

## NLRB Open to Changing Criteria for Mail Ballot Elections

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In an unpublished decision, the National Labor Relations Board (NLRB) has expressed an interest in possibly changing the criteria for mail balloting in a future “appropriate proceeding.” *Western Wall Systems, LLC*, Case 28-RC-247464 (Apr. 16, 2020).

NLRB elections can occur by manual ballot, by mail ballot, or by manual and mail ballot simultaneously. The majority of elections are by manual ballot conducted by the NLRB on the employer’s premises. Employees vote by secret ballot, in person, in a room designated for the election. In some situations, especially where voters are scattered at different locations, the NLRB may order a mail ballot election. The NLRB mails ballots to eligible employees, who must return the ballots to the NLRB within a certain amount of time (generally, 14 days) and almost always through the U.S. Postal Service system. Sometimes the NLRB conducts a mixed manual-mail ballot election.

Employers have long disfavored mail ballot elections because of the potential for union abuse, usually lower turnout, and unreliability of the postal system. (The conventional wisdom is that a higher voter turnout benefits the employer.) Indeed, numerous NLRB cases have chronicled irregularities involving mail ballot elections.

*Western Wall Systems* is one of those cases. It involved a mixed manual-mail ballot election. According to NLRB documents filed by the employer, seven voters were designated to vote by mail ballot. If they had not received their mail ballot packets by a certain date, they were supposed to call the NLRB.

Several problems arose with the mail ballot election, including:

- Most, if not all, of the seven mail ballot voters had not received ballots by the designated date.
- One voter attempted to call the NLRB and was told the NLRB did not know anything about the ballots.
- Five voters were sent duplicate ballots, but none were counted because they were improperly

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completed or arrived at the NLRB too late.

- One voter's original and duplicate ballots were returned to sender.
- The envelopes that needed to be signed by the voters had the reminder to sign in English only, while everything else was in both English and Spanish because the unit is largely solely Spanish literate.

The union won the election by a narrow margin; the mail ballots may have changed the result. The employer filed objections to the conduct of the election based on the problems with the mail balloting. The NLRB Regional Director dismissed the objections and the employer filed an appeal (Request for Review) with the (currently) three-member NLRB.

In its decision rejecting that appeal, the NLRB noted its frustration with mail ballot election irregularities: "[I]n our view, ... this is yet another case that reveals the many potential problems inherent in mail ballot elections."

The problems that occurred with the *Western Wall Systems* election are not unusual. While the NLRB was not specific about its concerns, it may issue stricter guidelines for mail ballot elections, including for when they may take place, the lengths of time allotted for returning the ballots to the NLRB Regional office, and procedures for Regional offices to follow in mailing original and duplicate ballots.

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