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Breaking: Federal Court Strikes Down New NLRB Rules on Representation Election Procedures; Implementation Delayed and Status of the Rules Uncertain

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After an initial COVID-19 related delay, the sweeping new NLRB representation election rules that reversed the Obama-era "quickie" election process were about to go into effect on May 31, 2020. However, an eleventh-hour district court order struck down a significant portion of the rule as unlawfully implemented for failing to follow proper administrative procedure, casting doubt on when, if at all, the new rules will apply. Details of the planned changes are outlined in our reporting on the NLRB's initial announcement of proposed amendments, as well as updated rules regarding election rules and procedures here and here.

On May 30, 2020, in a much-anticipated decision in a case brought by the AFL-CIO against the NLRB, Judge Ketanji Brown Jackson of the U.S. District Court for the District of Columbia found that the challenged-portion of the NLRB rules were substantive (not procedural) in nature and were, therefore, improperly implemented without providing the public a notice-and-comment period to provide feedback before implementation as required under the Administrative Procedure Act.

The AFL-CIO challenged (and the court overturned) the following aspects of the rules:

- Additions to the issues a petitioning party must litigate before obtaining an election,
- Providing parties the right to an NLRB advisory opinion on the status of particular individuals under the NLRA,
- Increasing the length of the campaign period,
- Modifying petitioners' rights to voter lists,

- Limiting parties' rights to select certain election observers, and
- Delaying employees' rights to bargaining collectively in certain cases even after a majority vote, by preventing regional directors from counting ballots and certifying results.

The Court did not vacate the remainder of the rules that were set to go into effect, which included extensions of time with regard to the election process and other procedural aspects of pre-election hearings, but remanded the entire set of rules to the NLRB for reconsideration in light of the Court's finding.

The order will not become a final order until the Court has issued its full Memorandum Opinion, which it stated it would do soon. The order is then subject to appeal. We previously noted that NLRB Regions considered this lawsuit when advising on the rules, and we will continue to monitor the Court's full Opinion and any appeal by the NLRB.

For now, employers should be aware that the Court effectively prevented any portion of the rule from taking effect this week. Until the NLRB reconsiders the rules in light of the notice-and-comment requirements, or the Court rules otherwise in response to an appeal, the 2014 rules regarding representation election procedures remain in effect.

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