

# NLRB Reiterates Its Commitment to Creating Employee-Friendly Policies

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An ideologically recalibrated (and motivated) National Labor Relations Board (NLRB) has yet again modified several Trump-era rules regarding representation case procedures and expanded the scope of protected concerted activity and protections for non-employees. In recent moves, the NLRB simplified the representation process by quickening each step required for employees seeking to unionize, and expanded the scope of protected concerted activities. Through issuance of the Final Rule and two recent rulings, the NLRB has again reinforced the Biden administration's pro-labor commitments.

## **Representation Process**

On August 25, 2023, the NLRB issued a [Final Rule](#) expediting the representation process, which takes effect on December 26, 2023. Typically, the representation process commences with representation petitions filed by employees, unions, or employers seeking an election. The election determines whether employees wish to be represented for purposes of collective bargaining with their employer. The NLRB will review the petition and determine if an election should be conducted and will direct an election. In cases where the parties do not agree on the voting unit or other issues, the NLRB's regional office holds a pre-election hearing to decide whether an election should be conducted. The NLRB's recent rule expedites each step of the representation process, including the election and pre-election hearing procedures, thereby benefiting employees seeking to unionize.

## **How does the Final Rule Change the Election Process?**

There are ten key changes to the pre-election hearing process, notifications of election information, and election process, which depart from the 2019 rule, and are set forth below.

1. Pre-election hearings will be scheduled to open eight calendar days from the service of the Notice of Hearing, altering the 2019 rule of 14 business days.
2. Regional directors will have discretion to postpone pre-election hearings for up to two business days where a party shows special circumstances and for more than two business days where a party shows extraordinary circumstances. Previously, regional directors could postpone a pre-election hearing for an unlimited amount of time if a party demonstrated good cause.
3. There is a tighter deadline for the filing of the non-petitioning party's Statement of Position, which is seven days after service of the Notice of Hearing, rather than eight business days (or 10 calendar days) after service.
4. Regional directors will have discretion to postpone the due date of a Statement of Position for

up to two business days if there are special circumstances and more than two in cases of extraordinary circumstances. Previously, regional directors could postpone the due date for an unlimited amount of time if there was good cause.

5. A petitioner shall respond orally to the non-petitioning party's Statement of Position at the start of the pre-election hearing rather than filing a responsive written Statement of Position prior to the pre-election hearing.
6. An employer has two business days after service of the Notice of Hearing to post the Notice of Petition for Election in the workplace and electronically distribute it rather than five business days to complete these requirements.
7. Disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit are no longer allowed to be raised at the pre-election hearing. Regional directors have authority to exclude evidence from the pre-election hearing that is not relevant to whether there is a question of representation.
8. Parties may not file post-hearing briefs unless they have the special permission of the regional director or hearing officer, departing from the 2019 rule, which permitted post-hearing briefs.
9. Regional directors ordinarily should specify the election details—the type, date(s), time(s), and location(s) of the election and the eligibility period—in the decision and direction of election and simultaneously transmit the Notice of Election with the decision and direction of election. Previously, election details did not need to be specified in the Notice of Election.
10. Regional directors shall schedule elections for “the earliest date practicable” after issuance of a decision and direction of election. The waiting period of 20 business days between the decision and direction of election and the election is eliminated.

If employers anticipate that their employees may file a representation petitions, employers should familiarize themselves with the updated representation process and work with counsel to address any concerns.

In the event that a representation petition is filed, employers should be prepared to move quickly in complying with all procedural requirements and challenging the representation petition, if necessary. As employers' ability to obtain additional time throughout the representation process is significantly curtailed by these changes, employers will also have less time to engage in negotiations during the election and pre-election processes and must have counsel who can capitalize on tight timelines.

### **Changes in Protected Activity**

In *Miller Plastic Products, Inc.*, the NLRB announced its return to a “totality of the circumstances” test for determining what constitutes protected concerted activity by employees under Section 7 of the National Labor Relations Act (the “Act”). *Miller Plastic Products, Inc.* involved the termination of a worker who raised concerns about COVID-19 safety protocols and the company's decision to stay open in the beginning of the pandemic. The NLRB ruled that the company violated the Act as the worker was engaged in protected concerted activity. In *Miller Plastic Products, Inc.*, the NLRB overruled its 2019 *Alstate Maintenance, LLC* decision, which had narrowed the test for determining concerted activity using a checklist of factors and returned to the 1986 rule in *Meyers Industries Inc.*, providing a fact-specific examination that looks at the totality of the circumstances. The NLRB also addressed the issue of whether single-worker actions constitute protected organizing activity and concluded a holistic approach evaluating whether an individual's protests have some connection to

group or concerted action is warranted.

Similarly, in *American Federation for Children, Inc.*, the NLRB held that federal labor law protects workers who advocate for nonemployees, such as interns, reversing a Trump-era ruling that allowed employers to penalize employees for aiding unprotected colleagues. Specifically, the NLRB overruled its 2019 *Amnesty International* decision, which held that the statutory concept of “mutual aid or protection” did not encompass the efforts of statutory employees to help themselves by helping others who are not statutory employees. In *American Federation for Children, Inc.*, the NLRB concluded that the Act protects the efforts of employees who take action to support nonemployees when those actions can benefit the employees who undertake them.

After the shifts announced by *Miller Plastic Products, Inc.* and *American Federation for Children, Inc.*, employers should be prepared to address employee complaints that could fall into the category of concerted activity or protected advocacy on behalf of nonemployees in a manner that complies with the Act.