

## The Final R-Case Rule is Here!

On December 15, 2014, the National Labor Relations Board published in the Federal Register its Final Rule amending its representation-case procedures. The Final Rule went into effect on April 14, 2015. However lawsuits challenging the Board's adoption of the Final Rule are pending in two federal district courts.

While the Final Rule changes some aspects of our representation case processing, the basic process is unchanged. We still work with the parties to enter into an election agreement so a pre-election hearing does not need to be held. And elections are conducted in the same manner as before the Final Rule.

A Guidance Memorandum discussing the new R-Case procedures, as well as a comparison of current and new R-Case procedures can also be found on the NLRB web site at <http://www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015>. Some of the significant changes for RC, RD, and RM cases include the following:

### **With Respect to Filing a Petition:**

- Petition forms in RC, RD and RM cases will include Petitioner's position on the type, date, time, and place of the election sought and the Petitioner's designated representative for service of documents.
- The Petitioner must serve the employer and all parties named in the petition with a copy of the petition, a blank [Statement of Position form](#), and a copy of the [Description of Procedures in R cases](#).
- The Petitioner may file the petition by E-Filing (through the Agency's website at <http://www.nlr.gov>), by facsimile, by mail, or in person at one of the NLRB's field offices.
- When filed, the petition must be accompanied by the showing of interest in support of the petition and a certificate of service. The showing of interest may now be E-Filed or faxed, but originals must be provided to the Region within 2 business days of the filing of the petition.
- When filed, the petition must also be accompanied by a Certificate of Service showing service by Petitioner on all parties named in the petition of a copy of the Petition, a blank Statement of Position form, and a copy of the Description of Procedures in R-Cases. An optional [Certificate of Service](#) form is available for this purpose.

### **With Respect to Initial Processing of a Petition:**

- The NLRB will send the Employer a Notice of Hearing and a Notice of Petition for Election. Within 2 business days of service of the Notice of Hearing, the Employer must post the Notice of Petition for Election in all places where notices to employees are customarily posted. The Employer must also distribute the Notice of Petition for Election electronically if the Employer customarily communicates with employees in the unit electronically. Failure to post or distribute the Notice may be grounds for setting aside an election whenever proper and timely objections are filed.
- The NLRB generally will schedule the pre-election hearing for a date 8 days after service of the Notice of Hearing (excluding intervening holidays) or the next business day thereafter if the 8<sup>th</sup> day falls on a weekend or Federal holiday. The hearing may be postponed up to 2 business days upon request of a party showing special circumstances or more than 2 business days upon request of a party showing extraordinary circumstances.

- A completed Statement of Position form must be filed and served by the Employer such that is received by the other parties and the regional director by the date and time specified in the Notice of Hearing, which will generally be at noon of the business day before the pre-election hearing is set to open.
- The Statement of Position solicits information that will facilitate entry into election agreements or streamline the pre-election hearing if the parties are unable to enter into an election agreement. It will include:
  1. A completed commerce questionnaire.
  2. Whether the Employer agrees the proposed unit is appropriate and if not, the basis for its contention that the proposed unit is not appropriate and the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit.
  3. Any individuals whose voting eligibility the Employer intends to contest at the pre-election hearing, and the basis of each such contention.
  4. Any election bar asserted by Employer.
  5. Other issues the Employer intends to raise at the pre-election hearing.
  6. The Employer's position on election details: type of election, date(s), time(s), location(s), payroll period information, and eligibility period.
  7. Contact information for the Employer's authorized representative.
  8. An alphabetized list containing the full names, work locations, shifts and job classifications of all employees in the petitioned-for unit. Unless the employer certifies that it does not have the capacity to produce the list in the required format, the list must be in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word. The first column of the table must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. The font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at [www.nlr.gov/what-we-do/conduct-elections](http://www.nlr.gov/what-we-do/conduct-elections).
  9. If the Employer claims the petitioned-for unit is not appropriate, it must also provide the full names, work locations, shifts and job classifications of all individuals the Employer claims must be added to the unit to make it an appropriate unit. The Employer must also indicate those individuals, if any, whom it believes must be excluded from the petitioned-for unit to make it an appropriate unit.

