Labor & Employment @lert

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Starbucks Loses Another Legal Battle in Effort to Stop Unionization

On August 8, the National Labor Relations Board (Board) dealt another blow to Starbucks and its efforts to control unionization across its locations.

At the end of 2020 during the height of the COVID-19 pandemic, the Board issued an opinion in *Aspirus Keweenaw*[1] setting forth five main factors and a sixth catch-all factor the Board should consider in determining whether to permit mail-ballot union elections in the age of COVID-19, stating the presence of at least one of the following factors can trigger a mail-ballot vote:

- The NLRB office conducting the election is operating under a mandatory teleworking arrangement
- Either the 14-day trend in the county where the facility is located shows an increase in new COVID-19 cases or the 14-day testing positivity rate in that location is 5% or higher
- The in-person election site can't be set up without violating mandatory state or local health orders limiting the size of gatherings
- The employer won't commit to following NLRB guidance for safe manual elections
- There is a current COVID-19 outbreak at the workplace or the employer won't reveal its current status
- Other circumstances that are "similarly compelling"

On July 25, in an effort to prevent a mail-in election at a Washington state location, Starbucks requested that the Board revisit the factors identified in *Aspirus Keweenaw*.

The crux of Starbucks' argument was that things have changed since the *Aspirus Keweenaw* decision. For example, since November 2020, COVID-19 vaccines are widely available and nearly 90% of adults have received at least one dose of a vaccine.[2] Starbucks also argued that a data trend, such as the 14-day trend in new testing positivity rates, "is now understood to be an unreliable and skewed statistic."[3]

Despite these arguments, the Board decided that the "Employer's Request for Review of the Regional Director's Decision and Direction of Elections is denied as it raises no substantial issues warranting review."[4] Nevertheless, two of the three Board members indicated in a footnote that while they believe the decision is correct in light of the majority opinion in *Aspirus Keweenaw*, the factors set forth in *Aspirus Keweenaw* need to be revisited in the appropriate proceeding.

While this decision permitted the present mail-in campaign to proceed, it suggests that the Board is prepared to move away from the lenient standards in *Aspirus Keweenaw*.

FOR MORE INFORMATION

For more information, please contact:

Eric S. Clark
513.352.6555
Eric.Clark@ThompsonHine.com

Bret W. Vetter
513.352.6502
Bret.Vetter@ThompsonHine.com

or any other member of our Labor & Employment group.

[1] *Aspirus Keweenaw*, 370 NLRB No. 45 (2020).
[2] Starbucks Request for Review of D&DE at 18.
[3] *Id.* at 19.
[4] *Starbucks Corp.*, N.L.R.B., Case 19-RC-297142, 8/8/22.