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NLRB Will Restart Union Representation Elections April 6, 2020



The National Labor Relations Board (NLRB) issued [a press release](#) on April 1, 2020, stating that,

The National Labor Relations Board will not extend its temporary suspension of Board-conducted elections past April 3, 2020 and will instead resume conducting elections beginning Monday, April 6, 2020.

Previously, the NLRB had paused all elections from March 19, 2020, until April 3, 2020, due to the COVID-19 pandemic. The agency's general counsel, who is responsible for supervising regional NLRB offices, has now decided that "appropriate measures are available to permit elections to resume in a safe and effective manner, which will be determined by the Regional Directors."

Maintaining Laboratory Conditions During a Pandemic Will Be a Challenge

During the time between the filing of a union recognition petition and the election itself, known as the "critical period," an employer is expected to maintain so-called "laboratory conditions"—that is, the employer must maintain stable workplace conditions so that employees can make their decision regarding unionization free from unlawful interference or undue influence. Normally, an employer would be extremely ill advised to consider sweeping changes to workplace rules during this critical period, yet [recent changes to federal law](#) are forcing employers to make exactly those sorts of changes. Similarly, it would be a clear violation of laboratory conditions to shutter the workplace and prohibit employees from leaving their homes to come vote in person in a representation election, yet local and state quarantine and shelter-in-place orders do just that. In short, conditions found violative of laboratory conditions in the past are the new normal during the COVID-19 pandemic, and it is hard to imagine how unions or employers can claim that an election occurring in these extraordinary times might not be improperly affected by these circumstances.

Regional Offices Will Face Challenges of Their Own in Trying to Keep the Election Mechanics Safe

Even in jurisdictions not currently subjected to "shelter-in-place" or "stay-at-home" orders, various directives limit assembly of large groups, and public health standards necessitate social distancing, typically of at least six feet between individuals. Board elections typically require a Board agent and employee representatives of the affected employer to sit in close proximity to each other to monitor the process. There were 121 representation petitions filed during the month of March 2020 prior to the Board's halting of elections. These petitions involved an average of 93 workers each. Twenty of them involved between 100 and 1,600 workers. In manual ballot elections in the workplace, eligible voters tend to congregate in close quarters while waiting to enter the polling area. These factors and the need to share equipment—ballots, pencils, voting booths, the ballot box—in the process present significant challenges to efforts to reconcile Board practice with the current Centers for Disease Control (CDC) guidelines.

Mail Ballot Elections Are Uniquely Subject to Undue Influence

The Board's rules do provide for mail balloting for times when union representation elections are to occur under difficult situations such as extensive picketing or lockouts, or where employees are widely dispersed. The Board's long-standing policy, however, has been that representation elections should as a general rule, be conducted manually, either at the workplace or at some other appropriate location. Because mail ballot elections take place outside the workplace and outside the supervision of Board agents, however, they are more susceptible to inappropriate influence and interference. These circumstances have historically resulted in an increased success rate for union organizing efforts.

Current Circumstances Simply Make It Difficult for the "Sober and Informed Exercise of the Franchise" That Laboratory Conditions Are Intended to Ensure

The COVID-19 pandemic is proving itself to be more disruptive than any weather event, and absenteeism and telecommuting are affecting all employers. Varying jurisdictional orders to "shelter in place" or "stay at home," as well as differing definitions of "essential workers" exempted from such orders, complicate attendance and operational schedules. Working at home has become the norm for many and [recently passed federal laws](#) provide mandatory sick leave for employees taking care of children and others during this pandemic. It will be a significant challenge for any regional director to navigate around these obstacles, any one of which is capable of invalidating an election held while a workforce is trying to weather the pandemic storm.

Takeaway for Employers

Employers facing a unionization vote amid the COVID-19 pandemic are likely to be whipsawed between dueling impulses—rapidly adapt to the changing business landscape and protect employee safety or struggle to maintain laboratory conditions in advance of an NLRB election. Frank communication with employees about the challenges posed by the rapidly changing business environment may be construed as prohibited threats or promises. Prudent employers facing union organizing efforts should consult labor counsel prior to making changes to the workplace necessitated by the COVID-19 pandemic.

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