

NLRB Amendments to R Case Rules Slow Down Quickie Elections

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On May 31, 2020, the NLRB's long-awaited amendments to its procedures regarding the procedure and schedule of Representation or "R" cases will become effective, revising changes that went into effect in 2014 (see prior alert on so-called "Quickie" or "Ambush" Election Rules [here](#)). There are a number of changes, including additional requirements on filings, as well as changing schedules, but the main takeaways result in a longer process allowing for more time to campaign and additional filing requirements to enable a more complete record prior to hearings.

Parties will now receive 14 business days after the filing of the Notice of Hearing ("NOH") prior to holding a pre-election hearing to resolve unit and other disputes. This increase nearly triples the existing rule, which provided eight calendar days.

Furthermore, an election may not be scheduled before the 20th business day after issuance of a Decision and Direction of Election ("DDE"), absent a waiver. However, the Regional Director ("RD") has discretion to issue a Notice of Election ("NOE") shortly after the DDE is issued. The RD may also choose to investigate issues before issuing the NOE. Under the prior quickie election rules, an election could be held as early as four days after the DDE (and generally no more than 21 days after the date of the petition). This change greatly extends the time period for conducting an election.

Additionally, while the non-petitioning party now receives eight business days after service of the NOH (it was previously one day before the hearing, typically seven calendar days after service), to file a Statement of Position ("SOP"), petitioners are now required to submit a written Responsive Statement of Position ("RSOP"), which was not required previously. Failure to submit an RSOP may result in a party being precluded from raising an issue, presenting evidence relating to an issue, cross-examining witnesses concerning an issue, and presenting argument concerning an issue if the party failed to raise the issue in its SOP or to dispute another party's SOP or RSOP. The RSOPs must be filed and served on all parties in response to each party's SOP. Previously, parties were able to respond to issues raised in a SOP at the hearing. Under the amended rules, every issue is identified in advance.

The RSOP does not need to be excessively detailed to avoid preclusion of issues, but sufficient to identify the issue. It must be clear from the RSOP that the petitioner disputes the other party's position. The RD may allow an amendment upon showing of good cause.

At the hearing, parties are now able to litigate the scope of the unit, eligibility of voters, and supervisory status, provided they are properly raised as described above. Issues will not be deferred unless agreed upon by the parties. Even if precluded from litigating issues, parties are still able to challenge voters at the election. Election details remain immune from litigation.

Parties now have a right to file briefs in pre- or post-election, post-hearing briefs. Post-hearing briefs must be filed within five business days. Under the previous rules, parties were required to seek leave to file from the RD or Hearing Officer.

In terms of timing, all time periods are now calculated in “business days,” with the exception of 10 calendar days for the parties to have the voter list prior to election. Other schedule changes include:

REQUIREMENT	2014 RULES	2019 RULES
Pre-Election Hearing	8 calendar days from NOH	14 business days from NOH
Posting/Electronic distribution of Notice of Petition for Election	2 business days from NOH and distribute electronically, if customary	5 business days from NOW with electronic distribution, if customer, to employees in petitioned-for unit
Statement of Position for Non-Petitioning Parties	12 pm the business day before the hearing if set 8 days from NOH, typically 7 calendar days	12 pm 8 business days from NOH (may postpone with good cause)
Responsive Statement of Position	N/A	12 pm 3 business days before hearing
Pre-Election, Post-Hearing Briefs	Filed with permission of RD within time limit and for subjects permitted by RD	Right to file within 5 business days of close of hearing
Notice of Election after Decision	Ordinarily issued with DDE	May issue with DDE; RD discretion to investigate details after issuance of Direction of Election
Voter List	2 business days after approval of election agreement or issuance of Direction of Election	5 business days after approval of election agreement or issuance of Direction of Election
Date of Election After Decision	Earliest date practicable	Earliest date practicable, but not before 20th business day after issuance of direction unless waiver filed for review
Objections to Election and Offer of Proof	7 days after tally has been prepared, except RD may extend time to submit proof for good cause	5 business days after tally has been prepared, except RD may extend time to submit proof for good cause

Post-Election Hearing on Objections/Challenges	21 days after preparation of tally of ballots or as soon as practicable, unless parties agree to earlier date	15 business days after preparation of tally of ballots or as soon as practicable, unless parties agree to earlier date
Post-Election, Post-Hearing Brief	Filed with permission of Hearing Officer and within time and for subjects permitted by Hearing Officer	Right to file within 5 business days after close of hearing
Exceptions/Supporting Brief to Hearing Officer's Report on Objections/Challenges	14 calendar days from issuance of report	10 business days from issuance of report
Answering Brief to Exceptions	7 days from last date exceptions could be filed, or further time RD may allow	5 business days from last date exceptions could be filed, or further time RD may allow
Requests for Review to RD Decision and Actions (Pre- and Post-Election)	Any time until 14 days after a final disposition	Any time until 10 business days after a final disposition
Opposition to Request to Review	7 days after last day that request for review must be filed	Within 5 business days after last day that request for review must be filed; no reply to opposition without special leave
Briefs Following Grant of Board Review	14 days after grant of review	10 business days after grant of review; no reply briefs absent special leave of Board

For more information on this subject, contact a member of Benesch's Labor & Employment Practice Group.

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