

Despite NLRB's Guidance Enhancing Safety Protocols for In-Person Union Representation Elections, Mail Balloting Predominates

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The National Labor Relations Act allows workers to form unions and negotiate job terms and conditions with their employers. In normal circumstances, workers vote on whether to unionize via physical, in-person elections overseen by National Labor Relations Board (the Board) agents. However, in May 2020, the Board authorized "mail ballot" union elections in response to concerns stemming from the ongoing COVID-19 pandemic.

Before COVID-19, the overwhelming majority of Board-conducted representation elections were done manually. Board agents typically came to an employer's place of business, set up a voting booth and employees were allowed to vote on whether or not they wished to be represented by a union by marking a paper ballot. Elections were run in this manner because the workplace was where almost all of the employees were physically present and maximum employee participation in the election process could be assured. In addition to providing a level playing field favoring neither management nor labor, manual voting does the most to ensure that elections can be held under "laboratory"-controlled conditions by greatly minimizing the risks of inappropriate conduct that could affect the outcome of the election.

As with many other things, COVID-19 changed the way the Board conducted elections. As states announced shelter-in-place orders and shut down non-essential workplaces, the Board suspended all in-person representation elections. In May, however, Board guidance resumed the holding of elections despite the fact that many workplaces were re-opening, but this time by mail ballot. Management has complained about this change because mail balloting has historically favored labor organizations and because mail balloting is conducted in a far less controlled environment and it is subject to coercion, abuse and other forms of objectionable misconduct, not to mention the unreliability of the postal service. Notably, employees receiving their ballots in the mail have typically been given 3-4 weeks to return them, allowing the unions the opportunity to visit employee homes to influence the vote – something management is not allowed to do. The level playing field is skewed dramatically in favor of the unions.

On July 6, the Board, through a General Counsel's Memorandum (PDF) (the Memo), suggested protocols to follow as a way of returning to manual elections. The Memo covers polling times, the configuration of polling places sufficient to accommodate social distancing, the cleaning of the election area and the physical handling of ballots. It also establishes a requirement for written certifications to be filed between 48 and 24 hours *prior* to the election as to the incidence of any positive COVID-19 test and/or the onset of any virus symptoms at the employer's workplace and of party representatives and election observer during the preceding 14 days. Nevertheless, the Memo notes, "that the COVID-19 pandemic is still evolving and that circumstances can change. In the end, the decision on election procedures and the safety of all participating in an election remain in the sound discretion of the Regional Director."

Regional Directors and the Board itself have been ruling in favor of mail ballots in most, if not all, cases where the issue has been raised by the employer. In *Antioch Tire, Inc.* (Illinois, August 19, 2020), an Illinois-based employer asserted that the Regional Director abused his discretion by ordering a mail ballot election due to the pandemic, which interfered with its free-speech rights by denying it time to hold group meetings with employees. In finding that a mail ballot election was warranted, the Board relied on the extraordinary circumstances resulting from the pandemic. Virtually identical rulings were made in *Daylight Transport, LLC* (California, August 19,

2020), *SunSteel, LLC* (Washington, August 4, 2020), *FDR Services Corp. of New York* (New York, August 6, 2020) and *PACE Southeast Michigan* (Michigan, August 7, 2020).

By deferring to the Regional Directors, it is clear that mail balloting continues to be the rule rather than the exception. A review of Notices of Election filed by the Board in September alone reveals that all elections are being conducted through mail balloting: Region 27 (Colorado), Region 4 (Philadelphia), Region 8 (Cleveland), Region 25 (Indianapolis) and Region 19 (Seattle). Each of these directed elections allows between 28 and 30 days for the employees to return the ballots.

Because mail ballot elections favor unions, management that knows or suspects union organizing is afoot should gather facts that would support its argument to the Regional Director as to why in-person balloting is preferred. It can do this by developing and enforcing its own safety protocols in response to COVID-19, by showing at a minimum that it has a large and well-ventilated room for voting and by providing its own evidence of the unreliability of the postal service.

If you have questions or would like more information, please contact John K. Baker (bakerj@whiteandwilliams.com; 610.782.4913) or another member of the Labor and Employment Group.

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