

# LABOR AND EMPLOYMENT LAW

## INFORMATION MEMO

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### NLRB Restores Expedited Union Election Procedures

On Aug. 25, 2023, the National Labor Relations Board (NLRB) published a final rule regarding election proceedings. In issuing the rule, the NLRB reinstated election procedures it issued in 2014. These procedures shorten the union election and certification processes and reinstate what have been termed “ambush” elections. In 2019 the NLRB issued a rule replacing many of the provisions of the 2014 rule, but several of the provisions of the 2019 rule were invalidated in *AFL-CIO v. NLRB*, 57 F.4<sup>th</sup> 1023 (D.C. Cir. 2023). The NLRB’s latest rule rescinded additional provisions of the 2019 rule. Specifically, the NLRB’s new rule implements the following:

1. **Pre-Election Hearings:** Pre-election hearings will now generally be scheduled to open eight calendar days after the Notice of Hearing is served consistent with the 2014 rule. Under the 2019 rule, hearings would generally be scheduled to open fourteen business days after service of the Notice of Hearing.
2. **Postponement of Pre-Election Hearing:** Under the new rule, upon request of a party, regional directors have the discretion to postpone a pre-election hearing up to two business days upon a showing of “special circumstances” and for more than two business days only upon a showing of “extraordinary circumstances.” Under the 2019 rule, regional directors could postpone the pre-election hearing for an unlimited amount of time upon the showing of good cause.
3. **Statements of Position for Non-Petitioning Parties:** Non-petitioning parties must generally file a statement of position by noon on the business day before the opening of the hearing, which will typically be seven calendar days after the service of the Notice of Hearing. This will generally result in a three calendar day reduction in the non-petitioning party’s time to respond.
4. **Extension of Time to File Statements of Position:** Regional directors can only postpone the deadline for a non-petitioning party to file a statement of position for two business days upon a showing of extraordinary circumstances. The 2019 rule allowed the deadline to be extended for an unlimited amount of time based on a showing of good cause.
5. **Petitioners’ Statements of Position:** Pursuant to the NLRB’s new rule, petitioners shall respond orally to the non-petitioning party’s statement of position at the opening of the pre-election hearing. This change relieves petitioners from having to submit a written response three days prior to the pre-election hearing.
6. **Posting of Notice of Petition for Election:** Employers must post the Notice of Petition for Election within two business days after service of the Notice of Hearing. The Notice of Petition for Election must be posted conspicuously in the workplace and be distributed electronically “if the employer customarily communicates with its employees electronically.” The 2019 rule provided employers with five business days to post and/or distribute the Notice of Petition for Election.

7. Eligibility and Inclusion Questions: Under the 2019 rule, questions regarding employees' eligibility to vote in an election and inclusion within the bargaining unit were "normally" litigated at the pre-election hearing. In its new rule, the NLRB has stated that such questions are generally not relevant at the pre-election stage, and that "regional directors have authority to exclude evidence that is not relevant" to the pre-election hearing.
8. Post-Hearing Briefs: Parties may now only file post-hearing briefs following pre- or post-election hearings with special permission. Under the 2019 rule, parties had up to five business days to file post-hearing briefs, with the possibility of a ten-day extension upon a showing of good cause.
9. Election Details: The new rule directs regional directors to specify the type, date, time, and location of elections, as well as the eligibility period, when transmitting the Notice of Election.
10. Scheduling of Elections: The new rule, like the 2019 rule, directs regional directors to schedule elections for the "earliest date practicable" after issuing a decision and directing an election; however, the new rule eliminates a twenty business day waiting period.

The NLRB's new final rule becomes effective Dec. 26, 2023. The effects of the new rule will speed up the election process and limit employers' time to campaign against unionization. Additionally, the elimination of the requirement for petitioners to file a written response to employers' statements of position will make it more difficult for employers to prepare for the pre-election hearing.

This final rule was issued without the typical notice and comment period. The NLRB stated that issuing a direct final rule was appropriate because its provisions "concern agency procedure and are therefore exempt from notice and comment" and because the final rule rescinded the 2019 rule and returned to the 2014 rule that was issued after notice and comments.

A copy of the full text of the rule can be found [here](#). If you have any questions regarding the NLRB's new rule, please contact [Nicholas Jacobson](#), any attorney in Bond's [labor and employment practice](#) or the Bond attorney with whom you are regularly in contact.

