



NLRB ISSUES MODIFIED RULES FOR “QUICKIE” ELECTIONS

On December 8, 2023, the General Counsel for the National Labor Relations Board (NLRB) issued a Guidance Memorandum on 2023 Election Rule Representation Case Procedure Changes (the “Memorandum”). The Memorandum significantly reduces the time previously available from the date a petition for election is filed to the date the election occurs. This change will give employers a very short period of time to develop and conduct a campaign to inform the concerned employees of the advantages of remaining union-free, the disadvantages of being represented by a union and why they should vote against having a union. Below are the most important modifications implemented by the Memorandum, which will go into effect on December 26, 2023.

Most notable modifications:

- The Board will schedule the pre-election hearing to open eight (8) calendar days from service of the Notice of Hearing, instead of the previous fourteen (14) business days under the current rules. The hearing may only be postponed for up to two (2) additional business days and only if the party demonstrates “special circumstances” and more than two (2) additional business days if a party shows “extraordinary circumstances.” Previously, Regional Directors had unlimited discretion to grant postponements.
- Employers will only have two (2) business days to post and distribute the Notice of Petition for Election, which will now provide more detailed information.
- Employers must submit the Statement of Position by noon the day before the hearing. This submission usually occurs seven (7) calendar days after service of the Notice of Petition for Election.
- The Union may respond orally to the Employer’s Statement of Position at the start of the hearing. Under the current rules, the union must respond in writing three (3) days before the hearing. This change means that the employer will learn the union’s position at the hearing, not before it.
- The pre-election hearing will principally focus on the need to conduct an election. Issues related to an employee’s voting eligibility and inclusion in an appropriate bargaining unit will only be considered if they must be resolved to determine whether an election is to be held (i.e., if the Union has submitted sufficient authorization cards to constitute a “showing of interest” among appropriate unit employees, or if the petitioned unit is illegal on its face). The remaining issues will be resolved after the election to determine if a majority of the employees entitled to vote have chosen to be represented by the union.

- Post-hearing briefs will only be allowed subject to the Regional Director’s special permission. Previously, employers and unions had the right to submit a post-hearing brief no later than five (5) business days after the hearing. The parties will be allowed to argue orally before the hearing’s closure.
- The new rules eliminate the twenty (20) business day waiting period previously provided between the decision to direct an election and the election. Under the new rules, elections will be scheduled for “the earliest date practicable.”
- Under the new rules, Regional Directors are responsible for providing comprehensive election details, such as type, date, time, location, and eligibility period, among others, in the decision and direction of the election, and simultaneously transmit the Notice of Election.

These modified rules will significantly reduce the timeframes between filing the petition and holding the election. Consequently, employers will have less time available to present their opposition to union representation and prepare for an election, and will therefore need to assimilate these modifications quickly, train their stakeholders, and preferably establish protocols for managing these new procedures before receiving a Notice of Petition for Election. The new rules are meant to simplify the election process and shorten the election period, creating a fertile ground for unions to win elections.

As we had explained in a previous Alert, the Board’s decision in *Cemex Construction Materials Pacific, LLC*, 327 NLRB No. 130 (Aug. 25, 2023) adopted a new framework for determining when employers must bargain with unions without a representation election, which makes union organizing by card-check instead of a secret ballot election more likely. Now, if a union requests recognition on the basis that a majority of employees in an appropriate bargaining unit have signed cards designating the union as their representative, an employer must either recognize and bargain with the union or promptly (within 2 weeks of the union’s demand for recognition) file a representation (“RM”) petition seeking an election. If an employer who seeks an election commits any unfair labor practice during the critical period prior to the election that would require setting aside the election, the Board will order the employer to recognize and bargain with the union instead of ordering a re-run election.

If the employer neither recognizes the union nor files a petition, the union may file a charge against the employer. If majority support (signed union cards) is proven in an appropriate unit, the Board will find that the employer violated the National Labor Relations Act, will certify the union as the employees’ exclusive representative, and will order the employer to bargain in good faith.

RECOMMENDATIONS

As we previously explained, the changes promulgated by the Board have the intended effect of (a) limiting the right of employees and employers to insist on a secret vote election and instead favoring certification based on union card checks and (b)

minimizing the time an employer has, once it receives notice that (i) a union is seeking to represent its employees and (ii) before the date of the election, to inform the employees of their right not to be unionized, make them aware of the reasons why they do not need a union, and that it is contrary to their best interests to be unionized.

Therefore, employers should consider taking steps such as:

1. Training managerial and supervisory staff on union activity awareness and employee restlessness.
2. Issuing, or revising and reissuing, a legally valid employer's union-free policy.
3. Issuing, or revising and reissuing, a legally valid no-solicitation, no-distribution rule.
4. Including a summary of the employer's union-free and open-door policies in routine employee training.
5. Not accepting a union representative request that the employer check union authorization cards, not recognizing voluntarily the union as the representative of the employees and calling labor counsel promptly.

At Pietrantoni Mendez & Alvarez, LLC, we are available to assist you in training your management employees and stakeholders on these new election procedures and designing the protocols that will be needed to manage a Notice of Petition for Election, if that happens.

If you have questions or need assistance, please contact one of our attorneys.

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