

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 24-02

December 8, 2023

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Jennifer A. Abruzzo, General Counsel

SUBJECT: Guidance Memorandum on 2023 Updated Representation Case Procedures

I. INTRODUCTION

On August 24, 2023, the Board adopted the 2023 Election Rule, which modifies certain procedures applicable to processing representation cases.¹ These changes will go into effect December 26, 2023. Like the 2014 Election Rule, certain aspects of which were rescinded by the 2019 Election Rule, the 2023 Election Rule removes unnecessary barriers to the fair and expeditious resolution of representation cases. In so doing, the 2023 Election Rule restores provisions first adopted in 2014, and in that regard, Guidance Memorandum on Representation Case Procedure Changes Effective April 14, 2015 (GC 15-06) provides valuable guidance relevant to the 2023 Election Rule. Notably, the 2023 Election Rule will, as outlined in further detail below, meaningfully reduce the time from petition filing to election and expedite the resolution of any post-election litigation thereby achieving the goal of fairly, efficiently, and expeditiously resolving questions concerning representation.

This memorandum describes how the 2023 Election Rule differs from the 2019 Election Rule and provides guidance to Agency personnel, parties, practitioners, and other stakeholders about representation case processing once the 2023 Election Rule goes into effect. Below is a listing and summary of the most significant changes followed by a more detailed explanation of those changes.

¹ On March 9, 2023, the Board rescinded four provisions from the 2019 Rule and reinstated previous regulations. Those provisions were (1) allowing employers up to five business days to furnish the voter list following the direction of election; (2) precluding Regional Directors from issuing certifications following elections if a request for review is pending or during the time in which a request for review could be filed; (3) limiting a party's selection of election observers to individuals who are current members of the voting unit whenever possible; and (4) automatic impoundment of ballots under certain circumstances when a petition for review is pending with the Board. Provisions one through three were never in effect because they were previously enjoined by United States District Court for the District of Columbia. The fourth provision had been in effect until March 9, 2023. The Board also filed a public notice staying the effective date of two other provisions of the 2019 Election Rule to September 10, 2023. Those provisions, which allowed parties to litigate disputes over all unit scope and voter eligibility disputes prior to the election and instructed Regional Directors not to schedule elections before the 20th business day after the date of the direction of election, had been enjoined and had never gone into effect. The 2023 Election Rule rescinds those two provisions.

2023 Election Rule Amendments

Prompt Pre-Election Hearings

- **Scheduling of Pre-Election Hearing:** Pre-election hearings will generally be scheduled to open 8 calendar days after petition filing; approximately 10 calendar days sooner than under the 2019 Election Rule.
- **Postponement of Pre-Election Hearing:** Regional Directors may postpone a pre-election hearing for up to 2 business days upon request of a party showing special circumstances and for more than 2 business days upon request of a party showing extraordinary circumstances.
- **Due Date for Non-Petitioning Party's Statement of Position:** A non-petitioning party's written response to the petition will generally be due 7 calendar days after petition filing; 3 calendar days sooner than under the 2019 Election Rule.
- **Postponement of Statement of Position:** Regional Directors may postpone the due date for the filing of a Statement of Position for up to 2 business days upon request of a party showing special circumstances and for more than 2 business days upon request of a party showing extraordinary circumstances.
- **Responsive Statement of Position:** Petitioners will be allowed respond orally to the non-petitioning party's Statement of Position at the start of the pre-election hearing without having to file and serve a written responsive Statement of Position.

Rapid Dissemination of Important Election Information

- **Posting and Distribution of Notice of Petition for Election:** Employers must post and distribute the Notice of Petition for Election within two business days after service of the notice of hearing, rather than five business days under the 2019 Election Rule.

Efficient Hearings

- **Litigation of Eligibility and Inclusion Issues:** Generally, only issues necessary to determine whether an election should be conducted will be litigated in a pre-election hearing. Accordingly, a Regional Director will ordinarily defer litigation of eligibility and inclusion issues to the post-election stage if those issues do not have to be resolved to determine whether an election should be held.
- **Briefing Following Pre- and Post-election Hearings:** All parties will be provided with an opportunity for oral argument before the close of the hearing. Written briefs will only be allowed with the permission of the Regional Director (pre-election hearing) or the Hearing Officer (post-election hearing).

