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COVID-19 & the NLRB

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Like every other organization in the United States, the Board was forced to navigate significant operational challenges in 2020.

BEGINNING IN MARCH 2020, BOARD HEADQUARTERS AND VARIOUS REGIONAL OFFICES ANNOUNCED CLOSURES AND WORK-FROM-HOME MEASURES.

On March 12, 2020, the Board announced[1] the closure of its headquarters in Washington, D.C., after learning an employee who was exhibiting cold-like symptoms potentially had been exposed to COVID-19. Just days later, on March 15, the Board announced[2] that its Regional Offices in Manhattan, Detroit, and Chicago would be closed while an employee in each of those offices was tested for the virus.

The Board then implemented telework policies at all four locations out of concern about potential spread of the virus. The telework policy in Washington, D.C., was slated to last through at least Monday, March 16, while the policies in Manhattan, Detroit, and Chicago were indefinite.

As the pandemic spread, Regional Directors ordered an unprecedented number of mail-ballot elections in lieu of manual elections.

In response to increasing concerns about COVID-19, however, on March 16 the Board expanded upon its telework policies and announced[3] an agency-wide telework policy that would last until at least April 1.

That same day the Board also closed a number of small resident offices including Little Rock, San Antonio, and San Diego. Throughout the end of March, the Board was forced to temporarily shutter more offices, including Phoenix, San Francisco, and Denver due to suspected COVID-19 cases.

The Board announced[4] on April 17 that all Regional Offices were "open" for operations. However, in the interest of safety and social distancing, the Board had limited access to offices by allowing visits by appointment only. Additionally, the Board extended its agency-wide work-from-home policy indefinitely. The policy required that all employees, except for limited essential personnel, continue to work from home.

THE BOARD INITIALLY SUSPENDED REPRESENTATION ELECTIONS BUT REVERSED ITSELF UNDER PRESSURE FROM UNIONS AND THEIR POLITICAL ALLIES, AND HAS SINCE ROUTINELY DIRECTED ELECTIONS BY MAIL-BALLOT VOTING.

Citing the extraordinary circumstances related to the COVID-19 pandemic, on March 19 the Board announced[5] the suspension of all representation elections, including mail-ballot elections, through April 3.

The move was met with immediate criticism from unions and their allies, including Committee on Education and Labor Chairman Robert C. "Bobby" Scott of Virginia. Congressman Scott in a letter addressed to NLRB Chairman John Ring, called the suspension "damaging" and claimed the Board was "forfeiting its duty to safely conduct representation elections."

On April 1, the Board changed course and issued a press release[6] announcing that it would resume conducting representation elections on April 6 because it had determined "appropriate measures [were then] available to permit elections to resume in a safe and effective manner."

The Board's long-standing policy has been that, ideally, representation elections should be conducted manually, in person. However, when deciding to resume representation elections the Board placed the responsibility of choosing what method would be used in the hands of Regional Directors.

As the pandemic spread, Regional Directors ordered an unprecedented number of mail-ballot elections in lieu of manual elections. They consistently held that the pandemic met the standard of "extraordinary circumstances" justifying mail-ballot elections under *San Diego Gas & Electric*, 325 NLRB 1143 (1998).

Some employers pushed back, requesting that more elections be held manually. In response to this demand, on July 6 the Board's General Counsel issued Memorandum GC 20-10.[7]

The memorandum provided over two dozen protocols with which employers would have to comply for the region to consider a manual election. However, it soon became clear that even when employers met all of the protocols, their requests to hold a manual election were almost always denied, usually due to COVID-19.

On November 9, the Board issued its decision in *Aspirus Keweenaw*, 370 NLRB No. 45 (2020)[8] and clarified its position on

how determinations regarding mail-ballot elections should be made. In *Aspirus Keweenaw*, the Board established six situations that would necessitate the use of mail ballots due to COVID-19.

Under this decision, if any one of the following is present, a mail-ballot election is appropriate:

- The agency office tasked with conducting the election is operating under "mandatory telework" status.
- Either the 14-day trend in the number of new confirmed cases of COVID-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5% or higher.
- 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.
- The employer fails or refuses to commit to abide by the GC Memo 20-10 protocols.
- There is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify its current status.
- Other similarly compelling considerations.

The day after the decision, the Board issued Memorandum GC 21-01[9] summarizing the major holdings of *Aspirus Keweenaw*, specifically the six situations requiring use of mail ballots. The Memorandum also provides that, other than GC Memo 20-10, it supersedes all other instructions on the subject of whether a mail-ballot or manual election is appropriate.

AFTER INITIALLY POSTPONING ALL ULP HEARINGS, THE BOARD DIRECTED RESUMPTION OF TRIALS EFFECTIVE JUNE 1, AND IGNORING THE CLEAR LANGUAGE OF ITS OWN RULES AND REGULATIONS, UPHELD JUDGES' UNILATERAL DIRECTION OF ENTIRE TRIALS VIA VIDEOCONFERENCE.

In light of the COVID-19 pandemic and related federal, state, and local guidance, the Board initially postponed all unfair labor practice (ULP) hearings. The Board then reversed course on May 15 and directed judges to resume trials starting on June 1, 2020. The accompanying press release[10] announced that judges would no longer sua sponte postpone hearings and that requests for postponements would be considered on a case-by-case basis.

As cases resumed, parties and judges were confronted with logistical questions concerning how hearings would be conducted consistent with public health guidelines. In response, judges unilaterally began to order trials to proceed entirely via remote videoconference technology.

These decisions were upheld by the Board on appeal despite clear language in the federal regulations to the contrary. Specifically, 29 C.F.R. 102.35(c) provides that an administrative law judge should only direct witness testimony to proceed via videoconference in ULP hearings upon a showing of good cause and compelling circumstances; and, must provide for several specifically listed safeguards designed to ensure "minimum" standards of due process.

In *Morrison Healthcare*, 369 NLRB No. 76 (2020),[11] the Board applied the framework of 29 C.F.R. 102.35(c) to determine that, given the compelling circumstances of the pandemic, a representation case preelection conference could be held via videoconference.

The Board concluded that Section 102.35(c) was instructive in the representation case despite its express application only to ULP hearings. In dicta, the Board declared, without any support in the express language of the rules or relevant case law, that Sec. 102.35(c) only applied to testimony by a single remote witness — not the conduct of an entire trial remotely.

Soon thereafter, in *William Beaumont Hospital*, 370 NLRB No. 9 (2020),[12] and *XPO Cartage Inc.*, 370 NLRB No. 10 (2020),[13] the Board applied this rationale to approve entire trials by videoconference without satisfaction of the express due process requirements of Section 102.35(c).

The Board stressed in these decisions that the pandemic constituted "compelling circumstances," sufficient to order remote video hearings. In *XPO Cartage*, the Board further held that, notwithstanding the language of Sec. 102.35(c) explaining the requisite contents of a written application, the judge could order a trial via videoconference absent application by party.

It is hard to square the Board's decisions in this area with anything but a submission to efficacy under unique public health circumstances.

Notes

1 http://bit.ly/3iZ59qc

2 http://bit.ly/3clYlBA

3 http://bit.ly/2MhhXfx

4 http://bit.ly/2KZAKeM

5 http://bit.ly/2KZFtx1

6 http://bit.ly/39sVzsq

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12 https://bit.ly/3aew6SN

13 https://bit.ly/2L3QXzK

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