

## NLRB Issues Key Rule and Precedent Changes

The National Labor Relations Board (NLRB) issued several important rule changes and case decisions favorable to employers over the last several weeks as part of its year-end wrap-up activities and ahead of the expiration of Board Member Lauren McFerran's term on December 16, 2019.

The new rules ensure more fairness for employers in the election process particularly because several changes incorporate more reasonable timeframes for employers to conduct required actions.

To prepare your organization for 2020, outlined below is an update of significant Board rulemaking initiatives and case decisions issued as a result of this recent activity.

## RULEMAKING

On December 18, 2019, without a notice and comment period, the Board implemented a **final rule** which contains several changes to **representation case procedures**. The new procedures are scheduled to go into effect **beginning April 16, 2020** and are unlikely to be successfully challenged.

The chart below provides a matrix by topic area that compares the current Board election rules to the changes implemented last week.

Topic	Current Rule	New Rule
Scheduling of Election	The regional director shall schedule the election for the earliest date practicable.	Regional directors must continue to schedule the election for the earliest date practicable, but – absent agreement by the parties – normally will not schedule an election before the twentieth (20th) business day after the date of the direction of election.
Notice of Petition	A notice of petition is to be posted by the employer two (2) days after service of the notice of hearing. If the notice is not posted, it could be grounds to overturn the election.	The employer is now given five (5) business days to post and distribute the notice of petition for election after service of the notice of the hearing. Failure to properly post the notice can result in the election results being set aside.
Statement of Position (SOP)	Employer must file SOP with the union and NLRB by noon before the opening of the pre-election hearing. This typically occurred seven (7) calendar days after service of the notice of hearing.  Petitioner required to respond only orally to the SOP at the start of the pre-election hearing – in most cases, the current rules do not provide for pre-hearing statements.	Non-petitioning parties must file a SOP within eight (8) business days after service of the notice of hearing, and regional directors will have greater discretion to grant extensions.  The petitioner is now required to file and serve a SOP on other parties responding to the issues raised in any non-petitioning party's SOP. This response is due at noon three (3) business days before the hearing.
Pre-Election Hearings	A hearing (if any) must be scheduled eight (8) calendar days from the notice of hearing.  Disputes concerning unit scope and voter eligibility are not required to be litigated or resolved before an election is conducted.	Pre-election hearings will generally be scheduled fourteen (14) business days from the notice of hearing, and regional directors will have greater discretion to postpone hearings.  Disputes concerning unit scope and voter eligibility – including issues of supervisory status – will now normally be litigated at the pre-election hearing and resolved by the regional director before an election is directed. The parties may, however, agree to defer litigation on such disputes until after the election.

Post-hearing Briefs	Post-hearing briefs are permitted only upon special permission of the regional director.	Parties are permitted to file post-hearing briefs with the regional director following pre-election hearings. Post-hearing briefs will be permitted for post-election hearings as well. Such briefs are due within five (5) business days after the conclusion of the hearing, and hearing officers may grant an extension of up to ten (10) business days for good cause.
Notice of Election	Regional directors “ordinarily will” specify election details in the direction of election.	The regional director’s discretion to issue a notice of election subsequent to issuing a direction of election is emphasized.
Voter Lists	Employers have two (2) business days to provide voter lists.	The employer now has five (5) business days to furnish the required voter list following the issuance of the direction of election.
Requests for Review of Direction of Election	<p>Following a request for a review of a direction of an election, ballots whose validity may be affected are not required to be impounded.</p> <p>A party may request review of partial actions made by a regional director and may request subsequent review of another part of the same action.</p>	<p>Where a request for review of a direction of election is filed within ten (10) business days of that direction and where the Board has not taken any action on the request, ballots whose validity might be affected by the Board’s ruling on the request or decision on review will be segregated and all ballots will be impounded and remain unopened pending such ruling or decision.</p> <p>While a party may still file a request for review of a direction of election more than ten (10) business days after the direction, the pendency of such a request for review will not require impoundment of the ballots.</p> <p>A party may not request review of only part of a regional director’s action in one request and subsequently request review of another part of such decision.</p>
Election Observers	The current rules provide for election observers but place no restrictions on who may be selected to serve as an observer.	Parties are required to select election observers who are current members of the voting unit whenever possible. When no such individual is available, a current nonsupervisory employee should be selected.
Certification of an Election	Regional directors are required to issue certifications following elections despite the pendency or possibility of a request for review.	The regional director will no longer certify the results of an election if a request for review is pending or before the time has passed during which a request for review could be filed - fourteen (14) days.

