NEW TECHNOLOGY AND REPRESENTATION ELECTIONS: DON’T GO MISTAKING PARADISE FOR TECHNOLOGY ACROSS THE ROAD

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Abstract: Amid dialogue on amending labor certification procedures are calls for the adoption of internet, electronic and/or telephone representation voting (IETV) procedures in representation elections. To date, most labor relations agencies in the United States and Canada have not implemented IETV. Two notable exceptions are the National Mediation Board (NMB), and the United States Federal Labor Relations Authority (FLRA). This article explores strengths and weaknesses of IETV and the potential for wider adoption of this technology in the representation election context. The article examines the NMB’s rationale in adopting IETV, and its experience with this new election format. Insight from interview participants provides a fuller examination of the prospects and pitfalls of IETV than previous research. Preliminary investigation shows the primary rationale for adopting IETV is pragmatic administrative decision-making, rather than minimizing employer and union interference in voting. Findings also show that IETV has been adopted as a substitute for mail-ballot elections, and not as a replacement for on-site manual elections. These findings have implications for extending the adoption of IETV to other labor relations agencies. This article posits that while IETV is an important innovation in the representation electoral process, it is too early for universal adoption of electronic and telephonic voting without additional research and experimentation. In experimenting with IETV, the focus should be on determining whether IETV fulfills the fundamental purpose of a representation election: to accurately reflect whether or not employees in a unit wish to be represented by the applicant union. Moreover, in introducing IETV, an agency must explore new means of communicating with unit employees aimed at maximizing participation in the election process, including electronic notification announcing the election along with possible agency staff visits to the workplace to explain the IETV procedure.

Keywords: NLRB, labor, board, union, labor unions, representation election, union representation, electronic voting, internet voting

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I. INTRODUCTION

As part of the scholarly dialogue on amending labor certification procedures in Canada and the United States, there have been calls for labor relations agencies to consider adopting internet, electronic and/or telephone representation voting (IETV) procedures in representation elections similar to those implemented by the National Mediation Board (NMB) in the past decade1 and utilized in political elections in certain jurisdictions around the globe.

Support for utilizing IETV in representation elections stems from two sources. IETV is viewed as a cost-effective measure to decrease the administrative and personnel costs to labor relations agencies associated with conducting on-site and mail-ballot representation elections. In addition, it is supported by those who believe that these technologically-based alternative procedures are more effective in fostering employee free choice by removing the conduct of the election from the workplace and protecting voter privacy2, and could be implemented

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2 Supra note 1.
without the need for legislative action. At the same time, IETV is opposed by traditionalists who view on-site manual representation elections as the most effective means for determining employee choice. Between the labor technophile, who views the adoption of IETV as a panacea, and the labor technophobe, who fears that IETV is a futuristic road to disaster, there is a large grey area filled with important unresolved questions that require careful academic scrutiny in conjunction with possible administrative experimentation.

Although IETV technology has been available for over a decade, and its adoption is supported by some labor scholars, it has not been implemented by most labor relations agencies in Canada and the United States on either the national or regional level. The most significant exception is the NMB and, more recently, the United States Federal Labor Relations Authority (FLRA). This article examines the rationale utilized by NMB in adopting IETV, along with its experience with this new representation election format. It will explore the strengths and weaknesses of IETV and the potential for wider adoption of this technology in the representation election context. With the benefit of insights gained from interviews with participants, this article is able to explore more fully than previous research the prospects and pitfalls in utilizing IETV as part of a labor relations representation process.

Though at a preliminary stage, our investigation has shown that the primary rationale for adopting IETV by labor agencies has been based upon pragmatic administrative decision-making: reducing governmental costs associated with administering representation elections. Concern over minimizing interference by employers and unions in the voting has not been the driving force for the adoption of IETV by the NMB or FLRA. Moreover, IETV has been adopted

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3 See e.g. Estreicher, supra note 1 at 15-16.

4 See, San Diego Gas & Electric, 325 NLRB 1143, 1153 (1998) (Hurtgen and Brame, dissenting) (“The manual election lies at the heart of our system of workplace democracy. It is the cornerstone of this Agency’s contribution to the successful workings of that democracy. Because of this, the Agency’s historic practice has been to hold manual elections, except in rare circumstances where such elections are not feasible”).

5 In the United States, the NMB is responsible for administering the Railway Labor Act, 45 U.S.C. 151, et seq., a labor relations statute for the railway and airline industries. The National Labor Relations Board (NLRB) is the administrative agency with the authority to administer the provisions of the National Labor Relations Act (NLRA) 29 U.S.C. §151 et seq, which covers most employers engaged in interstate commerce. The FLRA was created by the Civil Service Reform Act of 1978 and is responsible for administering the collective bargaining provisions applicable to federal government employees. In addition to these federal agencies, some States have statutes and executive orders granting collective bargaining right to state and local employees. Among those states is New York, which enacted the Public Employees’ Fair Employment Act, Civ. Serv. Law §200 et seq, in 1967.

6 Interviews were conducted in Spring 2010 with a labor relations board member, a union’s organizing director and an employer-side labor lawyer.

