

Plan Ahead, Employers: NLRB Ordering Mail Ballot Elections Because of COVID-19 Pandemic

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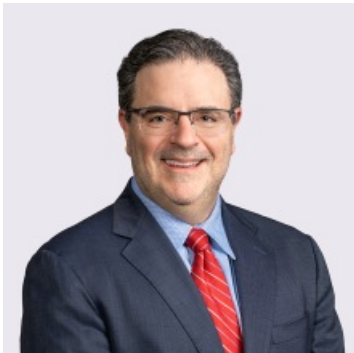
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Recent representation case decisions and directions of election by National Labor Relations Board (NLRB) Regional Directors strongly suggest that, until the COVID-19 pandemic subsides, employers will have a difficult time convincing Regional Directors that NLRB representation elections should be by manual, rather than mail, balloting.

In all seven cases in April thus far in which the regional director had to decide the issue, the employers argued against a mail ballot election and the unions in favor. In all cases, the regional directors ordered a mail ballot election, citing the COVID-19 pandemic and the health risk (to employees, NLRB personnel, and others) they believed would be created by a manual ballot election. See, *e.g.*, *Citizen 360 Condominium*, Case 02-RC-257691 (Apr. 17, 2020); *Victory Wine Group, LLC*, 16-RC-257874 (Apr. 23, 2020).

Mail balloting generally favors the union by, for example, giving the union an opportunity to visit employee homes to influence how they vote. Under the National Labor Relations Act (NLRA), employer representatives are prohibited from visiting employee homes in connection with representation elections. In addition, because eligible voters are given several days after receiving their ballots to return them to the NLRB, the impact and momentum of the employer's voter education campaign is decreased. This does not exist in connection with a manual ballot election, where the employer may educate employees one-on-one until the last moment before they vote.

All is not lost, however. Employers can take steps now to attempt to better position themselves to convince a regional director (and, if that fails, the NLRB) that a manual ballot election, rather than one by mail ballot, is the better option (or that the election should be delayed). (Employers also should consider how they will communicate effectively with their employees about unions and unionization in the event a union files a petition.)

Balloting Options Explained

Manual Balloting

Typically, a manual ballot election is conducted on the employer's premises in a room or area isolated from management offices, such as a lunchroom or break room. The balloting can take place over several hours, depending upon how many eligible voters there are. An NLRB representative must always be in the room to supervise the balloting and, in almost all cases, two or more employees also are present as "observers." The observers check off (on a list prepared by the employer) the names of those who present themselves to vote. Eligible voters enter the room, approach a table at which the NLRB representative and the two employees are seated, state their names, and receive a ballot, which they complete in a prefabricated, collapsible NLRB voting booth. After voting, voters place their ballots in a sealed cardboard box provided by the NLRB. When voting is over, the NLRB representative removes the ballots from the box and counts them, usually in the

presence of employees, union representatives, and employer representatives. The voting tally is recorded on a form that must be signed by both sides.

Mail Balloting

On the appointed day, the NLRB mails a voter packet to the home of each eligible voter. The packet includes the ballot, voting instructions, and a return envelope in which the completed ballot is to be placed and mailed. Typically, ballots are due in the regional office within 14 days after the ballots are mailed to the voters. The vote count typically takes place in the regional office a day or two after the ballots are due.

In *Citizen 360 Condominium* and *Victory Wine Group*, the ballots are due 21 days and 22 days, respectively, after mailing by the regional office to the voter. In addition, the vote counts have been scheduled to take place nine days and 13 days, respectively, after the ballots must arrive at the regional office. These extended time periods likely reflect an unease on the part of the regional directors with the U.S. Postal Service, as well as their recognition of difficulties voters may have returning their ballots by mail during this time. It is NLRB policy to count any votes that arrive at the regional office by the time the votes are to be counted (rather than counting only those ballots that arrived by the due date). This means that, in *Citizen 360 Condominium* and *Victory Wine Group*, ballots that arrive at the regional office a month or more after they are mailed to the voter will be counted. With any luck, even an impaired U.S. Postal Service can handle that task.

Employer/Union Arguments about Mail Ballot Elections

The employers and unions involved in *Citizen 360 Condominium* and *Victory Wine Group* argued the following:

Employer Arguments for a Manual Ballot Election

- The U.S. Postal Service system is impaired, making a mail ballot election unreliable.
- Mail balloting is inherently flawed and less reliable than manual balloting.
- Additional exposure to COVID-19 caused by a manual ballot election would be negligible because the eligible voters have already been exposed to anyone in the building is carrying the virus.
- The voting area can be cleaned.
- The voting would take place in a well-ventilated room large enough to allow social distancing.
- All parties involved could wear gloves and masks.
- The NLRB agent supervising the election could sterilize the ballot box.

