

# NLRB Publishes Final Rule Amending Election Case Procedures – Senator Promises Challenge To “Ambush Election Rule”

The National Labor Relations Board on December 22, 2011 published its [final rule](#) amending its representation case (i.e. “election”) procedures. The final rule is due to take effect on April 30, 2012.

The amendments represent a fundamental change in the Board’s election procedures. Most notably, the amendments remove any minimum time period (formerly 25 days) between the direction of an election and the election itself. Typically, this time period is most beneficial to employers, who use it to inform employees on the costs and other obligations of union representation, as well as reminding employees of the benefits of working in a union-free environment. The Board’s amendments allow Regional Directors the unfettered right to provide only a minimal time period (perhaps as little as 7 days or less) between the direction of election and the vote. Conscientious employers will develop proactive union-free labor relations messages and communicate with employees well before the first signs of union activity. Otherwise, an employer risks, under the final rule, being denied a sufficient opportunity, after the filing of an election petition, to persuade employees to vote against a union.

Publication of the final rule is the last step in the Board’s fast track for amending the representation case procedures. On June 22, 2011, the Board published its [proposed rule](#) to amend election procedures, proposing twenty amendments.

On July 18-19, 2011, the Board held a public meeting at which it heard testimony from sixty-six witnesses concerning the proposed rule. The Board also received over 65,000 written comments to the proposed amendments.

On November 30, 2011, the NLRB passed a resolution, [Resolution No. 2011-1](#) by a 3-1 vote, to prepare a final rule containing a limited number of election procedure amendments.

Finally, on December 22, 2011, the Board published the final rule, implementing seven major amendments to representation case procedures. The seven substantive amendments generally track the proposed amendments contained in Resolution No. 2011-1, and include:

1. Clarifying that the purpose of a pre-election hearing is to determine if a question of representation exists;
2. Providing hearing officers the authority to limit parties’ presentation of evidence to that which supports a party’s contentions and which is relevant to the existence of a question concerning representation;
3. Affording hearing officers in pre-election hearings the discretion to allow or refuse parties’ post-hearing briefs, to determine the subjects addressed in briefs, and to set filing deadlines;

4. Eliminating the parties' right to file, prior to the election, a request for the Board to review the Regional Director's ruling on any pre-election issues and to defer all such requests until post-election;
5. Eliminating the Board's current practice of ordinarily not scheduling an election sooner than 25 days after the direction of an election;
6. Significantly narrowing the circumstances (i.e., "extraordinary circumstances") under which the Board will grant a request for special permission to appeal a Regional Director's pre-election ruling; and
7. Creating a uniform procedure for Regional Directors' resolution of election objections and outcome-determinative challenges and to provide the Board discretion to refuse to review Regional Directors' decisions.

On the other hand, the final rule may not become effective on April 30, 2012, if either the U.S. Chamber of Commerce or U.S. Senator Mike Enzi (R-Wyo.) is granted their holiday wishes. Senator Enzi, the ranking member on the Senate Health, Education, Labor and Pensions Committee, has announced his intent to challenge the final rule to prevent unions from "ambushing" employers through hasty elections.

The U.S. Chamber of Commerce filed a [lawsuit](#) on December 20, 2011, seeking to enjoin the NLRB from enforcing its final rule and asking for a declaratory judgment holding that promulgation of the rule is contrary to the National Labor Relations Act, the First and Fifth Amendments to the U.S. Constitution, violates the Administrative Procedures Act, and violates the Regulatory Flexibility Act.

## **NLRB Further Postpones Effective Date of Notice Posting Rule – Now April 30, 2012**

As announced in a December 23, 2011 [press release](#) the National Labor Relations Board postponed the effective date of its employee rights notice-posting rule at the request of the federal court in Washington, D. C. hearing a legal challenge regarding the rule. The Board has determined that postponing the effective date of the rule would facilitate the resolution of the legal challenges that have been filed with respect to the rule. The new implementation date is April 30, 2012.

Butler Snow will continue to keep you informed of new and changing regulations that could affect your business. In

the meantime, if you have any questions concerning the status of the notice-posting rule or its requirements, please contact the [Butler Snow Labor and Employment Group](#) attorney with whom you usually work, or you may contact the editors of this e-Alert, [J. Wilson Eaton III](#), [Bart N. Sisk](#) and [Jeffrey A. Walker](#).