7 This may be due to the fact that the two agencies that have adopted IETV are using it to replace their reliance on mail-ballot elections. To this point, we have found no evidence that the choice to utilize IETV was motivated by concerns related to potential intimidation or coercion in other electoral formats.
generally as a substitute for mail-ballot elections, and not as a replacement for on-site manual elections. These findings have implications for further extending adoption of IETV to other labor relations agencies. Thus far, the academic literature has ignored the budgetary imperative behind IETV, and evidence that a change in election format may bring adverse consequences such as lower voter participation, and instead has focused almost exclusively on changing the electoral format as an essential means toward expanding employee free choice.

While IETV constitutes an important innovation in the representation electoral process, which may help resolve growing budgetary shortfalls and help eliminate concerns over implicit coercion in on-site elections, it is too early for there to be universal adoption of electronic and telephonic voting. Instead, labor relations agencies should consider, in conjunction with employers, unions and academics, taking experimental steps toward employing IETV aimed at determining whether it fulfills the fundamental purpose of a representation election: to accurately reflect whether or not employees in a unit wish to be represented by the applicant union. As part of any such experimentation, labor relations agencies should employ new proactive means of outreach to maximize participation in IETV elections.

II. ISSUES RELEVANT TO CHOICE OF REPRESENTATION VOTING FORMAT

The key attribute of a successful election format is to produce accurate results of employees’ actual preferences about representation. This reliability, or representativeness, has several dimensions. First, maintenance of privacy and freedom from improper influence are essential to ensuring that the balloting results are reliable. Second, that the election is accurate, in the sense that it is secure from tampering; is not subject to technical breakdown or error; and that it encourages all interested eligible voters to participate in the election. Ideally, an election would be a census of eligible voters in the proposed bargaining unit. Therefore, consideration must be given to whether a particular election format encourages or discourages voter participation. Each of these aspects of representativeness may also be influenced by the practical realities and burdens of administering an election that fall on the parties and the labor relations agency, including costs.

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8 Privacy and security concerns in the representation election context are related but distinct. Privacy involves the confidentiality of the voter: protection from disclosure of whether and how that person voted, and is important because the absence of privacy raises concerns about whether that person’s vote was influenced by external pressure, including fear of retaliation. Security concerns whether individual ballots and the election as a whole is protected from interference with the votes in the sense of fraudulent votes and ballot tampering. It is important to note that there may be a security failure without a privacy breach, such as where a ballot is tampered with, yet the voter identity is not revealed, so that voter privacy is not violated.

9 An earlier suggestion for a labor relations board-administered census of the unit to determine representation questions is set forth in Sara Slinn An Analysis of the Effects on Parties’ Unionization Decisions of the Choice of Union Representation Procedure: The Strategic Dynamic Certification Mode, supra, note 1 at 445).
III. THE REPRESENTATION ELECTION LANDSCAPE

With the notable exceptions of the NMB and FLRA, there are two representation election formats currently in use by labor relations agencies in the United States and Canada: traditional on-site elections at the workplace (also called “manual elections”) and mail-ballot elections.  

A. ON-SITE ELECTIONS

Traditional on-site balloting involves an election held at the employer’s worksite or another appropriate location. The labor relations agency seeks to obtain the consent of the parties with respect to the date, location and the voting procedure of the election. If the parties are unable to agree, the agency will determine these issues. In contrast to political elections, manual representation elections are not generally conducted at a neutral public office or school. According to NLRB procedures the “best place to hold an election, from the standpoint of accessibility to voters, is somewhere on the employer’s premises. In the absence of good cause to the contrary, the election should be held there.” If the labor relations agency considers it necessary, balloting may be held at multiple work locations and at multiple times and days.

Prior to the scheduled election, the employer posts at the worksite a hard-copy official notice prepared and issued by the labor relations agency informing employees of the election. On the day of the election, balloting is supervised by an assigned agent or agents of the labor relations agency. The employer and the union are permitted to have observers present during the voting. Employees file into the room where the election is being conducted to submit paper ballots into a secure ballot box. Prior to voting, employees are checked against the board’s voters’ list and, if necessary, contested ballots are segregated for later determination of voter eligibility.


11 NLRB, supra note 10 at s. 11302.2.
end of polling agency staff will remove the ballot box and manually tally the votes. This election format works best with single location voting, where employees are not widely dispersed and are available to vote at the workplace, and in smaller or mid-sized units.

This election format is presumptively reliable in terms of its mechanics except for the potential for human error. Security issues are not commonly raised regarding on-site elections: the board representative checks the voter lists, observers are present, the agency maintains control and custody of ballots and ballot boxes, and although agencies release numerical election results, ballots themselves are anonymous and cannot be linked to the voter. However, paper ballots can be spoiled and ambiguously marked, detracting from the reliability of this format, and other errors can occur in administering the vote. In contrast, concerns have been raised about voter privacy and opportunities for improper influence before and during on-site elections even when a voting booth is utilized. Former NLRB Chairman Gould has stated that an on-site election provides an employer with the opportunity to lawfully manipulate “the symbolism and drama” of an on-site election to its advantage. This proverbial home-court advantage, stemming from elections being scheduled at the premises controlled by one of the active participants in the campaign, is compounded by the general lack of access to those premises, and the surrounding private property, by the primary contestant, the union, both before and after the scheduling of the election. The benefits of this employer advantage can be substantially enhanced by the strategic timing of the on-site election. For self-evident reasons, an employer-side lawyer recommends that an employer insist on the election being conducted on payday. In addition, he suggests that employees seek to avoid elections conducted on Mondays to thereby decrease the effectiveness of home visits over the weekend by union supporters.

