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The NLRB has issued a Request for Information regarding electronic and internet voting systems, a move that signals potential dramatic change in Board-conducted representation elections.

NLRB: Is Electronic Voting on the Horizon?

By Stephen Smith and Reid Carron

The National Labor Relations Board (“NLRB”) has signaled that it is exploring alternatives to traditional manual paper-ballot elections. On June 10, the NLRB issued a “Request for Information” (“RFI”) concerning a “Secure Electronic Voting Service.”¹ The RFI, which was issued by the NLRB’s government procurement office, requests information on “industry solutions regarding the capacity, availability, methodology, and interest of industry sources for procuring and implementing secure electronic voting services for both remote and on-site elections.”

This is the second recent indication that the NLRB is considering replacing the paper ballot with electronic voting systems. Participants in recent industry groups have reported that the NLRB has approached the vendor that is currently supplying electronic voting systems to the National Mediation Board for information about the systems in use for railroad and airline industry elections.

Potential Hazards of Electronic Voting

The electronic voting systems under consideration are fraught with hazards for employers and employees. These electronic systems do not simply provide an on-site, electronic vote tabulating machine as an alternative to the traditional paper ballot. Rather, these systems include web-based and telephone-based voting platforms that allow votes to be cast from locations remote from the workplace. Thus, the NLRB’s RFI states:

The NLRB’s requirements are for the acquisition of electronic voting services to support conducting secret-ballot elections to determine representation issues. Specifically, the Agency requires a proven solution that supports mail, telephone, web-based and/or on-site electronic voting; that includes the necessary safeguards to ensure the accuracy, secrecy, observability, transparency, integrity, accountability, and auditability of Agency-conducted elections; and that has demonstrated experience in protecting similar type elections from both deliberate misconduct and simple error.

Numerous potential hazards are associated with these processes. Electronic voting, especially electronic voting at unsupervised locations remote from the workplace, brings with it the prospect of union-sponsored “election parties” at which employees will be subjected to pressure and intimidation from union organizers and pro-union coworkers. Further, unions, unlike employers, have the right to visit employees in their homes, so nothing in current law would prohibit union representatives from paying personal visits to employees who may have failed to appear at election parties or who are otherwise viewed as not supportive, or as wavering in their support of the union. The RFI shows that the NLRB is aware of these potential evils, without any indication that the NLRB has considered how they might be addressed. Thus, the NLRB requests potential vendors to describe whether means are available to address these problems:

With respect to electronic voting capabilities, the Agency specifically requests information, to the extent available, relating to what safeguards, if any, could be implemented to ensure that votes cast remotely were free from distractions or other interferences, including undue intimidation or coercion.

Equally problematic is the matter of employee “turnout” in elections conducted away from the workplace. “Mail ballot” elections have low employee participation rates compared to manual ballot elections. Unions tend to fare better in “low turnout” elections, so an important aspect of every employer’s campaign message is to remind all employees to vote. Once again the NLRB’s RFI seeks solutions as to this issue from potential vendors:

The Agency also requests, to the extent available, information relating to experience regarding the level of participation achieved through remote electronic voting technology (vs. traditional on-site elections, whether manual or electronic).

Manual elections supervised by the NLRB, in which employees cast paper ballots in the privacy of a voting booth, have long been favored as providing the most reliable indicator of whether employees wish to be represented by a union. The NLRB has roughly 75 years of experience with manual-ballot elections, and the secret ballot election has been referred to as the “crown jewel” of the Board’s processes. The Board has repeatedly emphasized the importance of preserving “laboratory conditions” in the conduct of elections to assure that employees are fully protected and fairly informed prior to casting their secret ballots. In recent years, unions have won more than half of the representation elections conducted in this manner. Despite this, private sector union membership has generally been in decline since its high water mark in the 1950s.

Tilting the Playing Field

The National Mediation Board (NMB) has used telephonic voting under the Railway Labor Act for seven years and has allowed internet voting for over two years. The NMB recently announced its final rule implementing a yes/no ballot in air and rail union elections, making the outcome of the election based on a majority of those who vote instead of requiring a majority of the entire bargaining unit to vote for unionization. That rule is currently being challenged by airline industry groups. Notably, the NMB rule change did not impact any of the other aspects of the voting process under the Railway Labor Act that tend to favor unions.

The NLRB proposal for electronic, remote-site balloting thus seeks to incorporate one of the most labor-friendly aspects of the NMB voting process. As a result, the NLRB and NMB procedures continue to converge toward a single voting process under both laws – a process having the likely outcome of increasing union win rates.

Experience with electronic voting systems under the Railway Labor Act has shown that these systems tilt the playing field in favor of unions seeking representation rights. The labor community no doubt will welcome this as a boon to its organizing efforts. The boost in union organizing, however, comes at a significant cost to the notions of fairness and workplace democracy that are part of the current system.

