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LEGISLATIVE ACTION ALERT

NLRB Establishes Standards for Mail-and Manual-Ballot Representation Elections During the COVID-19 Pandemic



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202-273-1991

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November 09, 2020

Washington D.C. – In a decision issued today, the National Labor Relations Board sets forth the considerations Regional Directors should weigh in determining whether an election should be conducted by mail-ballot, as opposed to an in-person manual- ballot, because of the COVID-19-related conditions. The case is *Aspirus Keweenaw*, 18-RC-263185, 370 NLRB No. 45 (2020).

The NLRB's longstanding policy strongly favors manual elections, although since the onset of the COVID-19 pandemic, the Board has permitted mail-ballot elections under an "extraordinary circumstances" exception to the manual ballot preference. Since March, approximately 90 percent of NLRB representation elections have been conducted by mail. The Board has approved the Agency's Regional Directors' decisions to conduct these elections by mail, recognizing the unique concerns raised by the pandemic. In today's decision, the Board provides the Regional Directors with updated guidance for use in determining the appropriate election method to be used in light of the unique COVID-19 circumstances. The decision outlines six situations related to the COVID-19 pandemic that, when one or more is present, will normally suggest the propriety of conducting an election by mail, rather than manual ballot. Those circumstances are:

1. The Agency office tasked with conducting the election is operating under "mandatory telework" status.
2. 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.
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 [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.
6. Other similarly compelling circumstances.

The Board further held this new guidance would be applied retroactively and accordingly remanded *Aspirus* to the Regional Director in light of the factors set forth in this decision. "Carrying out the mission of the Agency – particularly conducting our elections – has been challenging during these unprecedented times, and the Board acknowledges and sincerely thanks our Regional Directors and Regional Office staff for their extraordinary work on the front lines of this effort," Chairman John F. Ring said. "This decision," he added, "will provide much-needed guidance to Regional Directors and parties on the circumstances in which mail-ballot elections are appropriate during this pandemic. While protecting the health and safety of all election participants, these guidelines also recognize the benefits of conducting elections in the workplace, where many of the employees we serve have continued to work during the pandemic."