See various agencies’ procedures e.g. NLRB, supra note 10 at 11302–11335; and for the BC LRB see BritishColumbia,B.C.Reg.7/93, Part3, available at http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/11_7_93#part3; Federal Labor Relations Authority Office of the General Counsel, supra note 10 at s. 28.20.

Interview; see e.g. reports of errors in on-site and mail-ballot elections (United States, NLRB, “Quality Committee’s Comprehensive Report on Quality Casehandling” (December 22, 2009) online: <http://www.nlrb.gov/shared_files/OM%20Memo/2010/OM%202010-26%20Attachment.htm#Toc248728469>.

Supra note 5, San Diego Gas & Electric, 325 NLRB at 1148, n.3 (Gould, concurring) (citing his decades of experience as a practitioner and academician along with reported admissions made to him by employer advocates.)


Interestingly, and contrary to what commentators have generally contended, a union representative identified on-site elections as the best means for maximizing employee privacy and security in voting, and described mail-ballot and then ITEV elections as the weakest in that regard.\(^{17}\) He expressed concerns that off-site voting can be compromised in various ways including misappropriation of the voter identifier code and influence from others present when the employee votes. Nevertheless, he characterized those concerns as relatively minor and allowed that both the mail-ballot and electronic formats are beneficial to the electoral process because they eliminate employer scrutiny during the casting of ballots.

In many circumstances, on-site elections can be very costly for the labor relations agency. For instance, if the vote must be held at a number of worksites, if the election site is distant from a board office, or if the unit covers a large geographic area, then conducting a manual on-site election will result in travel and lodging expenditures along with the inherent cost staff time. Such elections require multiple agency employees to attend multiple sites to set up, administer the vote, and collect ballot boxes, and who may have to travel long distances, and with large units requiring substantial agency resources to manually count ballots.\(^{18}\)

One benefit of on-site elections which we had not contemplated, and which to our knowledge has not been addressed in the literature, is the value of the labor relations agency engaging a part of the community it serves. A labor board representative indicated to us that, in his experience, attendance of board agents at the workplace to administer the election is a valuable and important opportunity for the labor board to interact with employers and workers. As the crucial thing here is board presence and interaction, this could also be accomplished with other, non-traditional, forms of on-site voting, such as kiosk voting situated at or near the employer’s premises.\(^{19}\) This relatively minor location adjustment may diminish

\(^{17}\) Interview.


\(^{18}\) Interview.

Such costs may be more acute for smaller agencies such as the FLRA. Unlike NLRB which has 51 regional offices, the FLRA only has seven regional offices. Therefore it is often the case that the election will not be located near a board office, imposing substantial travel costs on the board to hold on-site elections, particularly as multiple board officers may be required to attend the vote. (Interview; United States, National Labor Relations Board, “Annual Report of the NLRB for the Fiscal Year Ended September 30 2009” (2009) online: <http://www.nlrb.gov/shared_files/Annual_Reports/NLRB2009.pdf>.

\(^{19}\) Interview. It is possible, for example, to envision the use of an officially-marked agency staffed mobile vehicle with IETV voting equipment parked within walking distance of the employer’s premises. However, the purchase or
the perceived employer advantage associated with on-site elections, maintain the level of voter participation, and ensure continued direct board supervision over the balloting. In developing appropriate protocols for experimentation with IETV by other labor relations agencies, consideration should be given to an initial oral presentation by a board representative to the workforce as a means of ensuring the greatest level of employee participation in the IETV election.

In mail-ballot elections, the agency obtains from the employer the names and addresses of employee on a voter’s list or on a set of mailing labels, and mails a ballot package to each eligible voter.\(^{20}\) Though the contents differ among agencies, a ballot package generally contains a ballot, a letter of instructions, an envelope to place the ballot and a prepaid return receipt envelope for returning the ballot by mail.\(^{21}\) Because of the time needed to allow for voters to receive and return ballots by mail, such elections are of a longer duration – generally two to four weeks – and generally at agencies’ discretion.\(^{22}\) As part of the mail-ballot schedule, some agencies include a period for voters to request a replacement ballot if they did not receive the original by mail or because they lost or damaged the original ballot. Once the ballots are returned, as with the manual on-site election, agency staff prepare and count the ballots by hand, generally in the presence of union and management observers.

For many labor relations agencies, mail-balloting is not the standard election format because it is relatively costly for standard size units with fewer work sites, and because of the longer period required for such balloting.\(^{23}\) Nevertheless, diminution of agency staffing levels over the

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\(^{20}\) For mail-ballot procedures for various boards see e.g. NLRB, supra note 10 at 11301.2, 11335, 11336; for the BC LRB, British Columbia, B.C. Reg. 7/93, s. 19.

\(^{21}\) See e.g. NLRB, supra note 10 at 11336.2(c); British Columbia, B.C. Reg. 7/93, s.19(a)(i); Federal Labor Relations Authority Office of the General Counsel, supra note 10 at 28.23.4; National Mediation Board, supra note 10 at 14.202.

