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NLRB Provides Employers with New Manual Election Standards

Employers facing union representation elections have spent the pandemic trying to satisfy the National Labor Relations Board's (Board) requirements to hold a manual, ballot box election, only to be refused in the vast majority of cases. Once the rare exception to the rule, mail-ballot elections have become the norm since April 2020. While the Board has attempted to set definitive requirements for an employer to obtain a manual election, its regional directors have generally denied all requests. On November 9, 2020, the Board issued a decision clarifying its position regarding how determinations regarding mail-ballot elections should be made. In the *Aspirus Keweenaw and Michigan Nurses Association* decision, the Board established "six situations that suggest the propriety of mail ballots due to the COVID-19 pandemic." 18-RC-263185, 370 NLRB No. 45 (2020). We discuss below the Board's prior attempts to address the COVID-19 pandemic, reasons why employers should be wary of mail-ballot elections, and this decision's impacts on employers.

With rare exceptions, the Board's long-standing policy has been that representation elections should be conducted manually, in person, either at the workplace during a work shift or at some other appropriate location. The problem with mail-ballot elections is that they take place outside the supervision of Board agents and are more susceptible to inappropriate influence and interference. Keeping in mind that a representation election is decided by the percentage of employees who vote, as opposed to the total number of employees, mail-ballot elections are a less reliable indication of employee sentiment, as they are at risk of resolution by low voter turnouts. Employees who change residences during the election period may not receive a ballot, others may be uncomfortable filling out or mailing in a government document, while many employees simply ignore the ballots altogether. Combined, these variables explain the increased success rate for union organizing efforts decided by mail-ballot elections and why employers avoid them.

Once it realized the pandemic's potential threat in March 2020, the Board [ordered](#) a temporary suspension of all representation elections through April 3, 2020. A few weeks later, the Board reviewed the suspension and on April 1, 2020, ultimately [declined](#) to extend it. In deciding to end the suspension, the Board placed future responsibility for determining whether it was safe to conduct in-person elections in the hands of the regional directors. But as the pandemic spread, regional directors directed an "unprecedented number of mail-ballot elections." They consistently held that the pandemic met the standard of "extraordinary circumstances" under *San Diego Gas & Electric*, 325 NLRB 1143 (1998), justifying mail-ballot elections almost exclusively.

Employers continued to demand manual elections, so the Board's general counsel [issued](#) Memorandum GC 20-10 on July 6, 2020, that suggested over two dozen protocols with which employers would have to comply for the region to consider a manual election. Under this guidance, the regional directors were authorized to make initial elections decisions, however, the Board retained final approval. The July 2020 memorandum included a written certification process that the polling area meets safety requirements, a requirement that the election agreement cover the logistical requirements for the polling area, and a post-election reporting protocol. It was comprehensive, covering topics ranging from positive-test protocols to PPE and glue sticks. However, it became clear that even when employers met all of these protocols, their requests to hold a manual election were still almost always denied by the regional director, usually due to COVID-19 statistics in the employer's community. Since March, 90% of elections have been by mail.

Mail-Ballot Elections Appropriate in Extraordinary Circumstances

Rather than continue to encourage employers to meet Memorandum GC 20-10's standards only to consistently deny their requests for a manual election, on November 9, 2020, the Board acknowledged that, even when an employer is willing to take all required precautions, external forces may still require a mail-ballot election. In *Aspirus Keweenaw*, the regional director issued a Decision and Direction of Election directing a mail-ballot election due to the "extraordinary circumstances presented by the COVID-19 pandemic at this time." This phrase had become the NLRB's standard rationale for denying employer requests for manual elections. The employer, Aspirus Keweenaw, appealed, and the Board remanded the case and took the opportunity to outline the six situations that will require a mail-ballot election. Under this new NLRB decision, if any one of the following is present, a mail-ballot election is appropriate:

1. The agency office tasked with conducting the election is operating under "mandatory telework" status
2. Either a 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% or higher
3. 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
4. The employer fails or refuses to commit to abide by the GC Memo 20-10 protocols
5. There is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify its current status
6. Other similarly compelling considerations

Takeaways

The *Aspirus Keweenaw* decision is helpful in that it clarifies a muddled situation. While not necessarily good news for employers, it at least provides more specific guidance to help assess the prospects, and the expense, of trying to hold a manual election. Until now, employers reasonably saw the Board's general counsel's Memorandum GC 20-10 as a roadmap to a manual election and may have expended considerable resources trying to meet its exacting protocols. Those efforts were largely wasted, as regional directors rejected those proposals due to external, pandemic-related reasons outside employers' control. The *Aspirus Keweenaw* decision clarifies that those external considerations will now always win the day and that employers should not bother asking for a manual election unless all six of its requirements are satisfied.

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