

The NLRB's General Counsel Issues Guidance on the New Accelerated Election Rules

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On April 14, 2015, the National Labor Relations Board's controversial "quickie election" rule goes into effect. This week, the NLRB's General Counsel, Richard F. Griffin, issued a 36 page guidance memorandum outlining the Board's new representation election procedures under the rule (NLRB Office of the General Counsel, Memorandum 15-06 (April 6, 2015)). The General Counsel asserts that the new rule does not "establish new timeframes for conducting elections or issuing decisions." However, almost every timeline for election procedures has been accelerated. This new rule significantly tilts the NLRB's election procedures in favor of unions by reducing the normal time for NLRB elections from approximately 38 days to as little as **13 days** from the filing of a petition.

The General Counsel makes clear that this memorandum "supersedes" any other Agency manuals or guidance. The new rule, and the General Counsel's accompanying procedures, shortens the time between the filing of an election petition and the election, provides for electronic filing of election petitions, compels the employer to post a notice of election within two days or risk overturning the election, requires employers to provide detailed employee information in specific formats, demands that employers detail their legal positions in a Statement of Position prior to any hearing or waive any defenses not raised, allows the regional director to refuse the employer's evidence based on an offer of proof, and delays legal challenges until the NLRB conducts an election.

The NLRB's General Counsel asserts that the change in procedures is necessary "to streamline and modernize the representation case process and eliminate unnecessary litigation and delay." In reality, the rule unfairly favors unions and infringes on employers' free speech rights, protected by both the U.S. Constitution and the National Labor Relations Act, to effectively communicate with its employees about union representation. In addition, the General Counsel creates several one-sided complex procedural requirements. Failure to comply with these convoluted requirements will impact the employer's ability to raise legal defenses and overturn favorable election results. The Board also seems have set clearly impossible deadlines and procedures for the Agency given the complexity of its own rules, the new organizing tools it has created for unions, and the realities of its existing personnel and budget.

Specific Changes under the Rule and the General Counsel's Procedures:

- The union may file the election petition electronically.
- After the Board receives the union petition, the regional director will send a Notice of Representation Hearing and Notice of Petition for Election to the employer in regular mail and will mark the correspondence "Urgent." The region will also "attempt" to send these documents by email or facsimile, unless no address or number is listed on the

petition. The region will attempt to obtain these numbers and will attempt to contact the parties after sending the documents.

- Within two business days after service of the Notice of Hearing, the employer must post a Notice of Petition for Election. The Notice must be posted in “conspicuous places, including all places where notices to employees are customarily posted.” All pages must be simultaneously visible. If the employer communicates with employees through email, the employer must also email the Notice of Petition to employees. The Notice of Petition must be posted until the petition is dismissed, withdrawn, or replaced by the Notice of Election. Failure to properly post the Notice of Petition is grounds for setting aside the election.
- Except in cases presenting “unusually complex issues,” the regional director will set the hearing eight days after service of the Notice of Hearing. The hearing will continue on consecutive days until complete.
- The employer must file a Statement of Position that identifies the issues it plans to litigate at the hearing. This Statement of Position is due at noon on the business day before the hearing. If the hearing is set more than eight days after the Notice of Hearing, the regional director may set the due date earlier than the day before the hearing.
- With its Statement of Position, the employer must include a list of employees with the full names, work locations, shifts, and job classifications of all individuals in the proposed unit and a separate list of individuals the employer wants added to the proposed unit. The employer must indicate who it wants excluded from the proposed unit or whose eligibility it contests, and the basis for those exclusions. The list must be in a searchable table format in a Microsoft Word compatible file. The first column of the table must begin with the employees’ last name and list must be alphabetized (overall or by department) by last name. The font size must be Times New Roman 10 or larger.
- In a supplementary memorandum, the General Counsel provided a chart outlining the dates for petitions filed from April 14, 2015 to April 29, 2015. For instance, if a petition is served on April 14, 2014, the hearing date would be Wednesday, April 22, 2015 and the employer’s Statement of Position would be due at noon on Tuesday, April 21, 2015.
- A party may request postponement of a hearing for two days under “special circumstances.” Requests to postpone the hearing for more than two business days require a party to show “extraordinary circumstances.” The regional director also has discretion to postpone a hearing when it “is highly probable” that the parties will enter into an election agreement.
- A request to postpone the hearing is not automatically treated as a request to extend the Statement of Position due date. An extension of the Statement of Position due date must

be specifically requested and detail the reason for that postponement. Again, the regional director may postpone the Statement of Position due date for two business days on a showing of “special circumstances” and for more than two business days only on a showing of “extraordinary circumstances.”

