

AFL-CIO Sues NLRB Seeking to Block 2019 Final Election Rule

Labor & Employment Law Update

By Jeffrey Risch on March 9, 2020

Back on December 16, 2019, we reported on the issuance of new regulations by the Trump administration that effectively repealed the 2014 “Quickie Election” Rule issued by the Obama National Labor Relations Board (NLRB).

The 2019 Final Rule, set to take effect on April 16, 2020, was designed to facilitate employers’ efforts to fight private sector labor unions in election cases. It provided more time to react to and educate the workforce on the “Good, Bad & Ugly” of union representation. As we noted before, in issuing the notice of the new regulations, NLRB Chairman John F. Ring (R) stated that “[t]hese are common sense changes to ensure expeditious elections that are fair and efficient. The new procedures will allow workers to be informed of their rights and will simplify the representation process to the benefit of all parties.” Sole Democratic Board Member Lauren McFerran (D), however, vehemently opposed the changes calling the Board’s actions “arbitrary and capricious.” McFerran also described the 2014 rule as “the product of a painstaking, three-and-a-half year process, involving the consideration of tens of thousands of public comments over two separate comment periods totaling 141 days, including 4 days of hearings with live questioning by Board members.” She then criticized the 2019 Final Rule as having been drafted without the public’s input.

Last week, on Friday March 6, 2020, the American Federation of Labor and Congress of Industrial Organization (AFL-CIO) seemingly used McFerran’s dissent as a roadmap when it sued the NLRB in an effort to block the 2019 Final Rule from taking effect in April. The AFL-CIO lawsuit alleges that the 2019 Final Rule issuance was “arbitrary and capricious” and “an abuse of discretion.” Moreover, the lawsuit claims that the 2019 Final Rule will substantially hinder union election efforts, will prejudice union efforts to campaign in support of votes in favor of unionization, and will substantially delay union certification. Finally, noting that the 2014 amendments enacted by the Obama Administration were intended “to remove unnecessary barriers to the fair and expeditious processing of representation case,” the lawsuit also alleges that the 2019 Final Rule essentially reinstates these barriers and violates the Administrative Procedure Act (APA) and the National Labor Relations Act (NLRA) insofar as it was issued without notice and without an opportunity to comment. We expect the Trump Administration will aggressively defend the Rule.

Last December we noted that come April 2020 employers would be in a much stronger position to successfully dispose of or counter union petitions in the private sector. Now, only time will tell if the AFL-CIO lawsuit puts the 2019 Final Rule on hold. With the 2020 presidential election gearing up, one thing is certain: the issues in the AFL-CIO lawsuit will become a crucial part of the election debate as candidates vie for the electorate's support. How the union election rule ultimately reads, however, may largely depend on who wins the White House in November. Stay tuned!

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