

OFF-SITE PLANNING AND DESIGN

Organizing, Unfair-Labor-Practice (ULP) Investigations, Hearings, and Elections in a Remote Environment



EMPHASIS ON ORGANIZING

Unions have been losing ground in the United States for decades, and they are always looking for opportunities to increase their membership and revenue streams. The COVID 19 pandemic presents such an opportunity, even in industries and areas not traditionally unionized.

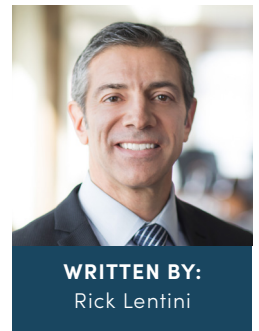
COVID-19 restrictions and precautions have heightened worker concerns about such issues as job security, job safety, and “hazard” pay. Unions have taken steps to capitalize on these sentiments and are using their websites, text messaging, social media, and virtual video meetings to solicit and organize workers, and they are telling workers their employers can do more to promote their safety and well-being.

Employers should proactively anticipate and address employee concerns. Engaging with employees to listen to their questions and provide answers on how they are appreciated, protected, and compensated can go a long way toward alleviating unrest and weakening a union campaign. Employers should also ensure that policies addressing solicitation in the workplace are up to date.

If a union is actively soliciting your employees, be careful not to interfere with employees’ rights to engage in concerted activity.

- Don’t question employees about unionizing activities or who supports or opposes the union.
- Don’t observe or inspect to discover employees’ union leanings.
- Don’t threaten employees with loss of benefits or any other adverse action.
- Don’t promise employees any benefits or improvement.

- Don’t scrutinize or retaliate against employees for concerted activity.
- Do provide employees with accurate information about their rights.
- Do inform employees about their competitive compensation and benefits.
- Do explain why you prefer direct communication with employees without a union middleman.



WRITTEN BY:
Rick Lentini

REMOTE ULP INVESTIGATIONS

Most National Labor Relations Board (NLRB) regional offices are open, but public access is by appointment only, and most Board employees are working remotely. Several offices are closed, including Seattle, Portland, and San Francisco.

The NLRB continues to process and investigate ULP charges. Witness interviews for affidavits are conducted by phone, and established priorities and timelines are unchanged. The NLRB continues to issue complaints and pursues Section 10(j) injunctive relief in federal court when it deems it appropriate.

VIDEO EVIDENTIARY HEARINGS

After postponing all hearings scheduled for May because of the pandemic, the NLRB’s Division of Judges announced on May 15 that it would resume hearings on ULP complaints effective June 1, 2020. In August, the Board reviewed administrative law judge orders to conduct ULP hearings entirely by videoconference due to public health concerns raised by the pandemic.

In *William Beaumont Hosp.*, 370 NLRB No. 9 (2020), the Board held that the administrative law judge did not abuse his discretion in finding that the pandemic constitutes “compelling circumstances” justifying a remote hearing conducted entirely by video technology. In part, the Board relied on Section 102.35(c) of the Board’s Rules and Regulations, which permits a witness in a ULP case to testify by video. The Board held that Section 102.38, providing that “[a]ny party has the right to appear at the hearing in person, by counsel, or by other representative,” bestows a right to appear generally but not a right to appear specifically in person. The Board found nothing in the National Labor Relations Act or its regulations precluding a judge from ordering a hearing via videoconference “on a showing of good cause based on compelling circumstances and under appropriate safeguards.”

In *XPO Cartage, Inc.*, 370 NLRB No. 10 (2020), the Board reiterated its holding in *William Beaumont Hosp.* and found that, under these compelling circumstances, conducting hearings via videoconference did not constitute a denial of due process. The Board noted that judges have discretion to “regulate the course of the hearing” under Section 102.35(a)(6) of its rules. In both cases, the Board commented that the parties retained the right to raise exceptions to any adverse rulings.

