnel, and potentially secure an election agreement.¹⁴ Pre-election hearings will now be approximately ten days sooner than under the 2019 rule. This short timeline might hinder an employee’s ability to thoroughly educate themselves before voting.
2. **Postponement of Pre-Election Hearing** – Regional Directors may postpone a pre-election hearing for up to two business days upon request of a party showing special circumstances.¹⁵ If the party can show extraordinary circumstances, the Regional Director may postpone the pre-election hearing for more than two days.¹⁶ Under the 2019 rule, regional directors could postpone a pre-election hearing for an unlimited amount of time upon a showing of good cause.¹⁷
3. **Due Date for Employer’s Statement of Position** – An employer’s written response to the petition (statement of position) will now be due by noon the business day before the opening of the pre-election hearing.¹⁸ Because the pre-election hearing will normally open eight calendar days after service of the Notice of Hearing, this means the statement of position will be due seven calendar days after service of the Notice of Hearing. Under the 2019 rule, the statement of position was typically due eight business days after service, which gave the employer approximately three additional days to submit their statement of position.¹⁹ This substantially restricts the time to prepare a sufficient statement of position.
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. Specifically, Regional Directors may grant additional time upon request of a party showing special circumstances for up to two business days or more than two business days if a party shows extraordinary circumstances.²⁰ 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.²¹
5. **Responsive Statement of Position** – Petitioners will respond orally to the employer’s statement of position at the start of the pre-election hearing.²² Under the 2019 rule, petitioners were required to submit a written response to the statement of position no later than three business days prior to the pre-election hearing.²³

6. Posting and Distribution of Notice of Petition for Election – After service of the Notice of Hearing, an employer has just two business days to post the Notice of Petition for Election.²⁴ The Notice of Petition for Election must be posted in conspicuous places and must be distributed electronically to employees if the employer customarily communicates with its employees electronically.²⁵ The NLRB argues it is easy for employers to comply with this requirement because the Notice of Petition for Election is provided by the Regional Director.²⁶ However, this tight deadline may be a challenge for large employers with several locations who may need more time to determine where the notice will need to be posted and to whom it must be electronically distributed.²⁷ Under the 2019 rule, employers had five business days to post the Notice of Petition for Election.²⁸
7. Litigation of Eligibility and Inclusion Issues – The new rule states that the purpose of the pre-election hearing is to determine whether a question of representation exists and that disputes regarding individual eligibility and inclusion typically do not need to be litigated or resolved before an election is conducted.²⁹ Thus, the 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.³⁰ By delaying the determination of these types of questions, employees are deprived of the ability to understand which of their co-workers would be included in the unit and which would not.³¹ This is different from the 2019 rule which required individual eligibility and inclusion issues to be resolved by the Regional Director prior to the election.³²
8. Briefing –Under the new rule, parties will only be allowed to file post-hearing briefs if they obtain special permission from the Regional Director or hearing officer.³³ Under the 2019 rule, parties were entitled to file briefs up to five business days following the close of a pre or post-election hearing.³⁴
9. Election Details – Regional Directors will 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 send the Notice of Election with the decision.³⁵ Under the 2019 rule, Regional Directors conveyed election details in the decision at their discretion.³⁶
10. Scheduling Elections – Regional Directors will schedule elections for the “earliest date practicable” after issuance of a decision and direction of election.³⁷ This eliminates the mandatory 20-day waiting period imposed by the 2019 rule³⁸ and most likely will decrease the period of time during which employees can become fully informed voters.

The new rule gives employers significantly less time to educate their employees regarding the advantages and disadvantages of unionization once a Petition for Election is filed. This may result in employees not being fully informed prior to voting. As Member Kaplan stated in his dissent, the new rule places more importance on speed than on an employee’s right to choose whether or not to be represented by a union.³⁹

Cemex Construction Materials Pacific, LLC

On August 25, 2023, the NLRB issued another blow to employers when it decided *Cemex Construction Materials Pacific, LLC*.⁴⁰ In the decision, the NLRB set forth a new, union-friendly

framework for determining when an employer has unlawfully refused to recognize and bargain with a designated majority representative of its employees.⁴¹ When a union requests recognition on the basis that a majority of employees in an appropriate bargaining unit have designated the union as their representative, an employer must either recognize and bargain with the union or promptly file an RM petition seeking an election.⁴² The NLRB defines “promptly” as within two weeks of the union’s demand for recognition.⁴³ If the employer neither recognizes the union nor promptly files a petition, the employer risks an unfair labor practice charge based upon its refusal to bargain.⁴⁴

If an employer who seeks an election commits any unfair labor practice that would require setting aside the election, the petition will be dismissed, and - rather than re-running the election - the NLRB will order the employer to recognize and bargain with the union.⁴⁵ This decision threatens to enforce collective bargaining on employers and employees without holding a secret ballot election.

The *Cemex Construction* ruling, combined with the revival of the NLRB’s 2014 “ambush” election rules, places a heavy burden on employers. Employers are required to meet strict deadlines and may face consequences for any violation, no matter how slight. Unfortunately, the recent rulings demonstrate that the trend of union-friendly decisions will likely not end anytime soon.

The St. Louis employment attorneys at McMahon Berger have been representing employers across the country in labor and employment matters for over sixty years and are available to discuss these issues and others. As always, the foregoing is for informational purposes only and does not constitute legal advice regarding any particular situation as every situation must be evaluated on its own facts. The choice of a lawyer is an important decision and should not be based solely on advertisements.

¹ *Representation-Case Procedures*, 88 FR 58076 (Aug. 25, 2023).

² *Representation-Case Procedures*, 79 FR 74308 (Dec. 15, 2014).

³ *Id.* at 74317.

⁴ *Id.* at 74308.

⁵ 88 FR at 58077.

⁶ *Representation-Case Procedures*, 84 FR 69524 (Dec. 18, 2019).

⁷ *Id.* at 69525.

⁸ *Am. Fed’n of Lab. & Cong. Of Indus. Organizations v. Nat’l Lab. Rels. Bd.*, 466 F. Supp. 3d 68, 73 (D.D.C.), order amended on reconsideration, 471 F. Supp. 3d 228 (D.D.C. 2020), and *aff’d in part, rev’d in part and remanded*, 57 F.4th 1023 (D.C. Cir. 2023), and *aff’d in part, rev’d in part and remanded*, 57 F.4th 1023 (D.C. Cir. 2023).

⁹ 88 FR at 58076.

¹⁰ *Id.* at 58083.

¹¹ *Id.* at 58077.

¹² *Id.*

¹³ *Id.* at 58079.

¹⁴ *Id.* at 58095 (Kaplan, M., dissenting).

¹⁵ *Id.* at 58079.

¹⁶ *Id.*

¹⁷ 84 FR at 69525.

¹⁸ 88 FR at 58079.

¹⁹ 84 FR at 69525.

²⁰ 88 FR at 58080.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 58086.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 58097 (Kaplan, M., dissenting).

²⁸ 84 FR at 69525.

²⁹ 88 FR at 58086.

³⁰ *Id.* at 58080.

³¹ *Id.* at 58093 (Kaplan, M., dissenting).

³² *Id.* at 58078.

³³ *Id.* at 58080.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 58093 (Kaplan, M., dissenting).

⁴⁰ *Cemex Constr. Materials Pac., LLC*, 372 NLRB No. 130 (Aug. 25, 2025).

⁴¹ *Id.* at 25.

⁴² *Id.* at 26.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*