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NLRB moves ahead with new election regs that were not blocked by federal judge

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The National Labor Relations Board has announced that it will move forward with parts of its new election regulations that were not blocked by a May 30 order from a federal judge in the District of Columbia.

The election regulations were scheduled to take effect May 31 and would have changed parts of the so-called “quickie election rule” issued by the NLRB under President Obama. Our prior bulletins discussing the new regulations are available [here](#) and [here](#). The AFL-CIO sued the current Board, arguing that the new regulations were not issued in compliance with the Administrative Procedure Act’s requirements for notice and an opportunity for public comment, were substantively arbitrary and capricious within the meaning of the APA, and violated the National Labor Relations Act.

On May 30, **Judge Ketanji Brown Jackson granted partial summary judgment to the AFL-CIO**, ruling that parts of the new regulations were implemented in violation of the requirements of the Administrative Procedure Act.

According to Judge Jackson, the following provisions of the new regulations were invalid:

- Reinstitution of pre-election hearings for litigating unit and eligibility issues.
- Increased time between a petition and an election.
- Increased time for the employer to provide a voter list to the union.
- Restricting election observers to election unit employees.
- Suspending certification of representatives by the NLRB Regional Director while a review of the case was pending.



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In response to Judge Jackson's Order, **the Board announced on June 1 that it would appeal and that effective May 31 it would implement in full all of the changes that were not affected by the Order.** These include the following:

- Hearings will be scheduled at least 14 business days from issuance of the notice of hearing, rather than 8 calendar days under the prior regulations.
- The notice of election will be posted within 5 business days of receipt instead of the prior 2 calendar days.
- The time for the non-petitioning party (usually the employer) to submit a statement of position is increased to 8 business days from service of the notice of hearing instead of the prior 7 calendar days.
- The petitioner (usually the union) must serve a statement of position in response to that of the non-petitioning party.
- Post-hearing briefs will be allowed.
- The discretion of the Regional Director on the timing of a notice of election after the direction of an election has been reinstated.
- Ballots will be impounded while a request for review is pending.
- Bifurcated requests for review are prohibited.

In addition, the regulations that took effect on May 31 made certain changes to formatting for pleadings and other documents, and made changes in terminology, which included defining "days" as "business days."

The Board's General Counsel issued a **Memorandum** on June 1 regarding the new election rules and Judge Jackson's Order. The Memorandum discussed the rules that took effect on May 31 and the manner in which the changes would affect internal Board procedures.

On June 7, Judge Jackson issued her **opinion**. A large portion of the opinion focused on whether the Court had jurisdiction to consider the parties' motions for summary judgment while considering the "Direct-Review Provision" of the National Labor Relations Act. In turning to the merits of the case, Judge Jackson noted that the parties did not dispute that the new regulations were an administrative "rule" for APA purposes. In finding that the regulations were substantive rather than procedural, Judge Jackson said that an "agency rule is essentially *presumed* to be substantive for the purpose of the notice-and-comment requirement, and that notice-and-comment rulemaking is thus generally required *unless* a rule satisfies one of the listed exceptions." (Emphasis in original.) She then said that, by lengthening the time frames for certain actions, the "NLRB is doing much more than merely and ministerially altering deadlines . . . the NLRB has delayed the timeframe within which duties *that are owed to the regulated entities* will be carried out." (Emphasis in original.) These duties "have a significant impact on the employees' ability to mount a successful campaign for unionization, as is their right under the NLRA." She remanded the rules to the Board for reconsideration.

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On June 9, the AFL-CIO filed a **Motion for Reconsideration**, asking Judge Jackson to find that the new regulations were invalid in their entirety and that portions were arbitrary and capricious under the APA and in violation of the NLRA. The labor organization also asked Judge Jackson not to remand the regulations to the Board. The Board subsequently filed its **response in opposition**. As of the date of this bulletin, there has been no ruling on the Motion for Reconsideration.

Conclusion

For now, employers confronted with union election petitions are faced with a complex set of rules that are “some new and some old.” The Court’s Order blocks some reform of NLRB election processes that are intended to (1) improve employees’ knowledge of who is eligible to vote and what the bargaining unit will be before casting ballots, (2) allow more time for informed decision-making by employees about representation, and (3) prevent confusion caused by certifications of representatives while an Administrative Law Judge decision and review by the Regional Director are pending. Given the complexity of the procedural framework and so many issues being “up in the air,” employers facing election petitions are encouraged to seek experienced labor counsel.

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