

NLRB General Counsel Announces “Suggested” Protocols for Conducting Manual, In-Person Elections Amidst the COVID-19 Pandemic

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After a brief delay where the NLRB suspended all representation elections from March 19 through April 6, 2020 (see [here](#) and [here](#)), NLRB Regional Directors have since largely required elections to be held via mail ballot to curb the spread of COVID-19.

Earlier this week, the Office of the General Counsel of the NLRB published a Memo, [GC 20-10](#), containing “suggested” manual election protocols designed to resume the conduct of manual elections, in certain situations, and in a safe and efficient manner. These protocols were developed collaboratively with Regional Directors, the NLRB Division of Operations-Management, the NLRB COVID-19 Task Force, and the internal union representing NLRB employees.

Election Mechanics

Regarding the mechanics of the voting process, the election agreement or Decision and Direction of Election (DDE) issued by the Regional Director should include a polling times procedure and voter release schedule that sufficiently ensure appropriate social distancing and that accommodate proper cleaning and sanitization at the polling site.

The agreement or DDE should also specify the maximum number of representatives from each party that will be permitted to attend the pre-election conference and ballot count, as well as the number of observers per party during the election—with one observer per party being the ideal number given social distancing guidelines.

Required Certifications

To enable the Regional Director to determine whether an election should proceed as scheduled, employers and party representatives who will be participating in the pre-election conference, election, and/or ballot count must submit written certifications.

The employer's certification must be submitted no earlier than 48 hours but no later than 24 hours before the election, and it must certify that the polling area is consistently cleaned in conformity with the CDC's safety standards. Additionally, the employer must provide the Regional Director with information pertaining to the number of individuals who have been present in the work facility within the past 14 days who have: (1) tested positive for COVID-19 or have otherwise been directed by a medical professional to proceed as if they have tested positive; (2) are awaiting test results; (3) are exhibiting symptoms of COVID-19; or (4) have had direct contact within the past 14 days with someone who has tested positive for COVID-19 or has pending test results.

Party representatives who wish to participate in the ballot count or serve as an election observer must certify that, within the preceding 14 days, they have not tested positive for COVID-19, experienced symptoms, or come into direct contact with someone who has tested positive. The Memo offers a sample certification form that can be used by employers (Attachment A of the Memo) and by individuals planning to oversee or manage the election process (Attachment B of the Memo).

The Memo also requires that all parties agree in writing to inform the Regional Director if, within 14 days after the date of a manual election, an individual present in the facility on the day of the elections tests positive for COVID-19, is awaiting test results, is exhibiting symptoms, or had direct contact with someone who has since tested positive for COVID-19. This requirement is designed to protect the health and safety of the Board Agents conducting the election.

Election Arrangements

Perhaps of greatest import, the Memo states that election agreements and DDEs "***must***" include specific "election arrangements," such as:

- A spacious polling area large enough to accommodate six-foot distancing between observers, the Board Agent, and voters;
- A separate entrance and exit for voters, with markings to depict safe traffic flow throughout the polling area;
- Separate tables spaced six feet apart so the Board Agent, observers, the ballot booth, and the ballot box are at least six feet apart;

- Markings on the floor to enforce social distancing and maintain separation between the Board Agent, observers, and voters; and
- Plexiglass barriers of sufficient size to protect the observers and the Board Agent, as well as masks, hand sanitizer, gloves and wipes for observers.

In addition, an inspection of the polling area by the Board Agent and the parties will be conducted by video conference at least 24 hours prior to the election, and all voters, observers, party representatives, and other participants must wear CDC-conforming masks during the pre-election conference, in the polling area, and while observing the count. Signs will be posted to notify participants of this requirement.

While the Memo stipulates that these safety measures do not need to be explicitly listed in the Notice of Election (NOE), the Memo mandates that the NOE affirm that appropriate safety measures will be implemented and enforced throughout the election process.

Takeaways

Despite being labeled as “suggested,” many of the protocols provided in the GC Memo appear to be far more than aspirational. Employers should expect Regional Directors to exercise their discretion in holding manual elections based on these health and safety protocols, as the General Counsel concluded the Memo by acknowledging that “the decisions on election procedures and the safety of all participating in an election remain in the sound discretion of the Regional Director.” This likely means mail ballot elections will continue to be the norm especially if an employer’s premises are not yet opened fully or the employer is not able to comply with the physical distancing and sanitary requirements promulgated by the Regional Director.

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