

NLRB Establishes Pathway to Holding More In-Person Manual-Ballot Elections during the COVID-19 Pandemic

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As employers faced with a representation petition filed during the COVID-19 pandemic can attest, Regional Directors of the National Labor Relations Board have been incredibly reticent to hold in-person elections. Indeed, since April 1st, when the Board resumed processing representation petitions, approximately ***ninety percent*** (90%) of elections have been held by mail rather than in-person. This necessary paradigm shift flew in the face of the Board's long-standing general policy to hold manual-ballot, in-person elections. However, on November 9, 2020, the Board finally provided Regional Directors and key stakeholders, such as employers, employees and unions with important guidance concerning when, and how, to decide whether to hold a representation election by manual- or mail-ballot.

Background

In [*Aspirus Keweenaw*](#), 18-RC-263185, 370 NLRB No. 45 (2020), the Employer argued that a manual election was warranted based on the Board's preference for manual-ballot elections and the relatively-low prevalence of COVID-19 in its Michigan county. The Employer also agreed to comply with the manual-ballot election protocols issued by the Board's General Counsel on July 6, 2020 in [GC Memo 20-10](#). That Memo set out a detailed protocol of how to hold in-person voting during the COVID-19 Pandemic, including detailed elections mechanics, health certifications, an agreement to notify the Region of any indication that individuals present at the voting location contracted COVID-19, and arrangements to ensure social distancing and compliance with CDC guidelines. Nonetheless, the Region, in *Aspirus Keweenaw*, ordered a mail-ballot election due to safety concerns and applicable governmental guidance.

The full Board reversed the Regional Director's decision and articulated a new six-“situation” test to determine whether an election should be held by mail rather than by manual ballot. Notably, the Board indicated that the presence of “one or more” of these situations “normally” suggests the use of a mail ballot due to the extraordinary circumstances of the COVID-19 pandemic:

- The Agency office tasked with conducting the election is operating under “mandatory telework” status.
- Either the 14-day trend in the number of new confirmed cases of COVID-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher.
- The proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size.
- The employer fails or refuses to commit to abide by GC Memo 20-10, Suggested Manual Election Protocols.
- There is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify its current status.
- Other similarly compelling circumstances.

The Board clarified that none of these situations *require* a mail-ballot election. Instead, the determination remains at the discretion of the Regional Director, but “a Regional Director who does direct a mail-ballot election under the foregoing situations will not have abused his or her discretion.” In other words, Regional Directors who follow the Board's guidance likely will not be reversed on this issue by the Board on review.

In *Aspirus Keweenaw*, the Board reversed and remanded the Regional Director's decision requiring a mail-ballot election for further consideration consistent with the new standard.

Takeaways

The country continues to be challenged by the COVID-19 pandemic, with outbreaks varying by state and locality. As evident over this past year, the normal operations of the NLRB, including the type and manner of representation elections, has been significantly affected. Namely, the ongoing pandemic has resulted in far more mail-ballot than manual-ballot elections.

The Board's decision helpfully articulates clearer guidance for Regional Directors faced with the unenviable task of deciding whether to hold in-person or mail-ballot elections at an employer's site during the pandemic. The decision also gives employers and unions some criteria to use to argue over the type of election to be conducted. This decision both lays the groundwork for a possible return to the long-standing tradition of in-person elections (which may be a boon for employers who prefer in-person voting), while also recognizing the gravity of the safety and health crisis that the country is currently experiencing by providing multiple situations in which a manual election almost certainly would **not** be ordered.

As with all things related to COVID-19 and the NLRB, this situation is fluid and we will continue to follow it. Stay tuned!

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