\(^{22}\) The NLRB indicates that generally two weeks is appropriate (NLRB, supra note 10 at s.11336.2(d). The FLRA generally allows three to four weeks for mail-ballot elections (Federal Labor Relations Authority Office of the General Counsel, supra note 10 at 28.23.a. The BC LRB has no specified length of time for mail votes, and has ordered a variety of election return limits (see e.g. 14 days and 21 days in The British Columbia Corps of Commissionaires [ 2003] BCLR Decision No. B309/2003; one month in Lally Brothers Holdings Ltd. and National Automobile [2005] BCLR Decision No. B338/2005). The NMB mails the ballot package to eligible voters not less than 21 days before the ballots are to be counted (National Mediation Board, supra note 10 at 14.202.

\(^{23}\) Lengthy elections are contrary to the spirit and rationale of the statutory “quick votes” prevailing in Canada. See e.g. Pan Fish Canada Ltd. and United Steelworkers of America, Local No. 1-2171, BCLR No. B20/2005: “The Board rarely orders mail-ballot votes because, among other things, of the length of time associated with doing so, particularly since certification applications are to be processed by the Board on an expedited basis. Typically the
decades has resulted in mail-ballot elections being a more common feature in some jurisdictions than others. At all times, though, conducting a mail-ballot election is at the agency’s discretion with geography and work schedules being the two most prominent criteria.\textsuperscript{24} Notably, agencies also stress that a factor in determining whether to permit a mail-ballot election is whether eligible voters will have a reasonable opportunity to participate in the election and that cost-savings should not be the sole consideration.\textsuperscript{25} Though mail-ballot elections can be costly and labor intensive for an agency because of the extensive ballot package that agency staff must compile and mail to voters, and because of the later manual tallying of votes, in some complex elections, this format can potentially demand fewer agency and union resources than on-site elections.\textsuperscript{26}

Decisions from the NLRB reveal a clear lack of unanimity over the desirability of the mail-ballot format as a substitute for on-site elections, and an express concern that cost-savings should not be the determining factor in favour of utilizing the mail-ballot format. In \textit{San Diego Gas and Electric}, a Board majority affirmed the decision of an Acting Regional Director to schedule a mail-ballot election for a unit of 20 employees working at eight different locations 80 miles apart.\textsuperscript{27} While the Board reiterated the NLRB’s long-standing policy in favor of on-site elections, it identified three situations under which an NLRB Regional Director may apply his or her discretion to order a mail-ballot election: when the work locations of eligible voters are scattered over a wide geographic area; when significant variations in work schedules of eligible voters result in them not being present at a common location at common times; or, when there is a pending strike, lockout or picketing. In his concurrence, then Board Chairman Gould stated that he supported the use of the mail-ballot format as a cost-saving device at a time of austerity. In dissent, Members Hurtgen and Brame expressed strong support for the continued use of on-site elections over the mail-ballot alternative. Among the concerns cited by the dissent were the lack of oversight by a Board agent in the voting that can lead to coercion and a diminishment in participation. In support of the latter concern, the dissent cited a 1994 NLRB

\textsuperscript{24} For agency policies regarding holding mail-ballot elections see e.g. NLRB, supra note 10 at 11301.2; and see \textit{Pan Fish Canada Ltd. and United Steelworkers of America, Local No. 1-2171}, BCLR No. B20/2005 as an approach representative of Canadian labour boards.

\textsuperscript{25} E.g. NLRB, supra note 10 at 11301.2; \textit{Re Aldergrove Neighbourhood Services Society}, BCLR No. B456/2001 at para.17: “As a matter of Board practice, mail-ballots are generally ordered where geography or other circumstances make it unlikely that holding an in-person vote within 10 days will ensure that, as required by Section 8(2)(a) of the Labour Relations Regulation, “every person eligible to vote has a reasonable opportunity to do so”.”

\textsuperscript{26} Interview.

\textsuperscript{27} \textit{Supra}, note 4. Notably, current NLRB Chairman Wilma B. Liebman was a member of the majority in this decision.
General Counsel Memorandum indicating that, overall, about 20 percent fewer eligible voters had participated in mail-ballot election (68.14 percent) than in on-site elections (87.9 percent).\textsuperscript{28}

Following the decision in \textit{San Diego Gas and Electric}, \S11301.2 of the NLRB’s Casehandling Manual was amended to reaffirm the Board’s preference for manual elections, set out the factors to be considered in determining whether the mail-ballot format was appropriate in a given case, and specifying that:

As a final factor, the Regional Director should also consider the efficient use of the Agency’s financial resources, because their efficient and economic use is reasonably a concern. However, mail-ballot elections should not be directed based solely on budgetary concerns. Under extraordinary circumstances, other relevant factors may also be considered by the Regional Director.\textsuperscript{29}

In contrast, other agencies, such as the NMB and FLRA, primarily hold mail-ballot elections reflecting the particular characteristics of the industries, worksites and bargaining units under their respective jurisdictions. The NMB is responsible for the airline and railroad industries in the United States, which are characterized by multiple worksites often located throughout the country, with very large, often national, units containing workers who are commonly away from their designated worksites for long periods. The FLRA, which is the labor relations agency responsible for federal government employees, often holds elections for nation-wide units. On-site elections would be extremely difficult and costly to administer because they would require multiple and scattered voting sites with balloting held on multiple days to ensure a reasonable ability for unit employees to participate in the election. Therefore, mail-ballot elections have become the norm for these agencies.\textsuperscript{30}

