

More In-Person Union Votes Likely With New Pandemic Test

By **Tim Ryan**

Law360 (October 3, 2022, 8:02 PM EDT) -- The National Labor Relations Board recently made a small but potentially significant tweak to its standard for when to conduct union representation elections by mail during the COVID-19 pandemic, with experts expecting the decision to lead to more votes in person.



Under the NLRB's Sept. 29 decision, the board's regional directors will look to the CDC's Community Levels metric when determining whether to order a mail-ballot election. (iStock.com/bee32)

The Sept. 29 decision in a case involving Starbucks made a **change to the standard** the NLRB established in a 2020 ruling called *Aspirus Keweenaw*, which set out **a series of six factors** the board's regional offices should consider when deciding on the method of a union representation election. The *Aspirus* decision caused the regional offices, which are responsible for conducting elections, to make mail-ballot elections the norm for the better part of two years.

That shift to more mail-ballot elections has started to reverse in recent months, and experts said the board's adoption of a new metric may push it even closer to pre-pandemic times when mail-ballot votes were much less common.

"It doesn't mean that mail-balling is over and done with, but I think it's going to go back to being reserved for those times when it's just highly impractical to hold a manual ballot," said Peter Finch, a partner at Davis Wright Tremaine LLP who represents employers.

Traditionally, the NLRB has preferred to conduct union representation votes in person instead of by mail, but the COVID-19 pandemic forced that policy to change in 2020. Former NLRB general counsel Peter Robb released a memo in July 2020 that laid out guidelines for conducting union representation elections during the pandemic, and the board set out a formal test for regional directors to use in its November 2020 Aspirus decision.

In Aspirus, the board said that it would not be an abuse of discretion for regional directors to order a mail-ballot election if one of six situations was present in a case. Those included if the election could not be conducted in accordance with state or local pandemic rules, if the NLRB's regional office for the area was teleworking, if the employer did not commit to complying with Robb's 2020 memo, if there was an outbreak at the employer's facility or if other "similarly compelling" circumstances were present.

One Aspirus factor that took on particular prominence said that regional directors should consider a mail-ballot vote if the 14-day case trend in the area where the employer's facility is located is increasing or if the test positivity rate is over 5%. Finch said that guidance, which was the second factor of the Aspirus test, was "almost always" the reason that a regional director ordered an election to be conducted by mail, considering businesses that were operating in-person more or less had to satisfy the other conditions of the Aspirus test.

That second step is what the board changed last week. Under the new decision, regional directors will look to the Centers for Disease Control and Prevention's Community Levels metric, rather than raw case trends or test positivity rates. The metric categorizes counties as either low, medium or high based on the number of new cases, hospital admissions and the proportion of hospital beds that are occupied by COVID-19 patients.

The new decision said regional directors will not abuse their discretion if they order a mail-ballot election in an area that is categorized as "high" under the CDC standard. The majority, consisting of the board's three Democrats, said the change will simplify litigation over COVID-19 data and is appropriate because of changes in how governments report data and the increased use of at-home tests.

In an explanation of the community levels metric from August, the CDC said it was shifting to the new datapoint because earlier measures like case trends and test positivity rates cannot capture "the risk of medically significant disease," especially with higher immunity rates from vaccination.

Daniel Schudroff, a management-side attorney with Jackson Lewis PC, said that even before the most recent ruling, he had seen in-person elections become more common after the pandemic made mail-ballot votes "the standard" over the last two years. He said he expects that trend to continue, though seasonal fluctuations in virus metrics might cause more votes by mail in the fall and winter months.

"I'm seeing more and more manual-ballot elections being scheduled, and that's a good thing. It means we're not at a level where we have high public transmission," Schudroff said.

Dmitri Iglitzin, a union-side attorney at Barnard Iglitzin & Lavitt LLP, said the new decision seems to make it more likely that manual elections will be ordered. He said the practice for his clients has been to ask the region what kind of election they are ordering given current virus numbers and agreeing to whatever type is feasible.

Iglitzin said that while the decision is up to each client, unions would in general prefer in-person votes and have been requesting them in places where regions are willing to order manual elections.

"Workers seem to be more excited about manual-ballot elections," Iglitzin said. "It's a little bit more exciting, dramatic. I would say on balance, manual-ballot elections are probably our preference."

Finch said the change should be a welcome one for unions, employers and workers. He said it became clear as time went on and pandemic data became more refined that the Aspirus standard needed to be updated, even though it made sense at the time the board issued it.

"You can't fault the board for not being able to predict the future when it came to how we assess these things," Finch said.

A recent decision from NLRB Seattle office Regional Director Ronald Hooks may help illustrate the potential effects of the board's decision. Hooks ordered a mail-ballot election Sept. 29 for workers at an

Imperfect Foods Inc. facility in Oregon because the rest positivity rate in Clackamas County was above 5% based on CDC data.

Hooks based the decision on several datasets from the state, and according to the CDC, the test positivity rate in Clackamas County was 7.63% as of Sept. 27. The CDC's community level for the county, however, is reported as "low," which is well below the standard of the board's new test.

NLRB members John Ring and Marvin Kaplan, both appointees of former President Donald Trump, dissented from the board's update to the Aspirus standard, saying the majority ignored concerns about the administration of mail ballots and the lower participation rates they typically draw. According to Ring and Kaplan, voter participation was 64.5% for mail-ballot elections held in 2022, compared to 75.3% for those held in person.

Schudroff said Ring and Kaplan made reasonable points about the workability of mail-ballot elections because the board has less control over how ballots are handled after they are mailed out.

"I understand the dissent's point, saying it's more likely irregularities are going to result when the board has less control of the balloting," Schudroff said.

Finch said he has not seen a problem with how mail-ballot elections have been conducted during the pandemic. He said Ring and Kaplan did make valid arguments that it might be useful to consider broader changes as the pandemic has progressed, though he noted that inviting additional briefing as they suggested might have even further delayed the process.

Mark Carter, a management-side partner at Dinsmore & Shohl LLP, said there was room for more changes to the board's pandemic elections policy as other areas of life have dropped many restrictions. He said the new test may still struggle to bring consistency to union representation elections as pandemic conditions evolve.

"America has returned to the workplace; it is difficult to understand why the NLRB isn't joining them," Carter said.

Iglitzin dismissed the dissent's concerns about mail-in ballots, saying there has not been evidence of widespread issues with their administration. He also said the board has long held that turnout is not a valid argument against the validity of a union representation election under the National Labor Relations Act, undermining the dissent's premise.

"There are plenty of mail-ballot elections with high turnout and in-person elections with low turnout," Iglitzin said. "There are a million reasons why workers might or might not choose to vote in an NLRA election."

--Editing by Abbie Sarfo.