## CASE DECISIONS

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In addition to the election rules changes noted above, the NLRB issued a number of significant decisions that have implications for all Board stakeholders, including employers. A partial list of such decisions include the following:

### Union Dues Check Off

*Valley Hospital Med. Ctr.*, 368 NLRB No. 139 (Dec. 16, 2019)

The Board overruled 2015 changes governing dues check off obligations when a CBA ends, restoring long standing precedent under which an employer's statutory obligation to check off union dues ends upon expiration of the CBA containing the check off provision. Thus, an employer has no independent statutory obligation to check off and remit employees' union dues after the expiration of the CBA even where the contract does not contain a union-security provision.

### Use of Employer Email

*Caesars Entertainment Corp.*, 2018 WL 3703476 (Dec.17, 2019)

The Board invited briefs in August of 2018 on whether it should overturn the legal standard articulated in *Purple Comms.*, 361 NLRB 1050 (2014). In that Obama-era decision, the Board allowed employee use of employer email for union business, prohibiting employers from imposing limitations on use of its email systems. On Dec. 17, 2019, the Board issued a decision in which it held that employers can ban workers from using company email for union business, union organizing purposes, and for other nonbusiness matters. Accordingly, employers may now restrict use of their email and other information technology systems to certain purposes as long as they do not discriminatorily target union-related communications and similar activity.

### Supervisor Status

*Bloomsburg Care and Rehab. Ctr.*, 06-RC-241173 (Dec. 3, 2019)

The Board affirmed an agency judge's ruling letting nurses at a Pennsylvania nursing home vote on whether to organize with the Retail Wholesale and Department Store Union, saying they are not union-ineligible supervisors. In doing so, the Board expressed a willingness to reconsider its worker status test that hinges on whether businesses actually follow alleged supervisors' disciplinary recommendations.

### Workplace Investigations

*Apogee Retail LLC*, 27-CA-191574 (Dec. 17, 2019)

In this decision, the Board applied its Boeing rules handbook framework and established that employers don't necessarily violate workers' rights to act collectively when they bar employees from discussing workplace investigations. The Board held that such confidentiality rules are generally legal as long as they are limited to the period of the active investigation.

## SETTLEMENTS

### McDonald's Settlements Approved (Dec. 12, 2019)

After nearly three years of protracted litigation, on Dec. 12, 2019, the Board instructed an administrative law judge to approve settlements resolving complaints against McDonald's USA LLC and 29 franchisees, based on violations allegedly committed by franchisees. **The case involved issues of joint employer liability and Board recusal policies.** The approved settlements do not impose joint and several liability on McDonald's USA, LLC as a joint employer.

## OFFICE OF THE GENERAL COUNSEL

### Neutrality Agreements

- In a consideration of an appeal by the National Right to Work Legal Defense Foundation, Inc. of dismissal of an unfair labor practice charge it had filed against a union and employer, the Board's General Counsel challenged the existing standards surrounding neutrality agreements between employers and unions seeking to organize an employer's employees.
- Neutrality agreements are often used by unions to bypass Board-conducted secret ballot elections, and generally consist of an agreement by the employer to recognize a union without an election where the union can show the employer it has majority support among the employer's employees.
- In the challenged case, the employer agreed to provide the union with employees' contact information to assist it in organizing, and to recognize the union without an election if the union showed majority support. Although the Regional Director found the agreement to be lawful, the General Counsel, in his review of the Regional Director's decision, indicated that in his view the agreement was unlawful because the employer provided the union with more than just "ministerial aid" during the organizing campaign.
- The General Counsel's challenge to how the Board normally approaches neutrality agreements could have major implications for organizing efforts around the country, as unions often rely on neutrality agreements to bypass the election process. Employers should take care to ensure that any such agreements they enter into with union organizers limits the assistance they are obligated to give to the union.

## LOOKING AHEAD TO 2020

Although the rulemaking changes and case decisions will guide deliberations and laborrelated activity as we move into the next decade, they were not unanticipated. The current Republican Board majority will likely continue to issue significant decisions, including a joint employer rule in this coming year. An upcoming January Intelligence Briefing will address the expected changes to the NLRB in the coming year.

Despite the significant Board rulemaking and decisions outlined above, employers should continue to consult with trusted experts in labor relations to educate and train managers and employees regarding such developments, and also continue to follow all provisions of the National Labor Relations Act.