In terms of reliability and representativeness, the mail-ballot format offers both strengths and weaknesses. Mail-ballot elections take place over an extended period, and boards have recognized the importance of workers having the opportunity to reflect, ask questions, and consider their representation election decision.\textsuperscript{31}

\textsuperscript{28} Memorandum from Fred Feinstein, NLRB General Counsel, to William B. Gould IV, NLRB Chairman, (2 June 1994). \textit{See also}, \textit{London’s Farm Dairy, Inc} 323 NLRB 1057 (1997) (where the Board majority cited the NMB experience of conducting mail-ballot elections where reports of improprieties are rare); \textit{Shepard Convention Services}, 314 NLRB 688 (1994), \textit{pet. for review granted}, \textit{Shepard Convention Services, Inc. v. N.L.R.B.} 85 F.3d 671 (D.C Cir.,1996) (overturning a Board decision ordering the holding of a mail-ballot election).

\textsuperscript{29} The relevant provisions for the conduct of elections is available at: \url{http://www.nlrb.gov/nlrb/legal/manuals/CHMII/Sections11300-11350.pdf}

\textsuperscript{30} Interview.

\textsuperscript{31} Such concerns underpin the NLRB’s \textit{Peerless Plywood} rule that prohibits captive audience speeches 24-hours prior to the scheduled election. Because last-minute election campaign speeches to groups of workers on the
While it may be the case that mail-balloting fosters reliability by offering voters the potential for greater periods of discernment it must also be recognized that this election format does not guarantee voter privacy or ballot security because of the absence of agency representatives and party observers. The defining characteristic of this format – that ballots are received and returned through the postal system – means that, unlike on-site elections, ballots are not consistently under agency control and possession. Though agencies prohibit unions or employers from collecting or handling ballots, complaints and fears have been raised, especially in the private sector, about this sort of misconduct, and there is no guarantee that the eligible voter him or herself filled out the ballot, and without pressure or interference.\(^3\) An employer-side lawyer indicated that employers had great concerns about improper union influence over and interference with NMB mail-ballot elections.\(^3\)

Reliability and representativeness of mail-ballot elections may also be a real concern due to the potential for errors and lower voter participation rate. In addition to the problem of spoiled ballots, which exists for all manual ballots, difficulties such as employees not receiving ballot packages or ballots having been mailed but not received by the board – or delayed in the mail and received late occur. Difficulties related to mail delivery of ballot packages and returned ballots are apparently especially problematic with large elections.\(^3\) Also, agencies rely on employers to provide contact information and voter lists, creating the possibility that incorrect or incomplete information will be inadvertently supplied to the board.

Moreover, if, as suggested above, one aspect of election representativeness is whether it reflects the wishes of all interested voters, then evidence of lower voter participation rates in mail-ballot elections, compared with on-site elections is a cause for concern. There is evidence that fewer eligible voters participate in mail-ballot elections than in on-site elections. Care must be taken in interpreting these statistics and, as discussed in the final section of this article, more investigation of this phenomenon is needed when contemplating IETV elections, but it is an important issue to be explored.

employer's time “...tend to interfere with that sober and thoughtful choice which a free election is designed to reflect.” and, so tend "...to destroy freedom of choice ...." (Peerless Plywood Company, 107 NLRB 427 (1953) at 429-30). Similarly, one factor the BC LRB considers in distinguishing between lawful and unlawful captive audience meetings is whether or not workers have an opportunity to reflect and make enquiries between the meeting and the election (Simpe 'Q' Care Inc., [2007] BCLRB Decision No. B161/2007 (Reconsideration of BCLRB Decision No. B171/2006)).

\(^3\) Employers and unions are not permitted to collect the ballots from workers to submit them to the board. Voters must individually mail-ballots back to the board. See e.g. National Mediation Board, supra note 10 at 14.202, 14.303-.403; Interview.

\(^3\) Interview.

\(^3\) Interview.
The limited, but consistent evidence of relatively lower voter participation rates in mail-ballot as compare to on-site elections spans more than one labor board. In 1972, during hotly contested decertification elections involving two state-wide units of employees, the Institutional Services Unit (ISU), composed of 44,000 direct care employees, and the Professional, Scientific, and Technical Services Unit (PST), composed of 34,000 professional employees, the competing unions fiercely disputed the proper mechanics for holding of the elections under the New York State Public Employment Relations Board’s (PERB). Although the unions agreed that the election format should maximize voter participation, insulate against undue influence, and provide the best security against ballot tampering, they differed as to which format would meet those objectives. PERB decided to hold a mail-ballot election for the PST unit and a combined on-site and mail-ballot election for the ISU unit. In its decision, PERB expressed the intent to study the elections “to ascertain whether either form of voting is, indeed, preferable to the other and whether other factors, such as the nature of the community in which the employees reside, affect the likelihood of their voting in either form of election.”