Union Arguments for a Mail Ballot Election

- Mail balloting is the most expeditious way to proceed.
- Mail balloting is the safest method for voting.
- Mail balloting will enfranchise the most eligible voters.

Regional Directors' Reasoning for Directing Mail Ballot Elections

The Regional Directors relied almost exclusively on the possible health risks associated with manual balloting for rejecting the employers' position. They found the following significant:

1. Each trip outside one's home risks further exposure and this may have a coercive effect on employee's willingness to exercise their Section 7 rights. An employee who is not scheduled to work on the election day should not be forced to decide between voting and minimizing exposure to infection.
2. Any gathering of each party's observers, the NLRB agent, and parties' representatives in connection with a manual ballot election arguably would be contrary to state law regarding gatherings.
3. Voters who are not working during the vote would be forced to further expose themselves to COVID-19 by making an extra trip to their workplace and could pass their own infection to other employees utilizing public transportation at that time.
4. The observers share the same voter list to check off the names of arriving voters.
5. All voters use the same cardboard voting booth; studies show the virus may remain viable on cardboard for 24 hours.
6. All voters share the same pencil to mark their ballot.
7. The NLRB agent must handle the paper ballots during the count that takes place immediately after the close of the poll.
8. The NLRB agent and all parties represented must sign the same tally of ballots.
9. Using masks and gloves, frequently sanitizing election equipment, using plastic barriers, and testing participants regardless of symptoms will not work.
10. Experts disagree over the distance required for safety and guidelines on social distancing are subject to change.
11. The regional office currently has no masks and gloves available because the supplies are most needed by healthcare at this time; in any event, the role of the observer would be made more difficult if voters were wearing masks covering their faces and obscuring their identity.
12. There is no indication the U.S. Postal Service is unable to deliver mail and no evidence was presented that the U.S. Postal Service is not currently operating in an efficient manner.
13. The instructions for voting by mail included in the packets sent to voters can advise sealing the ballot in the return envelope by means other than saliva.
14. The count of mail ballots could be scheduled well after the due date to return ballots, thereby reducing the virus's viability should the virus be on the paper ballot.
15. Conducting NLRB elections "on the earliest date practicable" is crucial to maintaining industrial stability and reinforcing the foundation necessary for the economy's swift recovery.
16. No evidence was presented that each eligible voter, observer, party representative, and each member of their respective households had not tested positive for COVID-19.
17. *San Diego Gas and Electric*, 325 NLRB 1143 (1998), gives the Regional Director the discretion to decide whether a mail ballot election may be appropriate. Mail ballot elections are not limited to the circumstances set forth in that case, but "other relevant factors," especially in "extraordinary circumstances," may be considered by a regional director. The present circumstances are extraordinary and present many relevant factors suggesting that a mail ballot election is appropriate.

Takeaways for Employers

As noted, mail ballot elections favor unions. As a result, it behooves any employer that may be vulnerable to union organizing during this time to determine in advance its best argument in favor of a manual ballot election (or for delaying the election) and develop the facts that support the argument now. There will not be enough time to do so after a petition is filed.

For example, one reason supporting the ordering mail ballot elections in *Citizen 360 Condominium* and *Victory Wine Group* was the employer's failure to present evidence that the U.S. Postal Service is not operating efficiently at this time. Gathering evidence in support of that argument now, given the short time that will be available to do so if a petition is filed, could mean the difference between a regional director ordering a manual, rather than a mail, ballot election (or delaying the election). That, in turn, could mean the difference between employees being represented by a union or remaining union-free. Any way an employer can distinguish its situation from the facts in *Citizen 360 Condominium* and *Victory Wine Group* will be a step in the right direction.

Further, the NLRB has expressed an interest in revisiting mail balloting if an appropriate case is presented. For more on this, see our blog, [NLRB Open to Changing Criteria for Mail Ballot Elections](#). Thus, any case in which a regional director orders a mail ballot election could be *the* case the NLRB chooses as the vehicle to change the factors for determining whether a mail ballot election is appropriate. To take advantage of that possibility, an employer faced with a mail ballot election ordered by a regional director should preserve all of its rights throughout the proceeding.

Please contact a Jackson Lewis attorney with questions about this or other NLRB or NLRA issues.

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