If the Employer fails to timely furnish the list(s) of employees, the Employer will be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing.

**With Respect to Pre-election Hearings:**

- The purpose of the hearing is to determine if a question of representation exists. Although an appropriate unit must always be established, disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted. The Regional Director has discretion to defer litigation of individual eligibility or inclusion issues until after the election, if necessary.
- At the hearing, the Statement of Position is received into evidence and all other parties will respond on the record to each issue raised in the Statement of Position before introduction of further evidence.

A party generally will be precluded from raising any issue, presenting evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response.

- At the hearing, the Hearing Officer will solicit the parties' positions on the type, date(s), time(s), and location(s) of the election; the eligibility period; and the need for foreign language ballots or notices. The hearing officer will also solicit the name, address, email address, facsimile number, and phone number of the employer's on-site representative to whom the Region should transmit the Notice of Election if the Regional Director directs an election and will inform the parties of their obligations if an election is directed and the time for complying with such obligations.
- Parties are entitled to oral argument but are not allowed to file post-hearing briefs unless the Regional Director grants special permission.

**With Respect to a Direction of Election:**

- If the Regional Director directs an election, the Decision and Direction of Election (D&DE) will ordinarily specify the type, date(s), time(s) and location(s) of the election and the eligibility period.
- The Region will send the direction and notice of election to the parties and their representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided).
- The Regional Director will schedule the election for the earliest date practicable consistent with the Rules.
- Parties may file a request for review at any time following the decision until 14 days after a final disposition of the proceeding by the Regional Director. A party can file before the election or wait until after the election to see if the election results moot an appeal. There will no longer be a 25-day waiting period to allow the Board to rule on a request for review.
- A party may request from the Board a stay of Election, expedited consideration, or the impounding and/or segregation of some or all of the ballots, which will only be granted upon a clear showing that it is necessary under the particular circumstances of the case.

**With Respect to an Election:**

- An alphabetized voter list must be *received* by the regional director and the parties within two business days after approval of the election agreement or issuance of the direction of election unless a longer time was specified in the agreement or in the decision and direction of election.
- The voter list must contain the eligible voters' full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses and available home and personal cell phone numbers). Unless the employer certifies that it does not have the capacity to produce the list in the required format or the parties agree to a different format, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at [www.nlr.gov/what-we-do/conduct-elections](http://www.nlr.gov/what-we-do/conduct-elections).
- The voter list must also include in a separate section the same information for those individuals who will be permitted to vote subject to challenge based on the parties' agreement or the direction of election.

- The Notice of Election will ordinarily be transmitted with the D&DE or sent promptly after the election agreement is approved. The Employer must post the Notice for at least 3 full working days (excluding Saturdays, Sundays and holidays) prior 12:01 am on the day of the election and must also distribute it electronically if it customarily communicates with the employees in the unit electronically.
- A party can generally challenge someone for good cause at the election whose eligibility was not contested at the hearing.

**With Respect to Objections and Post-Election Hearings:**

- Objections must contain a short statement of the reasons for the objections and be accompanied by a written offer of proof. However, the Regional Director may extend the time for filing the offer of proof upon request of a party showing good cause. The party filing the objections, must serve the objections, including the short statement of the reasons therefor, but not the offer of proof, on the other parties.
- A hearing on objections or determinative challenges will be scheduled to open 21 days after the preparation of the tally of ballots or as soon as practicable thereafter, unless parties agree to an earlier date.
- Exceptions to the Hearing Officer Report must be filed with the Regional Director.
- Except in consent election agreement cases, all Regional Director post-election decisions will be subject to discretionary review by the Board.

For more information about the Final Rule, please visit <http://www.nlr.gov/news-outreach/fact-sheets/nlr-representation-case-procedures-fact-sheet>.