

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 21-01

November 10, 2020

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Peter B. Robb, General Counsel

SUBJECT: Guidance on Propriety of Mail Ballot Elections, pursuant to *Aspirus Keweenaw*, 370 NLRB No. 45 (2020)

As the Covid-19 pandemic has unfolded, the Board's guidance regarding the propriety of mail-ballot elections in view of the pandemic has similarly evolved. To date, such guidance has been case specific, but in *Aspirus Keweenaw*, 370 NLRB No. 45 (November 9, 2020), the Board set forth a detailed framework for how Regional Directors should exercise their discretion when considering election type during the extraordinary circumstances presented by the pandemic. Specifically, the Board has found that, in addition to the established circumstances where a mail ballot election can be conducted, one or more of the following situations will normally justify the propriety of a mail-ballot election due to the Covid-19 pandemic.¹

1) The Agency office tasked with conducting the election is operating under "mandatory telework" status.

The goal of mandating telework earlier in the pandemic was to reduce interpersonal contact that might lead to the spread of the virus; the direction of mail-ballot elections where the office conducting the election was on mandatory telework was accordingly consistent with that goal. Since mid-June 2020, the Agency's offices have all been on permissive, rather than mandatory, telework, but given the fast-moving nature of the pandemic it remains possible that a given office could again be placed on mandatory telework. Should that eventuality come to pass, mandatory telework will once again justify the propriety of a mail-ballot election.

2) Either the 14-day trend in the number of new confirmed cases of Covid-19 in the city/county where the facility is located is increasing, or the 14-day testing positivity rate in the city/county where the facility is located is 5 percent or higher.

To best assess whether safety needs dictate a mail-ballot election, Regional Directors should generally focus their consideration on recent statistics that reflect the

¹ The Board applied the *Aspirus Keweenaw* factors retroactively to the framework of that case, and presumably will do so in other matters, both pending and new. *Aspirus Keweenaw*, 370 NLRB No. 45, slip op. at 8.

severity of the outbreak in the specific locality where the election will be conducted. Thus, a mail-ballot election will normally be appropriate if either (a) the 14-day trend in the number of new confirmed Covid-19 cases in the city/county where the facility is located is increasing, or (b) the 14-day testing positivity rate in the city/county where the facility is located is 5 percent or higher.² Where a workforce generally lives in a geographically identifiable location that is distinct from the employer's facility, it may be appropriate to focus consideration on Covid-related data from that locality as well. City- and county-level 14-day-trend information is readily accessible online.³ Johns Hopkins University tracks the 14-day testing positivity rate on a state-by-state level,⁴ and at least some states also track this measure on a city- or county-level basis.⁵

There may be some instances where the use of either broader regional data or narrower intra-county data is more relevant to a particular case.⁶ Regional Directors are not required to use any particular geographic level of data where better, more applicable, data exists, and Regional Directors should cite with explanation the best available geographic statistical measure in making their determinations. The question of whether geographically broader or narrower statistical measures provide a better basis for making a mail-ballot determination will necessarily be based on the specific facts of each case.

Regional Directors should include in their decision the most recently available city- or county-level data regarding the 14-day trend. The decision should also include the most recent city- or county-level testing positivity rate, where available or, if not available, the most recent state-level testing positivity rate. The Board has indicated that a Regional Director's direction of a mail-ballot election based on these measures, consistent with the principles stated above, will be sustained, unless a party contending that the Regional Director should have relied on a different geographic measure presented that sufficient data and argument to the Regional Director, as part of its submission regarding election arrangements, to establish that the Regional Director's reliance on the geographic measures cited above was an abuse of discretion.

² For either statistic, the 14-day period should be measured from the date of the Regional Director's determination, or, if data from the decisional date is unavailable, from a date as close to the date of issuance of the direction of election as possible. We acknowledge that some flexibility may be required on this count, particularly with respect to the positivity rate.

³ County-level data should be accessed at <https://coronavirus.jhu.edu/us-map>.

⁴ See <https://coronavirus.jhu.edu/testing/testing-positivity>.

⁵ City- or county-level positivity rate data should be obtained from official state or local government sources. In cases where city/county-level data are not available, Regional Directors should look to state-level data for the state in which the facility is located.

