

# **NLRB Ditches COVID Positivity Rates as Factor Justifying Mail Ballot Elections**

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The National Labor Relations Board (NLRB) has updated the test to be used by its Regional Offices for determining whether purported safety concerns related to COVID-19 justify conducting a union election by mail ballot rather than by an in-person manual election. In a move most employers view as long overdue, the NLRB will no longer review the 14-day trend in new reported cases and the local testing positivity rate, and will instead look to the Centers for Disease Control and Prevention's (CDC) Community Risk Tracker which designates counties as having "Low," "Medium," or "High" community transmission risk. *Starbucks Corporation*, 371 NLRB No. 154 (Sept. 29, 2022). Under the new test, mail ballots will ordinarily be ordered when the CDC's tracker shows a "High" community risk level. A level of "Low" or "Medium" would not ordinarily warrant a mail ballot. The new test should result in an immediate decrease in the number of mail ballot elections directed by the NLRB and a corresponding increase in the number of in-person manual elections.

In keeping with most other democratic institutions, in-person manual elections have long been the preferred means for determining whether employees desire union representation. The preference is based both on higher participation rates in in-person elections held at the workplace and the simple recognition that manual voting that occurs in the presence of an NLRB agent is less susceptible to manipulation and, therefore, generally more reliable. Since the onset of the pandemic in March of 2020, however, the NLRB has conducted 2432 mail ballot elections but only 521 manual elections.

The disparity can be tracked directly to the six-factor test the NLRB adopted in November of 2020 in *Aspirus Keweenaw*, 370 NLRB No. 45 (2020). Under the *Aspirus* test, a mail ballot election would be ordered if any one of six enumerated factors were present. The second factor looked at whether the 14-day trend for newly reported cases in the county where the employer was located was "increasing" and whether the testing positivity rate over the prior 14 days was above 5 percent. Factors such as the prevalence and effectiveness of vaccines and access to home testing had rendered these metrics unreliable predictors of transmission risk. The CDC itself replaced these metrics with its current Community Risk Tracker in February.

In *Starbucks*, the NLRB has brought its mail ballot test back in line with current CDC thinking. This change should result in fewer mail ballot elections which is a positive development for employers (and employees) facing union organizing drives.

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