

Update: Federal Judge Amends Prior Order Concerning 2019 Election Rules, Affording Deference to the NLRB, but Appeal to D.C. Circuit Remains

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In late May, on the eve of the effective date of the NLRB's sweeping changes to the election process, Judge Ketanji Brown Jackson of the U.S. District Court for the District of Columbia [held](#) that certain of the new rules were substantive—not procedural—in nature, and were improperly implemented without affording the public an opportunity to comment. The portion of the rules relating to procedural aspects of elections (such as timing regarding the election process) were upheld and went into effect, but the remainder did not (e.g., issues a party may litigate before an election, right to NLRB advisory opinion, 20-day waiting period before election may be held, among others). The NLRB immediately announced its intent to appeal the decision.

On the eve of the July 4th holiday weekend, Judge Jackson granted a motion for reconsideration and amended the order, in part. Although the Court did not overturn its earlier ruling, the Court held that the election rules—as a whole—were not “arbitrary and capricious” under the Administrative Procedure Act (APA), which likely will aid the NLRB's appeal to the D.C. Circuit. The Court also found the new rule requiring an automatic impoundment of ballots if there is a challenge to the approval of an election that remains pending after voting was not “arbitrary and capricious,” and did not violate the NLRA.

As the Board is in the process of appealing the May 30 Order, we will keep an eye on this case as it continues to develop. For now, the procedural regulations that were [implemented on June 1](#) will remain in effect for the foreseeable future.

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