

U.S. District Court Vacates Parts of New NLRB Election Rules and Remands Non-Vacated Parts for Reconsideration

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In an abbreviated order issued on May 30, 2020, Judge Ketanji Brown Jackson of the U.S. District Court for the District of Columbia ruled that the National Labor Relations Board (NLRB) improperly implemented portions of the final rules on representation elections initially scheduled to take effect on April 16, 2020. The NLRB delayed implementation to May 31, 2020, due to the COVID-19 pandemic.



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Two days after the U.S. District Court issued its order, the Board [announced](#) it would implement in full all rule changes unaffected by the order. The Board did not explain how it conducted its reconsideration and noted in the announcement it intends to appeal the order, as soon as the district court issues its memorandum opinion. The Board did, however, issue [Memorandum GC 20-07](#), which provides further guidance on the representation case procedure changes. This article provides a brief background of the litigation leading to the order, and a summary the rule changes implemented on May 31, 2020.

Background

In a lawsuit filed March 6, 2020, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) challenged the changes made to the NLRB election rules arguing that the Board improperly implemented the rules on representation elections, in their entirety or in part, without notice

and comment. The complaint alleged that the changes to the Obama-era rules, finalized in 2014, were substantive, not procedural, thereby prohibiting the Board from making unilateral changes. Judge Jackson granted summary judgment to the AFL-CIO on count one of the complaint, but only regarding the specifically articulated rules identified in the complaints. Before the Board's announcement, it was unclear whether the portions of the representation elections rules unaffected by the order would still be implemented on May 31, 2020.

The Board's Announcement

The Board's announcement highlights five provisions of the December 2019 amendments to the representation election rules impacted by the district court's order:

“Reinstitution of pre-election hearings for litigating eligibility issues;

Timing of the date of election;

Voter list timing;

Election observer eligibility; and

Timing of Regional Director certification of representatives.”

The court held that these provisions were substantive, not procedural, thereby prohibiting the Board from making unilateral changes. Thus, these provisions are not effective and it remains to be seen if and when they will take effect.

According to the Board's announcement, the remaining provisions are effective as of May 31, 2020. These include:

- “Scheduling the hearing at least 14 days from issuance of the notice of hearing;
- Posting the notice of election within 5 days instead of 2 days;
- Changes in timeline for serving the non-petitioning party's statement of position;
- Requiring petitioner to serve a responsive statement of position;
- Reinstatement of Post-Hearing Briefs;
- Reinstating Regional Director discretion on the timing of a notice of election after the direction of an election;
- Ballot impoundment procedures when a request for review is pending;
- Prohibition on bifurcated requests for review;
- Certain changes in formatting for pleadings and other documents; and
- Terminology changes and defining days as ‘business’ days.”

Key Takeaways

The NLRB's announcement demonstrates its disagreement with the order and provides clarity regarding which portions of its rules on representation elections became effective May 31, 2020. The announcement, however, raises several new questions for employers. For example, it is unclear what will

happen after appeals are exhausted and the rule, in whole or in part, is vacated. In addition, the status of elections conducted under the announcement may be subject to being set aside or rerun. Future court decisions and guidance from the Board will be necessary to resolve these issues. For now, employers may follow the Board's guidance in the announcement and should be aware of which provisions of the representation election rules became effective May 31, and which did not.

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