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November 08, 2022

National Labor Relations Board Updates Considerations for Directing Mail Ballot Elections

The National Labor Relations Board (NLRB or the Board) issued a decision on September 29, 2022, in *Starbucks Corporation*, 371 NLRB No. 154 (2022), updating the considerations that guide regional directors when deciding whether union elections should be conducted by mail ballot due to COVID-19 concerns. This decision updates the Board's standard laid out in *Aspirus Keweenaw*, 370 NLRB No. 45 (2020), which identified six factors to guide regional directors in exercising their discretion to order mail ballot elections and held that the presence of any one factor would justify—though not require—the direction of a mail ballot election:

1. The agency office tasked with conducting the election is operating under "mandatory telework status."
2. Either the 14-day trend in 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 reasonably 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 abide by GC Memo 20-10, "Suggested Manual Election Protocols."
5. There is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify its current status; or
6. Other similarly compelling circumstances.

The *Starbucks* decision updates factor 2 by "reorient[ing] factor 2 from its current data points to the Centers for Disease Control and Prevention's (CDC) recently established Community Level tracker." According to the CDC, this tracker "provides an integrated, county view of key data for monitoring the COVID-19 pandemic in the United States [and] allows for the exploration of standardized data across the country." The Community Level tracker is grounded in a collective assessment of three data points: new COVID-19 cases, new COVID-19 hospital admissions, and the percentage of staffed inpatient beds in use by COVID-19 patients.

Under the new standard, a regional director will not abuse their discretion by directing a mail ballot election when the county encompassing the employer's facility is in the "High" Community Level category. Additionally, the Board held that "Medium" and "Low" Community Levels will not be independently sufficient to support a mail ballot determination under factor 2. The *Starbucks* decision does not alter the remaining five *Aspirus* factors and does not apply retroactively.

In a [press release](#) following the decision, NLRB Chairman Lauren McFerran commented, "State and local governments no longer provide the COVID-19 data in the manner that they did when the 2020 *Aspirus* decision was issued. Using the CDC's tracker instead will allow Regional Directors to easily and consistently evaluate the safety of conducting in-person elections, while minimizing delay caused by disputes over the appropriate interpretation and application of COVID-19 data."

Implications for Employers

For employers, this will likely clarify what has become a murky process. Under *Aspirus*, unions and employers often presented different and conflicting COVID-19 data due to the variety of data sources and inconsistent metrics. By focusing only on the CDC's tracker, the NLRB has streamlined a process that had grown cumbersome.

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