

NLRB Elects to Implement Procedural Changes to Obama-Era Election Rules

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The battle between a now pro-employer NLRB and labor unions continues. In the latest skirmish, the NLRB has announced its new election rule (which repeals Obama-era “quickie” election rules) will take immediate effect to the extent that a federal court has not struck provisions of the rule down.

The Obama NLRB issued rules for expedited union elections (disparagingly referred to by management-side opponents as “quickie election” rules) in 2014. Those rules deprived employers resisting unionization of many of the tools they had used for years to delay elections and vote counts, and to challenge election results they didn’t like. That all changed, unsurprisingly, with a Trump NLRB—but the NLRB’s own rulemaking process seemed pretty “quickie” itself, which became exactly the thing that labor unions challenged.

The NLRB first issued its new rule in December 2019 without releasing a proposed rule for public comment. Consistent with many of the NLRB’s recent pro-employer decisions, which we have reported on [here](#), the amendments reverse the Obama-era election process by extending certain procedural deadlines and permitting more time between the date a union files a petition for an election and the date when the workers vote on unionization. This time period is crucial for employers to communicate with the workforce prior to a vote on unionization. The new rule also affords more opportunities for employers to challenge the process.

In March, the AFL-CIO brought suit against the NLRB, claiming that portions of the new rule, including changes to the election timeline, were substantive in nature, and thus the NLRB improperly issued the rule without going through the required notice and comment rulemaking process under the Administrative Procedure Act. On May 30, 2020, one day before the rule was supposed to go into effect, U.S. District Court Judge for the District of Columbia, Ketanji Brown Jackson agreed and issued an order enjoining the NLRB from implementing these provisions. However, the court’s order did not strike the new rule’s remaining procedural provisions, which include extensions of time to the election process and pre-election hearing procedures, and instead remanded the rule to the NLRB for reconsideration.

Well, it looks like the NLRB quickly “reconsidered.” Two days later, on June 1, 2020, the NLRB announced that the procedural portions of the rule that were unaffected by the court’s order were effective immediately. A guidance memorandum from the NLRB General Counsel regarding implementation of the rule can be found [here](#).

So, what does this mean for the future of the new rule? It is still unclear what will become of the provisions subject to the court’s order. The court has not issued a full opinion yet, and after, the order is subject to appeal by the NLRB. However, based on the NLRB’s quick implementation of the

unaffected provisions, it is clear that despite court-imposed hurdles, the NLRB is intent on dialing back the “ambush” election rule, even if it has to be done on a piecemeal basis.