Typically, non-manual elections also involve a significant “spread” in polling time. Manual ballot elections can most often be held on a single day, conducted in one or two election shifts, each lasting an hour or so. A narrow and well-defined voting period allows

both parties to the election to plan their communications with a specific target date in mind. Electronic voting, on the other hand, may extend over a period of up to 20 or 30 days' time. An employee who becomes upset with an issue at work on just one of those days may cast a "spite" ballot against the employer. This diffusion of the voting period over many days also is likely to detract from the significance of the event in the eyes of employees. Under current manual ballot procedures, an NLRB agent appears on site, sets up the polling stations, and posts signs around the polling area. The NLRB agent gives instructions to the employee election observers, controls the movement of employees through the polling area, maintains control of the ballots and ballot box, and conducts a visible count of the ballots in the presence of employee, union, and management witnesses. This ritual has the effect of impressing upon the minds of employees the significance of the event, an effect that is undermined if balloting can occur at any computer over a period of days or weeks.

The possibility of web-based or similar digital voting systems also presents concerns for the privacy of an individual's ballot. No doubt the NLRB will attempt to implement and maintain security procedures relative to electronic voting data. However, recent experience with security breaches involving digitally stored internet data, whether through malicious unauthorized access or inadvertent disclosure, raises concern as to whether the NLRB will be able to protect the integrity and privacy of electronic ballots.

Electronic Voting Plus "Quick Snap" Elections?

The prospect of electronic voting coupled with "quick snap" elections – elections where voting would occur very quickly after a union petition is filed – is particularly troubling. Indeed, it creates the possibility that the NLRB could administratively perform an end-run around congressional resistance to the Employee Free Choice Act (EFCA). Labor has been unable to secure the necessary votes to pass EFCA, which would in practical effect eliminate secret ballot elections in favor of "card check" certification. Under the current manual ballot system, elections typically occur at a median of 38 days after the filing of an election petition. This gives the employer several weeks to conduct communication and education meetings to inform employees about "the other side of the story." EFCA would eliminate this communication opportunity by relying upon cards signed before the employer was even aware, in many cases, that organizing activity was taking place. Similarly, electronic balloting systems, if coupled with "quick snap" elections, could have the practical effect of eliminating the employer's opportunity to communicate with employees about this important question.

In a worst case scenario, the NLRB could permit electronic votes to be cast almost as soon as an election petition has been filed, before employees have heard from both sides. The NLRB could then make unit and voting eligibility determinations after many or even all of the employees had voted, allowing the voting machines to cull out electronically those ballots that are eventually excluded from the unit. The NLRB could then claim that it had preserved the secret ballot election and had maintained the secrecy of all ballots, but still afford unions the opportunity to obtain certification without the employer having the opportunity to explain to employees its views on union representation. This approach is consistent with the views of Craig Becker, newly appointed to the Board. Member Becker has opined that employers "should be stripped of any legally cognizable interest in their employees' election of representatives."

Rulemaking or Administrative Fiat?

The NLRB has not stated whether it is considering implementing electronic balloting by administrative fiat, or whether it will proceed with formal rulemaking before embarking down this path. The fact that this RFI was issued in the absence of any request for public comment on proposed rules changes suggests, however, that the agency may be contemplating implementing this by way of administrative fiat. The Board might simply direct its regional offices to begin using electronic voting technology.

The RFI contains other indications that this may be the Board's plan, by way of "pilot programs":

If the NLRB decides to proceed, it plans to award a fixed price or fixed unit price contract with a base year and four option year terms... It is noted that the NLRB prefers to execute pilot programs prior to full implementation.

This "administrative action" approach is entirely consistent with the broader labor agenda seeking change from the current administration. In the U.S. Chamber of Commerce's blog, ChamberPost,² Brad Peck offers the following quote from a representative of the AFL-CIO:

[If] we aren't able to pass the Employee Free Choice Act, we will work with ... appointees to the National Labor Relations Board to change the rules governing forming a union through administrative action[.]

Any attempt to implement electronic voting without formal rulemaking by the NLRB would likely meet legal challenges. The current Board, however, may believe that it has only a narrow window of opportunity to act on this item before midterm elections. It also may be using issuance of the electronic voting RFI as a sounding board or precursor to a proposal for formal rules changes.

Employer Action Items

Employers concerned about the prospect of remote-site electronic voting systems may wish to consider the following steps:

- Contacting the Chamber of Commerce for information about organized opposition to this pro-labor agenda item.
- Contacting local industry groups to make sure they are aware of this issue.
- Encouraging industry and trade groups to consider mounting organized legislative opposition to the NLRB's plan.
- Writing members of Congress regarding the NLRB's attempt to circumvent by administrative fiat current opposition to EFCA.
- Considering industry-sponsored lawsuits to challenge any attempt by the NLRB to implement this significant change without formal rulemaking and public comment.

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¹ The NLRB's Request for Information is available at: www.fbo.gov/index?s=opportunity&mode=form&tab=core&id=107db4b6d2c97f65c56c4f00f72c704c&_cview=1.

² www.chamberpost.com/2010/03/when-it-comes-to-craig-becker-heed-the-words-of-his-supporters.html.