Expeditious Elections

- **Specification of Election Details in Decision and Direction of Election; Notice of Election:** Regional Directors will ordinarily specify the election details (the type, date(s), time(s), and location(s) of the election and the eligibility period) in the decision and direction of election and will ordinarily simultaneously transmit the Notice of Election with the decision and direction of election.
- **Elimination of the 20-Business Day Waiting Period Between Issuance of the Decision and Direction of Election and the Election:** Regional Directors will schedule elections for “the earliest date practicable” after issuance of a decision and direction of election, rather than observing the 20-business-day waiting period under the 2019 Election Rule.

II. SCHEDULING HEARINGS AND STATEMENTS OF POSITION

- §102.63(a)(1) provides that pre-election hearings generally are scheduled to open 8 calendar days from service of the Notice of Hearing.
- §102.63(a)(1) provides that Regional Directors may postpone a pre-election hearing for up to 2 business days upon request of a party showing special circumstances and for more than 2 business days upon request of a party showing extraordinary circumstances.
- §102.63(b) provides that a non-petitioning party’s Statement of Position is normally due 7 calendar days after service of the Notice of Hearing.
- §102.63(b) provides that Regional Directors may postpone the due date for the filing of a Statement of Position for up to 2 business days upon request of a party showing special circumstances and for more than 2 business days upon request of a party showing extraordinary circumstances.
- §102.66(b) provides that a petitioner shall respond orally to the non-petitioning party’s Statement of Position at the start of the pre-election hearing.

Pre-Election Notices of Hearing and Requests for Postponement- § 102.63(a)(1)

Under the 2023 Election Rule, procedures for docketing and service of documents upon the filing of a petition, including the issuance of a Notice of Hearing, are the same as described in GC 15-06, Guidance Memorandum on Representation Case Procedure Changes Effective April 14, 2015. Pre-election hearings will generally be scheduled 8 calendar days from notice of the hearing. Under the 2019 Election Rule, pre-election hearings were

scheduled for 14 business days after service of the Notice of Hearing. Under the 2023 Election Rule, parties may only request a two business-day postponement for special circumstances and any additional days require a party to demonstrate extraordinary circumstances. Previously, Regional Directors had discretion to approve postponements for good cause, with no limitation on the number of days for a postponement.

Statements of Position, Responsive Statements of Position, and Requests for Extensions to File Statements of Position - § 102.63(b)

The requirements for non-petitioning parties to file and serve initial Statements of Position remain the same as under the 2019 Election Rule, except that initial Statements of Position must be filed and served on the other parties within 7 calendar days after the service of the Notice of Hearing. Under the 2019 Election Rule, such Statements of Position were due by noon 8 business days after the service of the Notice of Hearing. Under the 2023 Election Rule, Regional Directors may postpone the due date for the filing of a Statement of Position for up to 2 business days upon request of a party showing special circumstances and for more than 2 business days upon request of a party showing extraordinary circumstances. Previously, Regional Directors could postpone the due date for the filing of a Statement of Position for an unlimited amount of time upon request of a party showing good cause. Under the 2023 Election Rule, a petitioner will be allowed to respond *orally* to the non-petitioning party's Statement of Position at the start of the pre-election hearing. Previously, a petitioner was required to file and serve a responsive *written* Responsive Statement of Position 3 business days prior to the pre-election hearing.

III. PETITION NOTICE, ISSUES APPROPRIATE FOR LITIGATION, BRIEFING

- §102.63(a)(2) provides that, within 2 business days after service of the Notice of Hearing, the employer shall post the Notice of Petition for Election in conspicuous places, including all places where notices to employees are customarily posted, and shall also distribute it electronically to employees in the petitioned-for unit if the employer customarily communicates with its employees electronically.
- §102.64(a) provides that disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted.
- §102.66(h) provides that briefs after the close of pre-election hearings shall be filed only upon special permission of the Regional Director and within the time and addressing the subjects permitted by the Regional Director.
- §102.69(c)(1)(iii) provides that briefs after the close of post-election hearings shall be filed only upon special permission of the Hearing Officer and within the time and addressing the subjects permitted by the Hearing Officer.

Notice of Petition for Election - § 102.63(a)(2)

As under the 2019 Election Rule, employers are required to post the Notice of Petition for Election in conspicuous places where notices to employees are customarily posted, and to distribute them electronically if the employer customarily communicates with employees in that manner. Employers will now have up to two business days to post and electronically distribute the Notice of Petition for Election, where under the 2019 Election Rule employers had up to five business days. The 2023 Election Rule simplifies the requirement that employers who customarily communicate with employees electronically must distribute the Notice of Petition for Election by those means to employees in the petitioned-for unit. An employer continues to be required to maintain the posting of the Notice of Petition for Election until the petition is withdrawn or dismissed or, if an election is scheduled, until a Notice of Election replaces the Notice of Petition for Election. Failure to properly post or distribute the Notice of Petition for Election may be grounds for setting aside the election whenever proper and timely objections are filed.