In 1973, PERB’s Office of Research issued a report entitled “Voter Participation in Mail Versus On-Site Elections” analyzing the level of voter participation in both elections on the basis of agency and geography. The report found that in PST, 63.9 percent of eligible voters participated in the mail-ballot election. In ISU, 54.5 percent of eligible ballots were cast on-site as compared with 40.5 percent through mail-ballots. However, these statistical variations were due, in part, to factors such as geographic location. Since this 1973 report, PERB has continued to conduct mail-ballot or on-site representation elections, depending on the unit’s size and other considerations, finding each format to be effective and reliable.

Recent statistics from the NLRB also indicate that voter participation tends to be lower in mail-ballot elections than for on-site votes. Between January 1, 2006 and December 31, 2007, approximately 240 of the NLRB’s 4,305 representation elections were conducted by mail-ballot or mixed on-site/mail-ballot. The overall voter participation rate in all representation elections over this period was 80% (224,247 of 280,295 eligible voters cast ballots); and the participation rate in on-site elections was 81.57%, but only approximately 65% in mail or mixed on-site/mail elections.

35 State of New York, 5 PERB ¶3056 (1972).
36 Supra, note 35, 5 PERB at 3099.
IV. THE NEED TO STUDY IETV CONDUCTED POLITICAL ELECTIONS

Thus far, those proposing the adoption of the IETV representation election format have not included an examination of the literature analyzing the experimentation in the use of IETV in political elections in Europe and the United States. In exploring the use of IETV in representation elections, there must careful consideration given to the growing body of commentary and research critiquing, questioning and assessing the use of the electronic format in political elections.

Very broadly, this literature can be described as focusing on three key concerns that are equally applicable to the use of IETV in representation elections: technological security; participation and access; and privacy and opportunities for influence. To meet those concerns, there must a secure and tested technological base, a legal and regulatory regime, and an electoral culture supportive of electronic voting.

With respect to voter participation, one key concern with IETV is the potential adverse affect of what is commonly called the “digital divide.” There is a fear that a shift to electronic voting will create an imbalance in participation with those with greater access to the internet having greater impact on the outcome. At the same time, there is hope that a move to IETV will result in greater participation by younger voters. Some research has linked the digital divide to issues of equity, although the extent to which commentators find that this is a barrier to IETV is varied.³⁸ Moreover, differences in views exist about whether the digital divide and its


An example of the mixed views and evidence on this issue is seen in research surrounding an internet-based Democratic primary election held in Arizona in 2000. While some researchers found evidence of effects of a digital divide with more votes being cast from remote internet locations by affluent people than by lower-income people (Gibson 2001-2002). Nevertheless overall election turnout increased by over 500%, and one pair of
associated problems will decrease over time as more people gain internet access, or whether growing internet access alone is insufficient to bridge the divide, which also depends on access to other resources.

At the same time, IETV in political elections has not resulted in any known increase in voter participation. Furthermore, concerns remain over the security of IETV systems, and the opportunities for breaching voter privacy and prospects for improper influence and coercion of voters where voting takes place outside of polling stations.

V. INTRODUCING IETV AT LABOR RELATIONS AGENCIES

At present only the NMB and FLRA offer IETV representation voting. Unlike Canadian boards and the NLRB, the NMB and FLRA have a history of conducting their elections by mail-ballot due to the size and geographic scope of the bargaining units. Beginning in 2002, the NMB adopted telephonic voting, and then added internet voting in 2007. This combination of telephonic and internet voting has replaced mail-balloting as the board’s standard election format, while the FLRA has recently held its first telephonic and internet election of a relatively small unit. Both agencies had sufficient budgetary allocations to cover the inherent start-up costs in utilizing IETV.

commentators pointed out that turnout actually increased among African-American, Hispanic and Native American communities (Smith and Clark 2005).

Some researchers also contend that, when internet voting is adopted as a form of absentee balloting, then the negative effect from internet voting on minorities and low income voters does not differ from that resulting from absentee ballots generally. They suggest that these results are explained by foresight and advanced planning tending to be used more often by people with a higher socio-economic status, and that that is the source of the difference, rather than the technological hurdle of the internet (Schaffner and Prevost, 2004).


40 Krueger, supra note 38 at 494 argues:

“The logic is straightforward. Those already engaged in politics are those endowed with the resources (civic skills, money, and free time) necessary to participate; with the addition of a new participatory medium, the same high-resource individuals should better take advantage of this new participatory opportunity. Thus, even equal Internet access may not prevent greater disparities between the participatory rich and the participatory poor.”

41 Fairweather and Rogerson, supra note 17; Alvarez and Hall, supra note 17 (especially Chapter 5); Lonck Dumortier, supra note 17 (especially 62-67).

Also see 34 NMB 41 at 204-208 where the NMB directly addresses, and distinguishes their system and experience, from some of the broader security and privacy concerns that have arisen with regard to IETV elections in other contexts.
Though current discussions of IETV centre on the opportunity it may provide for encouraging greater employee privacy and freedom from the coercive influence of employers or unions, such issues were not the motivating factors that resulted in the introduction of IETV by these labor agencies. Instead, practical considerations of limited agency resources and an interest in administering more efficient, lower-cost representation elections were the main factors driving adoption of telephone and internet voting formats by the NMB and FLRA.