Following these Board decisions issued in August, the General Counsel issued Memorandum GC 20-12 authorizing all Regions to schedule remote ULP hearings via video technology, unless:

- “The Region believes that unusual aspects of the contemplated trial make video hearing unfeasible;” or
- “There are witnesses the General Counsel wishes to call who do not have access to equipment that will enable a connection to the video technology platform the Agency is using for remote hearings[.]”

Where either of these conditions apply, the Region is directed to consult with the NLRB’s Division of Operations Management.

SANITIZED ELECTIONS

On July 6, 2020, the General Counsel issued Memorandum GC 20 10 describing suggested protocols for manual elections during the pandemic. Regional Directors still have discretion to determine when, how, and in what manner elections are conducted. Detailed recommended protocols are contained in this memorandum, which include the following to be provided by the employer:

- Spacious polling area, sufficient to accommodate six-foot distancing, which should be marked on the floor with tape to insure separation for observers, Board Agent, and voters.
- Separate entrance and exit for voters, with markings to depict safe traffic flow throughout the polling area.
- Disposable pencils, without erasers, and glue sticks to seal ballot envelopes.
- Plexiglass barriers of sufficient size to protect the observers and Board Agent to separate observers and the Board Agent from voters and each other, preelection conference and ballot-count attendees, as well as masks, hand sanitizer, gloves, and wipes for observers.
- All voters, observers, party representatives, and other participants should wear CDC-conforming masks in all phases of the election, including the preelection conference, in the polling area or while observing the count. Signs will be posted in or immediately adjacent to the Notice of Election to notify voters, observers, party representatives, and other participants of this requirement.
- Certifications concerning sanitation of the voting facility and the health of observers and all individuals who have been present in the facility.

The election mechanics also include polling-times procedures for releasing voters, designed to minimize crowding and the time each voter spends in the facility. Only one voter at a time is to approach the observer booths and election booths, which are to be sanitized frequently.

KEY TAKEAWAYS

1

Employers should take steps to avert union organizing campaigns during the pandemic.

2

Although NLRB offices in Seattle and Portland are closed to the public, investigations and hearings continue remotely. Investigators conduct witness interviews by phone, and affidavits are delivered by e mail and signed remotely.

3

In accordance with an August 25, 2020, General Counsel Memorandum, all Regional offices are authorized to schedule and conduct remote hearings via video technology.

4

Manual elections are proceeding under strict protocols designed to minimize the risk of spread of disease.

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 20-10

July 6, 2020

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

FROM: Peter B. Robb, General Counsel

SUBJECT: Suggested Manual Election Protocols

After discussions with Regional Directors, the NLRB Division of Operations-Management, NLRB COVID-19 Task Force Members and our internal union, we are releasing the following suggested manual election protocols. These suggested protocols were developed collaboratively in an effort to determine how best to conduct manual elections safely and efficiently in this unprecedented environment. The Regional Directors have authority delegated by the Board to make initial decisions about when, how, and in what manner all elections are conducted. They have made, and will continue to make, these decisions on a case-by-case basis, considering numerous variables, including, but not limited to, the safety of Board Agents and participants when conducting the election, the size of the proposed bargaining unit, the location of the election, the staff required to operate the election, and the status of pandemic outbreak in the election locality. We recognize that the Board has the ultimate authority to make decisions on when, how and in what manner elections are conducted, whether on review of Regional Director decisions or through other guidance or rules.

SUGGESTED MANUAL ELECTION PROTOCOLS

1. Election Mechanics

- A. Polling times procedures for releasing voters must be sufficient to accommodate social distancing/cleaning requirements, without endangering participants by unnecessarily elongating exposure among Board Agents and observers.
- B. Any election agreement or Direction of Election should specify:
 - The maximum number of representatives for each party who can attend the pre-election conference and the ballot count;
 - Whether there will be a voter release schedule to ensure that voters are not crowded, depending on circumstances of the election;
 - The number of voter lists; and
 - The number of observers per party during the election, which should be limited to one each where feasible.
- C. Only one voter will approach the observers' table(s) and election booth(s) at a time to ensure social distancing.
- D. After clearance by the observers, the Board Agent will place an individual ballot on table for the voter and then step back to maintain social distance.

