

# NLRB Issues Guidance for Updated Representation Case Procedures

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Practice Area: Labor and Employment

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On June 1, 2020, the National Labor Relations Board (the “Board”) issued General Counsel Memorandum 20-07, providing detailed guidance as to how the Board’s December 13, 2019 modifications to its Rules and Regulations governing processing of representation cases (the “2019 Amendments”) will be implemented. The 2019 Amendments modify significant revisions previously made to Board practices and procedures in 2014. The 2014 revisions imposed new procedural requirements and significantly contracted the timeline between the filing of a petition and the election. The 2019 Amendments will apply to all petitions for election filed on or after May 31, 2020, and this *Legal Update* highlights the most significant changes to these procedures.

## Pre-Election Hearing Timelines and Procedures Modified

- Pre-election hearings will generally be scheduled 14 business days from the Notice of Hearing, and Regional Directors will have greater discretion to postpone hearings. Previously, pre-election hearings were scheduled eight calendar days after the Notice of Hearing.
- Regional Directors will now be able to approve postponements for good cause, where previously parties could only request a two business day postponement for special circumstances, and any additional days required a party to demonstrate extraordinary circumstances.
- Hearings will still continue day-to-day (without postponement or break) unless there are extraordinary circumstances that would warrant otherwise.
- Employers must now post and distribute the Notice of Petition for Election within five business days after the Notice of Hearing. Under the 2014 Rules, posting and distribution were required within two business days. The requirements for electronic posting and distribution have also been modified.

## Modifications to Statements of Position Procedures and Requirements

- Non-petitioning parties must now file a Statement of Position within eight business days after service of the Notice of Hearing, rather than seven calendar days under the 2014 Rules. Previously, these Statements of Position were due noon the day before the opening of the hearing.
- Petitioning parties are now required to file and serve a Responsive Statement of Position no later than noon three business days before the scheduled hearing. Under the 2014 Rules, petitioning parties only responded to the non-petitioning parties Statement of Position orally at the hearing.
- Consistent with previous practice, a petitioner or a non-petitioner failing to timely raise or place in dispute any issue in the Statement of Position or Responsive Statement of Position may be precluded from litigating the issue at the hearing.

## Post-Hearing Briefs Permitted

- Parties are once again permitted to file post-hearing briefs with the Regional Director following pre-election hearings. Post-hearing briefs will be permitted for post-election hearings as well. Briefs are due within five business days, and Hearing Officers may grant an extension of up to 10 business days for good cause.

### **Requests for Review Procedures Modified**

- If a request for review of a pre-election decision is filed within 10 days of the direction of election and remains unresolved when the election is conducted, the election will still be conducted, but all ballots will be automatically impounded and will remain unopened pending resolution of the request for review.
- If a request for review is made more than 10 business days after issuance of the direction of election, the election will take place, but ballots will not be impounded. Instead, the ballots will be opened and counted, and a Tally of Ballots will issue.

### **Business Day Calculation**

- Under the 2014 Rules, there was a lack of consistency on the calculation of days. Under the 2019 Amendments, all time periods applicable to the election rules will be based on business days as opposed to calendar days, and a definition of business days is provided.

### **What the 2019 Amendments Mean for Employers**

Board representation case procedures are manifold and complex, and a comprehensive analysis of all relevant procedures is beyond the scope of this *Legal Update*. While certain timelines have been relaxed under the 2019 Amendments, representation cases can still proceed quickly, with a limited opportunity to address and prepare for numerous issues that will directly impact an employer's rights during representation case proceedings. Therefore, employers should take steps to prepare themselves to respond to a representation petition in the event of organizing activity.

When facing organizing efforts or threats, it is critical to be familiar with all the Board's relevant representation case rules, procedures, policies and requirements. Failure to comply with representation case rules can have serious consequences, such as the filing of objections to the conduct and results of an election, requiring further litigation, cost, and uncertainty, and possibly resulting in a re-run of an election. Additionally, failure to timely file and raise issues in Statements of Position or Responsive Statements of Position can have dire consequences, precluding a party from litigating an issue during the hearing.

Because of these complexities, we recommend that employers consult with experienced labor counsel well in advance of any possible representation case petition to be in the best position to successfully participate in a representation case proceeding and preserve and protect their position and rights.

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