The importance of the relative cost of different types of voting depends on the particular types of elections, procedural requirements and the characteristics of the industries and proposed units and voters in elections that a board must administer. This partly explains why the NMB was an early adopter of this technology, and raises considerations for other boards contemplating adopting IETV. Large, national elections posed a formidable administrative burden on the NMB, even with mail-ballots, as the mailing packages had to be prepared and mailed-in ballots had to be tallied by hand by NMB staff. At NMB, one practical consequence of these larger elections was that all available mediation staff (approximately 15 people at the time) and all the legal staff would spend almost a whole day counting ballots. A further difficulty with mail-ballots, and one that was a particular challenge in large elections, was the reliability of mail delivery. Issues arose about employees not receiving the ballot package, or perhaps ballots were returned but not received in time to be counted. The labor intensive and costly nature of this process prompted the NMB to seek more efficient options for administering elections.

In the mid-1990s the NMB began exploring the possibility of telephonic electronic voting and internet voting, as a less costly alternative to mail-ballots, consulting with technological experts and contractors as well as with the labor and management community. However it was not until after the anthrax contamination crisis in 2001 when unions insisted that members not handle mail from Washington D.C., including ballot packages sent from the NMB, that the Board first tried telephone voting in September 2002. In that case, the use telephone voting was with the consent of the parties.

An employer-side lawyer indicated to us that, at the time the NMB adopted telephonic electronic voting, employer advocates were concerned about the possibility of union interference and manipulation of the voting process similar to their concerns over mail-ballot

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42 See supra note 1.

43 Interview.

44 Interview. Beginning in the early 1980s the NMB had instituted a practice of holding exclusively mail-ballot elections.

45 Interview.

46 Interview.
elections. Because of NMB’s tradition of “majority of the unit” rule for determining representation in elections and the fact that to vote against representation a voter does not have to cast a ballot, raises greater concerns about scrutiny of employees. An employee who votes in this system will be voting for representation.

In early 2007, when the NMB announced that it would begin to offer internet voting and telephonic electronic voting, together, as the primary means of conducting representation elections, it conducted a mock election so that interested parties could try out the system, providing 90 days for interested persons or groups to comment, but only received three submissions. The NMB reported limited concerns from these commentators. The Port Authority of New York and New Jersey expressed concern that the instructions were not clear that to vote “no” the employee need not cast a vote at all. The NMB agreed to clarify its instructors to voters. The International Association of Machinists and Aerospace Workers raised concerns about the security of the system, privacy of voter identification numbers, and that the digital divide would disenfranchise voters without familiarity or access to the internet. Another union expressed concern about the secrecy of internet ballots. The NMB clarified the security and confidentiality provisions of its system, and emphasized that it was not possible to link the voter’s PIN to their actual identity. An employer-side lawyer who participated in this process indicated that, by the end of this pilot project, he was satisfied that the NMB had dealt with the employers’ concerns, and described the NMB’s adoption of internet voting as “almost a non-event”.

As the system now operates, a third party contractor administers telephonic and internet elections for these agencies. Voters are mailed a confidential and randomly-assigned voter identification number and personal identification number and mailed instructions about three weeks before ballots are tallied and voting instructions are posted in the workplace. Only the NMB Election Administrator is aware of voters’ identification numbers and name.

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47 Interview. An example offered is of a union inviting workers to a common location to vote, raising the concern that individual voters could be influenced in their votes – or whether to vote at all.

48 An employer side lawyer tells us that, in mail-ballot elections at the NMB, employers would tell workers to destroy their ballots if they did not want to vote for a union, to ensure that they did not accidentally vote for unionization by submitting a ballot.

49 United States, National Mediation Board, “Introduction of Internet Voting/Mock Election” (2007) 34 NMB No. 13. Comments were received from the Port Authority of New York and New Jersey, one from the International Association of Machinists (IAM) and one from the Sheet Metal Workers International Association (SMWIA); United States, National Mediation Board, “Internet Voting Comment Period” (2007) 4 NMB 41.


51 Interview.

elections, because representation is determined by whether a majority of eligible voters in the unit vote for representation, only employees who want to vote for representation participate in the election. Representation in FLRA elections is, in contrast, determined by the majority of ballots cast, therefore both those voters supporting and opposing representation are to participate, and vote either “yes” or “no”. Voters either call in using a touch-tone phone or internet through the agency’s website.\textsuperscript{53} Votes are electronically tallied and results provided to the parties in writing.\textsuperscript{54}

As with other forms of off-site voting, IETV raises concerns about the possibility of improper influence or interference by peers, family, unions or employers. However, it appears that the NMB has successfully navigated these potential problems. We have found no reported NMB cases of individual interference or privacy breaches relating to the IETV format. Nor are there any known cases involving technological security breaches. Moreover, an employer side counsel, with lengthy experience before the NMB, reports that he is not aware of any such problems with NMB’s use of IETV, and states that based upon his experience that IETV raises fewer privacy and security concerns than mail-ballot elections.\textsuperscript{55} Meanwhile IETV offers several advantages in this regard by granting voters the opportunity to protect their voting from employer and union scrutiny, and provide a greater period for voters to make a free and informed choice.\textsuperscript{56}

Nonetheless, concerns over security and confidentiality in IETV cannot be ignored. In 2007, a United States District Court concluded that the electronic voting system utilized in an internal union election violated the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA).\textsuperscript{57} In \textit{Chao v. Allied Pilots Assoc.} \textsuperscript{58} the United States Department of Labor successfully challenged a union’s election because the particular form of internet voting system employed compromised the confidentiality of the vote because this system permitted a particular voter to be matched with his or her vote, thus compromising voter privacy.\textsuperscript{59}

\textsuperscript{53} “Voters need access to a touch tone phone or access to the Internet in order to vote. Voters will not be able to vote using rotary dial or pulse phones.” (Frequently Asked Questions: Representation \url{http://www.nmb.gov/representation/faqs-ola.html})

\textsuperscript{54} Frequently Asked Questions: Representation \url{http://www.nmb.gov/representation/faqs-ola.html}.