- E. Voting will include use of newer cardboard booths, if available, which are easier to keep clean than the older aluminum booth. The Board Agent will disinfect the booth before it is brought back into the NLRB office and before any other employees handle it.
- F. If more than one booth is used, booths must be more than six feet apart.

2. Certifications required:

- A. No earlier than 48 hours before the election but no later than 24 hours before the election, the employer must (Attachment A):
 - Certify in writing that the polling area is consistently cleaned in conformity with established CDC hygienic and safety standards;
 - Certify in writing how many individuals have been present in the facility within the preceding 14 days, who:
 - have tested positive for COVID-19 (or has been directed by a medical professional to proceed as if they have tested positive for COVID-19, despite not being tested) within the prior 14 days;
 - are awaiting results of a COVID-19 test;
 - are exhibiting symptoms of COVID-19, including a fever of 100.4 or higher, cough, or shortness of breath; or
 - have had direct contact with anyone in the previous 14 days who has tested positive for COVID-19 (or who is awaiting test results for COVID-19 or has been directed by a medical professional to proceed as if they have tested positive for COVID-19, despite not being tested).
- B. If the above certifications are not timely provided, the Regional Director or designee (i.e. manager or supervisory employee) has the discretion to cancel the election.
- C. Based on the certifications, the Regional Director will consider whether the election should be held as scheduled.
- D. Each party, party representative and observer participating at the pre-election conference, serving as an election observer, or participating in the ballot count, must certify in writing that, within the preceding 14 days (Attachment B):
 - They have not tested positive for COVID-19 (or has been directed by a medical professional to proceed as if they have tested positive for COVID-19, despite not being tested) within the prior 14 days;
 - They are not awaiting results of a COVID-19 test; or
 - They have not had direct contact with anyone in the previous 14 days who has tested positive for COVID-19 (or who is awaiting test results for COVID-19 or has been directed by a medical professional to proceed as if they have tested positive for COVID-19, despite not being tested).
 - Individuals who do not provide such certifications will not be permitted to be physically present at the pre-election conference, to serve as an observer, or at the ballot count.
 - Individuals who are not a party, party representative or an observer, must stay at least 15 feet away from the Board Agent at the pre-election conference or the ballot count.

3. All parties must agree in writing to notify the Regional Director, within 14 days after the day of the election, if any individuals who were present in the facility on the day of the election:

- have tested positive for COVID-19 (or has been directed by a medical professional to proceed as if they have tested positive for COVID-19, despite not being tested) within the prior 14 days;
- are awaiting results of a COVID-19 test;
- are exhibiting symptoms of COVID-19, including a fever of 100.4 or higher, cough, shortness of breath; or
- have had direct contact with anyone in the previous 14 days who has tested positive for COVID-19 (or who are awaiting test results for COVID-19 or have been directed by a medical professional to proceed as if they have tested positive for COVID-19, despite not being tested).