- The Statement of Position will be introduced into the record at the beginning of the hearing. No evidence will be heard on any issue not raised in the employer’s Statement of Position. If the employer fails to provide the list of employees, the employer cannot contest the appropriateness of the unit at any time. Parties may make oral closing arguments, but post-hearing written briefs are only allowed “with special permission of the regional director.”
- The following issues must be litigated in a pre-election hearing: (1) jurisdiction; (2) labor organization status; (3) bars to elections; (4) appropriate unit; (5) multi-facility and multi-employer issues; (6) expanding and contracting unit issues; (7) employee status, for instance, if the classification of independent contractors concerns more than 20 percent of the unit; (8) seasonal employees; (9) inclusion of professional employees or guards with other employees; (10) eligibility formulas; and (11) craft and health-care employees. The General Counsel specifically lists the existence of a joint employer relationship as one of the issues that must be litigated at the pre-election hearing. However, except for jurisdiction, the employer will waive these issues if not raised in the Statement of Position.
- Under the new rule, the parties no longer have the right to litigate an individual’s eligibility before the election. The question of whether individuals are excluded from the unit as supervisors may be resolved after the election. Not knowing whether individuals are supervisors prior to the election prevents the employer from knowing who it may lawfully use as company spokespersons in the campaign. The regional director may defer the supervisory status issue until after the election even if a party asserts that pro-union conduct by a supervisor tainted the petition or showing of interest. Issues regarding certain classifications may be deferred if the number of individuals in the disputed classification does not significantly change the size and character of the unit. Similarly, whether an employee should be excluded or included as a temporary employee, part-time employee, or casual employee can be decided after the election.
- The Board Agent will contact the parties after the petition is filed to explore voluntary election agreements and narrow the issues for hearing. The election should be held at the earliest practicable date, but the regional director has discretion to approve election dates in agreements. The employer’s appeal rights are significantly limited if the parties voluntarily agree to an election.
- The General Counsel states that “nothing in the Act requires that the unit for bargaining be the *only* appropriate unit or the *most* appropriate unit.” Although the General Counsel states it will continue to apply certain presumptions regarding appropriate units, expect

the NLRB to endorse large, joint employer units allowing unions to organize nationwide employers, or small, micro units that make it easier for unions to obtain the support needed for filing election petitions.

- Instead of giving parties the right to litigate matters at the hearing, the hearing officer may require an offer of proof outlining the evidence the employer will present. If the regional director decides the offer of proof is insufficient, no evidence will be received on that issue at the hearing. The regional director may also issue a notice to show cause, which is essentially a request for an offer of proof before the hearing. The regional director can use this information to determine not to conduct a hearing.
- Appeals to the National Labor Relations Board of the regional director's pre-election decisions are limited under the new rules.
- At the hearing, the hearing officer will ask the union whether it wants to waive part or all of the ten day period it is entitled to have the voter list. Waiver of the ten day period will significantly speed up the date of the election. The regional director's decision and direction of election will include the election details and set the election for the "earliest date practicable."
- The employer must provide the voter list to the regional director and the union within two business days after the decision and direction of election. The list must be alphabetized, include employees' full names, work locations, shifts, job classification and contact information (home addresses, personal email address if available, home and personal cell phone numbers). The employer must electronically file and serve the list on the union and failure to serve the list is grounds for setting aside the election. The list must be in a searchable table format in a Microsoft Word compatible file. The first column of the table must begin with the employees' last name and list must be alphabetized (overall or by department) by last name. The font size must be Times New Roman 10 or larger.
- The employer must post the Notice of Election, or distribute it by email or the company intranet if the employer customarily communicates with employees electronically. The Notice of Election must be posted in conspicuous places in the workplace, including all places where notices to employees in the unit are customarily posted, at least three full working days (excluding Saturdays, Sundays and holidays) prior to 12:01 a.m. on the day of the election.

Steps Employers Can Take Now to Address the Quickie Election Rule:

- Provide effective training to company management and supervisors regarding the importance of positive employee relations and the potential impact of unionization.
- Conduct an attorney-client privileged union vulnerability audit. The goals of the audit are to learn about potential issues in the workplace and assess manager/supervisor effectiveness.
- Assess the scope of potential bargaining units. Assess practices and organizational structure to ensure they support this unit composition.
- Select a response team. An employer's success in countering an organizing effort depends on who communicates to employees. Ideally, the response team should include representatives from various areas within the company, including senior management, legal, human resources, front line supervisors and operations. Once the response team is established, it should be provided with informational and experiential training.
- Prepare your Statement of Position.
- Prepare a campaign calendar with draft communications to expedite decision making if a petition is filed.
- Review employee handbooks to ensure they comply with the NLRB's new rules regarding employer policies (See NLRB Office of the General Counsel, Memorandum GC 15-04 (March 18, 2015)). Overly broad handbook policies can form the basis for overturning a union election.