The National Labor Relations Board (“Board”) published its final rule (“2023 Rule”) on Friday, August 25, amending the representation election procedures that it previously proposed in 2019 and finalized, after some additional revisions, in 2020 (“2019 Rule”). Recall that the 2019 Rule had already experienced a significant setback earlier this year. In January 2023, the D.C. Circuit vacated three substantive changes that the 2019 Rule would have made to the election procedures adopted by the Board in 2014 (“2014 Rule”) while keeping the procedural changes intact. The D.C. Circuit also vacated a fourth provision for violating 29 U.S.C. § 153(b) of the National Labor Relations Act. The vacated changes included:

- giving employers up to five (5) business days to furnish the voter list following the direction of election, up from two (2) business days in the 2014 Rule;

- limiting a party’s selection of election observers to individuals who are current members of the voting unit whenever possible, with the 2014 Rule containing no such limitation;

- precluding Regional Directors from issuing certifications following elections if a request for review regarding the Decision and Direction of Election (“DDE”) is pending or before the time has passed during which a request for review could be filed, while the 2014 Rule permitted Regional Directors to certify elections regardless of whether a request for review or objections to the conduct of the election had been or still could be timely filed; and

- imposing an automatic impoundment of ballots under certain circumstances, which the 2014 Rule did not have.

The Board formally rescinded those changes in March 2023, at which time it reinstituted the
provisions adopted as part of the 2014 Rule concerning each of these issues. The 2023 Rule thus abolishes the last vestiges of the changes to the election procedures set forth in the 2019 Rule in favor of a return to the election procedures adopted by the Board in the 2014 Rule.

As was the case with the 2014 Rule, which was often referred to as the “quickie” or “ambush” election rules, the 2023 Rule is expected to be a boon to unions. The union-friendly changes to the Board’s election procedures include the following:

- The pre-election hearing will be scheduled eight (8) calendar days from service of the Notice of Hearing, down from fourteen (14) business days in the 2019 Rule.

- The non-petitioning party’s pre-election Statement of Position is due by noon on the day before the pre-election hearing, i.e., seven (7) calendar days after service of the Notice of Hearing. Previously, the Statement of Position was due eight (8) business days after service of the Notice of Hearing.

- Regional Directors will have discretion to postpone a pre-election hearing or extend the date for filing and service of the Statement of Position upon request limited to no more than two (2) business days if special circumstances are shown and to more than two (2) business days if extraordinary circumstances are shown. The 2019 Rule did not place any limit on the length of time a Regional Director could postpone a pre-election hearing and/or the due date of the Statement of Position upon a request if the requesting party could show good cause for postponement.

- The petitioner is given the opportunity to respond to the Statement of Position orally at the pre-election hearing. The 2019 Rule required the petitioner to file and serve a responsive Statement of Position three (3) business days before the pre-election hearing.

- The employer has two (2) business days after service of the Notice of Hearing to post the Notice of Petition for Election in conspicuous places throughout the workplace and to distribute the Notice to employees electronically through the employer’s customary electronic communication system (e.g., email). The employer had five (5) business days to do so under the 2019 Rule.

- Disputes over voter eligibility or their inclusion in the appropriate unit will no longer need to be resolved before the election. The 2019 Rule required that such disputes be litigated at the pre-election hearing and resolved by the Regional Director before the election.

- Parties will only be permitted to file post-hearing briefs following the pre-election hearing after receiving special permission from the Regional Director or following the post-election hearing with special permission from the hearing officer within the time prescribed. When permitted, briefs will only be able to address the subjects permitted,
by the Regional Director or hearing officer. Under the 2019 Rule, parties were permitted as a matter of right to file briefs up to five (5) business days after the close of the pre- or post-election hearing, which time could be extended an additional ten (10) business days upon a showing of good cause.

- The Regional Director ordinarily will specify the election details (i.e., the type, date(s), time(s), and location(s) of the election and the eligibility period) in the DDE and to simultaneously transmit the Notice of Election with the DDE. The 2019 Rule allowed Regional Directors to convey election details in the DDE and to transmit the Notice of Election simultaneously with the DDE, but granted them the discretion to provide such details in a later-issued Notice of Election.

- Regional Directors will be required to schedule elections for “the earliest date practicable” after issuance of the DDE. The 2019 Rule had imposed a waiting period of twenty (20) business days between the issuance of the DDE and the scheduled election date.

The 2023 Rule is now scheduled to go into effect on December 26, 2023. It is likely, however, that there will be legal challenges to the 2023 Rule filed before its effective date.

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