4. Election Arrangements to Be Included in Election Agreement

- A. Spacious polling area, sufficient to accommodate six-foot distancing, which should be marked on the floor with tape to insure separation for observers, Board Agent, and voters.
- B. Separate entrance and exit for voters, with markings to depict safe traffic flow throughout polling area.
- C. Separate tables spaced six feet apart so Board Agent, observers, ballot booth and ballot box are at least six feet apart.
- D. The Employer will provide markings on the floor to remind/enforce social distancing.
- E. The Employer will provide sufficient disposable pencils without erasers for each voter to mark their ballot.
- F. The Employer will provide glue sticks or tape to seal challenge ballot envelopes.
- G. The Employer will provide plexiglass barriers of sufficient size to protect the observers and Board Agent to separate observers and the Board Agent from voters and each other, pre-election conference and ballot count attendees, as well as masks, hand sanitizer, gloves and wipes for observers.
- H. The Agency will provide to the Board Agent(s) running the election a face shield, mask, disposable clothes covering if requested, hand sanitizer, gloves and disinfecting wipes.
- I. An inspection of the polling area will be conducted by video conference at least 24 hours prior to the election so that the Board Agent and parties can view the polling area.
- J. In accordance with CDC guidance, all voters, observers, party representatives, and other participants should wear CDC-conforming masks in all phases of the election, including the pre-election conference, in the polling area or while observing the count. Signs will be posted in or immediately adjacent to the Notice of Election to notify voters, observers, party representatives and other participants of this requirement.

Election Agreements and DDEs must include the details set forth above. Rather than including a lengthy narrative description of safety measures directly on the Notice of Election (“NOE”) the NOE must affirm that appropriate safety measures will be enforced prior to and during the election and subsequent count.

Procedures for Assignment of Manual Elections:

- A. Regional Directors are encouraged to assign the election to Board Agents who have volunteered to run the election.

5. Elections Requiring Travel

- A. The Agency will supply the Agent with hand sanitizer, gloves and disinfecting wipes to clean the car throughout the trip and pumping gas. See [CDC guidelines for pumping gas¹](#).
- B. Concerns regarding hotel arrangements and travel via air will be handled at the Regional level. Guidance on cleaning measures undertaken by various hotel chains can be found on [FedRooms](#).
- C. Board Agents who want to use taxis or private vehicles to travel to and from local elections, even if reachable by mass transit, must secure approval from the Regional Director in advance of the election.

Finally, although we appreciate the effort of all who have assisted in developing these Suggested Guidelines, we recognize that the COVID-19 pandemic is still evolving and that circumstances can change. In the end, the decisions on election procedures and the safety of all participating in an election remain in the sound discretion of the Regional Director.

/s/

P.B.R.

Attachments

¹ <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html>

Case Name: _____

Case Number: _____

CERTIFICATIONS*

The polling area is consistently cleaned in conformity with established CDC hygienic and safety standards

_____ Yes _____ No

Within the preceding 14 days, the number of individuals have been present in the facility who:

Have tested positive for COVID-19 (or has been directed by a medical professional to proceed as if they have tested positive for COVID-19, despite not being tested) within the prior 14 days	
Are awaiting results of a COVID-19 test	
Are exhibiting symptoms of COVID-19, including a fever of 100.4 or higher, cough, or shortness of breath	
Have had contact with anyone in the previous 14 days who has tested positive for COVID-19 (or who is awaiting test results for COVID-19 or has been directed by a medical professional to proceed as if they have tested positive for COVID-19, despite not being tested)	

By: _____

Title: _____

Date: _____

* Must be submitted to the Regional Director no earlier than 48 hours before the election but no later than 24 hours before the election. If the certification is not timely provided, the Regional Director or designee has the discretion to cancel the election.

Case Name: _____

Case Number: _____

CERTIFICATIONS*

Within the preceding 14 days, the individual named below (please initial below):

Has not tested positive for COVID-19 (or has been directed by a medical professional to proceed as if they have tested positive for COVID-19, despite not being tested) within the prior 14 days	
Is not awaiting results of a COVID-19 test	
Is not exhibiting symptoms of COVID-19, including a fever of 100.4 or higher, cough, or shortness of breath	
Has not had contact with anyone in the previous 14 days who has tested positive for COVID-19 (or who is awaiting test results for COVID-19 or has been directed by a medical professional to proceed as if they have tested positive for COVID-19, despite not being tested)	

By: _____

Title: _____

Date: _____

* Must be submitted to the Board agent into order to participate in the pre-election conference or at the ballot count or serve as an observer.