Litigation of Eligibility and Inclusion Issues- § 102.64(a):

The purpose of the pre-election hearing is to determine whether a question of representation exists. Accordingly, under the 2023 Election Rule disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily do not need to be litigated or resolved prior to an election, and Regional Directors have authority to exclude evidence that is not relevant to determining whether there is a question of representation and thereby avoid unnecessary litigation on collateral issues that may result in substantial waste of resources. Under the 2019 Election Rule, individual eligibility and inclusion issues were “normally” to be litigated at the pre-election hearing and resolved by the Regional Director prior to the election.² Restoring the 2014 Election Rule more efficiently avoids litigating and resolving issues that are often mooted by the election results or amicably resolved following an election and permits more expeditious resolution of representation cases.

Briefing Following Pre- and Post-Election Hearings- § 102.66(h) and 102.69(c)(1)(iii):

Under the 2023 Election Rule, parties may file post-hearing briefs with the Regional Director only with the Regional Director's special permission (following *pre*-election hearings) or Hearing Officer only with the Officer's special permission (following *post*-election hearings) and within the time and addressing only the subjects permitted by the Regional Director or Hearing Officer, respectively. Under the 2019 Election Rule, parties were entitled to file briefs

² This provision from the 2019 Election Rule never took effect. It was enjoined by order of the district court prior to its effective date. When that injunction was lifted, the Board stayed its effective date until the date it was repealed.

up to 5 business days following the close of a pre- or post-election hearing, with an extension of an additional 10 business days available upon a showing of good cause. The 2023 Election Rule permits Regional Directors and Hearing Officers adequate flexibility to request briefing in the rare complex case and eliminates redundant and repetitive briefing, and consequent delay, in the more commonplace straightforward cases.

IV. ELECTION DETAILS INCLUDED IN DECISION – RECISSION OF 20-BUSINESS-DAY WAITING PERIOD

§102.67(b) provides that when the Regional Director directs an election, the direction ordinarily will specify the type, date(s), time(s), and location(s) of the election and the eligibility period.

§102.67(b) also provides that the Regional Director shall schedule the election for the earliest date practicable consistent with the 2023 Election Rule. The Regional Director shall transmit the direction of election to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided).

Specification of Election Details in Decision - § 102.67(b). This amendment reverts to the standard of the 2014 Election Rule and rescinds the 2019 Election Rule that provided that the Regional Director “may” specify the election details in the decision and direction of election.

Directions of Elections- § 102.67 (b). If the Regional Director directs an election, the direction ordinarily will specify the type, date(s), time(s), and location(s) of the election and the eligibility period. The Regional Director shall schedule the election for the earliest date practicable consistent with the 2023 Election Rule. The Regional Director shall transmit the direction of election to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided). The Regional Director shall also transmit the Board's Notice of Election to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided), and it will ordinarily be transmitted simultaneously with the direction of election. If the direction of election provides for individuals to vote subject to challenge because their eligibility has not been determined, the Notice of Election shall so state, and shall advise employees that the individuals are neither included in, nor excluded from, the bargaining unit, inasmuch as they have been permitted to vote subject to challenge. The election notice shall further advise employees that the eligibility or inclusion of the individuals will be resolved, if necessary, following the election

Elimination of the 20-Business Day Waiting Period Between Issuance of the Decision and Direction of Election and the Election:

As discussed above, Section 102.67(b) provides that Regional Directors shall schedule elections for the earliest date practicable after issuance of a decision and direction of election. The 2019 Election Rule imposed a 20-business day waiting period between the date of the direction of election and the election.³

V. CONCLUSION

I am confident that this memorandum will assist in the smooth implementation of the 2023 Election Rule, which allows us to better effectuate the policies and purposes of the Act by addressing the barriers to fairly, efficiently, and expeditiously resolving questions concerning representation imposed by the 2019 Election Rule. I thank the field personnel for ensuring that these changes are adopted and for promptly educating the public about the 2023 Election Rule.

If you have questions related to this memorandum, please direct them to your Assistant General Counsel or Deputy.

/s/
J.A.A.

³ This provision from the 2019 rule never took effect. It was enjoined by order of the district court prior to its effective date. When that injunction was lifted, the Board stayed its effective date until the date it was repealed.