⁶ Broader regional data or narrower intra-county data should be from official state or local government sources.

If, based on the specific facts of a given case, a Regional Director directs a mail-ballot election based on a different geographic measure than the city- or county-level (or, where applicable, state-level) data discussed above, the decision should articulate the basis for relying on that measure.

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.

In order to prevent the spread of the virus, many state and local governments have enacted mandatory restrictions on gatherings. Conducting a manual election that cannot reasonably be conducted without violating mandatory restrictions on gathering size would be at cross-purposes with these restrictions, so it will not be an abuse of discretion if Regional Directors direct mail-ballot elections in such situations.⁷ Non-mandatory guidance will not, by itself, be a sufficient reason to direct a mail-ballot election.⁸

4) The employer fails or refuses to commit to abide by the GC Memo 20-10 protocols.

[GC Memo 20-10, Suggested Manual Election Protocols](#) sets forth suggested protocols for conducting manual elections safely and efficiently, while also expressly retaining Regional Directors' discretion to make case-by-case determinations regarding the method of election. These protocols are designed to ensure manual elections can be conducted safely and efficiently, and the memo indicates that these protocols must generally be included in an election agreement or decision and direction of election providing for a manual election. Employers who are requesting manual elections must unequivocally commit to abide by [GC Memo 20-10's](#) suggested protocols. An employer's failure or refusal to commit to abide by the suggested protocols therefore may support the direction of a mail-ballot election.⁹

⁷ In evaluating this factor, Regional Directors should be mindful that release schedules are an established procedure for managing the progress of voters. See NLRB Casehandling Manual (Part Two) Representation Proceedings, Secs. 11330-11330.5. Such procedures should be considered, where appropriate, as a means of alleviating Covid-19 concerns related to maximum gathering-size restrictions.

⁸ Apart from restrictions on gathering size, many states and localities have issued health orders related to travel, including quarantine requirements. Board agents traveling to conduct an election are federal government employees performing an essential service, however. Accordingly, Regional Directors should not direct a mail-ballot election based on travel-related provisions that are not applicable to travel for that purpose.

⁹ An employer requesting a manual election should provide specific details to the Regional Director, about how it will comply with [GC Memo 20-10's](#) protocols. .

In some cases, employers may propose safety protocols beyond those specified in [GC Memo 20-10](#). The Regional Director has discretion to determine all aspects of the conduct of an election, including any safety protocols.

5) There is a current Covid-19 outbreak at the facility or the employer refuses to disclose and certify its current status.

A current Covid-19 outbreak at the facility where the manual election would occur poses potential health and safety issues for everyone who participates in the election. Accordingly, for the duration of the pandemic, in all cases where a party requests a manual election, the employer shall certify, by affidavit, as part of its submission regarding election arrangements, how many individuals present in the facility within the preceding 14 days have tested positive for Covid-19 (or are awaiting test results, are exhibiting characteristic symptoms, or have had contact with anyone who has tested positive in the previous 14 days). The Employer must promptly notify the Region of any changes to the number of employees at the facility who have tested positive (or who are awaiting test results, are exhibiting characteristic symptoms, or have had contact with anyone who has tested positive in the previous 14 days), up to the day of the election itself.

6) Other similarly compelling considerations.

The foregoing five situations normally suggesting the propriety of a mail-ballot election are not exclusive or exhaustive. If a Regional Director directs a mail-ballot election based on other circumstances related to the Covid-19 pandemic, the Board will consider at that time whether those circumstances similarly warrant an exception to its preference for manual elections.

During the pandemic, Regional Directors have been confronted with many novel and difficult decisions requiring the exercise of discretion. Although the Board's recent decision provides further guidance, Regional Directors must continue to exercise their sound discretion where new situations arise. Your efforts are recognized and appreciated. If you have questions related to this memorandum, please direct them to your Assistant General Counsel or Deputy.¹⁰

P.B.R.

¹⁰ Aside from elements set forth in [GC Memo 20-10](#), upon which the *Aspirus Keweenaw* Board relies in part, the instructions set forth in this memorandum supersede all other instructions on the subject.