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Board Rescinds Four Provisions to 2019 Election Rule Following Federal Appeals Court Vacating the Provisions

Labor Relations Update on **March 13, 2023**

Thursday, the NLRB issued a notice to rescind four provisions from the Board's Rules and Regulations contained in its Final Rule published in December 2019 (the "2019 rule"). The Board's notice rescinding all four provisions, which were struck down by the Court of Appeals for the D.C. Circuit in January (discussed here), resurrects the previous regulations.

The 2019 rule contained several provisions pertaining to the "quickie" election rules of 2014 (the "2014 rule," which we discussed here). However, the Court of Appeals affirmed a federal district court decision vacating three provisions to the 2019 rule as improperly enacted without notice and comment and further held a fourth provision was contrary to the NLRA. The four provisions (and the first three provisions' 2014 rule predecessors) were as follows:

- allowing employers up to five business days to furnish the voter list following the direction of election (from two business days under the 2014 rule);
- precluding Regional Directors from issuing certifications following elections if a request for review is pending or during the time in which a request for review could be filed (the 2014 rule directed Regional Directors to certify elections regardless of whether a request for review had been filed);
- limiting a party's selection of election observers to individuals who are current members of the voting unit whenever possible (the 2014 rule permitted any observer of the parties' choosing, subject to the Regional Director's limitations); and
- providing for automatic impoundment of ballots under certain circumstances when a petition for review is pending. Practically, if an employer fails to get a pre-election hearing and quickly goes to an election, the ballots will not be impounded pending the employer's request for review of the election. If the challenged ballots are not greater than the difference in "Yes" vs "No" votes, the Region could certify

the union even while the employer is in the process of appealing to the full Board.

The Board's movement regarding these changes is swift. While normally there would be at least a thirty-day delay of implementation of the final rule, the Board stated it had good cause to waive that requirement as "this rule implements a court order…." (See here for the Final Rule)

The Federal Register also filed for public inspection a notice staying the effective date of two provisions of the 2019 rule pertaining to pre-election litigation of certain disputes (voter eligibility, unit scope, and supervisory status) and election scheduling (establishing a presumptive waiting period of twenty business days between the Regional Director directing an election and the election date). These provisions never went into effect, having been enjoined by the District Court.

Takeaways

While litigation remains pending regarding the legality of two provisions, the Board's step to rescind the four provisions signals a concession by the Board to the Court of Appeals ruling. As a result, this dims hope for the time being that these provisions of the 2019 rule would return bargaining parties to an era before the "quickie" election rules of 2014. The Board is still considering whether it will revise or repeal the 2019 rule. In the meantime, parties will continue to operate under the 2014 rule provisions, largely to the detriment of the employer.

As always, we will continue to monitor any developments.

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