\textsuperscript{55} Interview.

\textsuperscript{56} Interview; Herbert, 2005: 18.

\textsuperscript{57} 29 U.S.C. 401, et seq. LMRDA is a federal law that regulates internal union elections.

\textsuperscript{58} WL 518586, 181 LRRM 2578 (N.D., Texas)

\textsuperscript{59} As the Court explained: “The undisputed facts in this case demonstrate that the votes in Allied’s 2004 election were cast in a manner that specifically identified voters with their votes. The voting system used a number identification maker to link Allied members’ votes stored in techvote database with their identity stored in the
Although there is evidence that the mail-ballot format may be associated with lower voter participation rates, because the NMB representation rule currently requires that only ballots in favour of unionization are cast, looking at voter participation rates for NMB elections is equivalent to looking only at “yes” votes and gives us no insight into whether IETV might affect voter turnout. As the FLRA IETV system allows for both “yes” and “no” votes, careful observation of participation in future IETV elections at that agency may be helpful.

Nonetheless, compared to other instances of IETV where internet voting was employed alone, both NMB and FLRA use telephonic electronic and internet voting together. As described by the NMB in 2007 “there has not been one allegation that employees do not have access to telephones.” And that by offering both telephone and internet voting “…the Board is not disenfranchising voters. On the contrary, the ability to vote through the Internet will give enhanced access to national guard/reserve employees and other employees temporarily working overseas.” Therefore, perhaps concerns over possible negative effects from technological access can, and have been, overcome by offering two forms of IETV.

VI. CONCLUSION

The administrative choice of format for representation elections is central to ensuring the statutory right of employees to freedom of choice to support or oppose organizational representation and collective bargaining. Although the question of the most desirable electoral format is a complex and contextual question, few would oppose a format that diminishes government costs, maximizes participation and expands voter freedom. The NMB and the FLRA have embraced IETV as a cost-saving alternative to their respective traditions of conducting mail-ballot representation elections. In the political arena, election officials are increasingly embracing IETV as a means for encouraging greater voter participation. In contrast, the NLRB and other labor relations agencies have been slow to transition even to mail-ballot elections, in part, due to expressed concerns over the impact it has on the level of participation.

In order to determine whether IETV is an electoral paradise sitting across the road, experimentation by labor relations agencies must take place in the use of the technology, in member database.” (Supra, note 58 at p.7). The court decision was later withdrawn suggesting that the case was settled between the parties.

60 34 NMB No. 41 at p. 205.

cooperation with the parties, with the results being subject to neutral and rigorous scrutiny and analysis. To assist in such experimentation, labor scholars need to examine and report on the growing literature in the fields of political and computer sciences with respect to electronic voting including problems associated with the digital divide.

To accomplish experimentation with IETV on the administrative level will require the necessary resources for agencies to consult and/or contract with vendors for the technological knowledge and infrastructure needed to ensure security. In preparation for such experimentation with IETV, agencies will need to examine whether to first experiment with IETV kiosk stations supervised by board staff, along with the development of appropriate protocols aimed at maximizing participation. This may require communicative innovations by agencies aimed at ensuring employees receive timely neutral information about the election in an appropriate contemporary format emphasizing the new means for conducting the election. Such innovations may include internet and intranet postings at the worksite of the notices of the election and/or direct email distribution of the election information.\(^62\)

\(^62\) The NLRB recently solicited amicus briefs in three pending unfair labor practice cases on the question of whether the agency should order employers to post or distribute remedial notices electronically, and what should be the applicable legal standard for ordering an electronic form of posting or distribution. See, \textit{NLRB invites amicus briefs in pending cases:} http://www.nlrb.gov/shared_files/Press\%20Releases/2010/R-2744.pdf. In \textit{Texas Dental Association,} 354 NLRB No. 57, n.4 (2009), the two-member Board split on the question of whether the employer should be ordered to electronically post the remedial notice. In that case, Chairman Liebman stated that she would grant the remedy, consistent with her dissent in \textit{Nordstrom, Inc.,} 347 NLRB 294, 294 n. 5 (2006), and the evidence in the record demonstrating that the employer customarily communicates with its employees electronically. Member Schaumber did not agree, finding that an electronic posting was not warranted because, in his view, the General Counsel had failed to demonstrate that the employer regularly distributes its policies electronically. In contrast to the differing views at the NLRB over whether to order electronic remedial notices, we have not found any indication that the NLRB is considering workplace electronic election postings as a means for encouraging greater voter participation.