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## Some Think of the Future: Internet, Electronic, and Telephonic Labor Representation Elections

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**SOME THINK OF THE FUTURE: INTERNET, ELECTRONIC, AND  
TELEPHONIC LABOR REPRESENTATION ELECTIONS**

SARA SLINN\* AND WILLIAM A. HERBERT\*\*

ABSTRACT

Amid the scholarly dialogue regarding amending labor certification procedures, there have been calls for the adoption of Internet, electronic, and/or telephonic representation voting (“IETV”) procedures in representation elections. To date, most labor relations agencies in the United States and Canada have not implemented IETV. Three notable exceptions are the National Mediation Board (“NMB”) and the Federal Labor Relations Authority (“FLRA”) in the United States, and the Canada Industrial Relations Board (“CIRB”). This Article explores the strengths and weaknesses of IETV and the potential for wider adoption of this technology in the representation election context. The Article examines NMB’s rationale in adopting IETV, and its experience with this new election format. Insights and experiences from interview participants provide a fuller examination of the prospects and pitfalls of IETV than previous research. The primary rationale for adopting IETV has been premised on 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 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

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\* Associate Professor, Osgoode Hall Law School. An earlier version of this Article was presented at 47th CIRA Meeting/International CRIMT Conference, June 16–18, 2010, Université Laval, Quebec, Canada and at the Fifth Annual Colloquium on Current Scholarship in Labor and Employment Law, September 24–25, 2010, Washington University School of Law and Saint Louis University School of Law, St. Louis, Missouri. We appreciate the helpful suggestions and comments from participants at both conferences. In addition, we would like to thank Osgoode Hall Law School student Jennifer Charles and Albany Law School student Daniel Bernstein for their assistance.

\*\* Deputy Chair and Counsel, State of New York Public Employment Relations Board (“PERB”), Albany, New York. The views expressed by Mr. Herbert in this Article do not reflect the views of PERB or the State of New York. Mr. Herbert would like to express his appreciation to PERB Chairperson Jerome Lefkowitz for granting permission to participate in this collaborative academic endeavor.

electoral process, it is too early for there to be universal adoption of the format 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 under the new election format.

#### 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 United States National Mediation Board (“NMB”) in the past decade and utilized in political elections in many jurisdictions around the globe.<sup>1</sup>

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.<sup>2</sup> In addition, it is

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1. See Samuel Estreicher, *Improving the Administration of the National Labor Relations Act Without Statutory Change*, 25 A.B.A. J. LAB. & EMP. L. 1, 10 (2009) (suggesting experimentation by the National Labor Relations Board (“NLRB”) with mail-ballot and Internet voting for representation elections); Martin H. Malin & Henry H. Perritt, Jr., *The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces*, 49 U. KAN. L. REV. 1, 59–60, 62 (2000) (cautiously advocating that NLRB explore electronic means of receiving collective worker expressions of interest and Internet voting); Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 720–23 (2010) (proposing emulating the NMB’s use of Internet and telephonic technologies as one potential means for preserving privacy in the representational process and, at the same time, structurally decreasing the level of employer intervention during the voting process); Sara Slinn, *An Analysis of the Effects on Parties’ Unionization Decisions of the Choice of Union Representation Procedure: The Strategic Dynamic Certification Model*, 43 OSGOODE HALL L.J. 407, 442–46 (2005) (proposing alternative voting formats including agency conducted employee polls, electronic and kiosk voting); William A. Herbert, *The NLRA in a Technological Society: A Law Not Busy Being Born, Is Busy Dying*, 2005 A.B.A. SEC. LAB. & EMP. L. TECH. COMMITTEE MIDWINTER MTG. 18, available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1009&context=william\\_herbert](http://works.bepress.com/cgi/viewcontent.cgi?article=1009&context=william_herbert) (noting that NMB electronic voting eliminates inherent employer domination by moving it off-site and expands the voting period, thereby providing employees with a greater opportunity to make a free choice).

2. See *infra* notes 79–81 and accompanying text (stating the actual cost of an IETV election versus a mail-ballot election in certain cases); see also Slinn, *supra* note 1, at 443 (proposing that electronic voting is a more cost-effective means of conducting representation elections than on-site elections).

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, in protecting voter privacy, and can be implemented administratively without the need for legislative action.<sup>3</sup> 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.<sup>4</sup> 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 the United States or Canada on either the national or regional level. The most significant exception is NMB and, more recently, the United States Federal Labor Relations Authority (“FLRA”) and the Canada Industrial Relations Board (“CIRB”).<sup>5</sup> This Article examines the

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3. See Sachs, *supra* note 1, at 721–23 (proposing that electronically conducted elections could allow for more privacy as well as less employer intervention); Slinn, *supra* note 1, at 446 (suggesting that one way of protecting employee privacy during union elections is to have employees vote without disclosing detailed information about the elections); see, e.g., Estreicher, *supra* note 1, at 15–16 (discussing the uncertainty regarding union organizers’ right to access company property once there is sufficient union interest to trigger a representation election).

4. See San Diego Gas & Elec., 325 N.L.R.B. 1143, 1153 (1998) (Members Hurtgen & 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, NMB is responsible for administering the Railway Labor Act, 45 U.S.C. §§ 151–88, a labor relations statute for the railway and airline industries. 45 U.S.C. §§ 151, 151a, 154–55, 181 (2006). 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. §§ 151–69, which covers most employers engaged in interstate commerce. 29 U.S.C. §§ 151, 152(2), 153 (2006). FLRA was created by the Civil Service Reform Act of 1978 and is responsible for administering the collective bargaining provisions applicable to non-postal federal government employees. 5 U.S.C. §§ 7103(a)(6), 7104–05 (2006). In addition to these federal agencies, some states have statutes and executive orders granting collective bargaining rights. For example, New York PERB administers two separate State collective bargaining laws: the Public Employees’ Fair Employment Act, Civ. Serv. Law §§ 200–14, which covers State and local government employees; and the New York State Employment Relations Act (SERA), New York Labor Law §§ 700–18, which is applicable to private sector employees who work for employers not covered by the NLRA. N.Y. CIV. SERV. LAW § 201(7), 202 (McKinney 2011); N.Y. LAB. LAW § 715 (McKinney 2002).

In Canada, CIRB is responsible for Part I and certain provisions of Part II of the Canada Labour Code, R.S.C. 1985, c. L-2, which apply to federally regulated private sector industries, including: aeronautics, air transport and airports, atomic energy, banking, customs, grain

rationale utilized by NMB, FLRA, and CIRB in adopting IETV, along with the experiences of these agencies with this new technologically-based election format. It will explore the strengths and weaknesses of IETV and the potential for wider adoption of this format 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 the labor relations representation process.<sup>6</sup>

Our investigation demonstrates that the primary rationale for adopting IETV by labor agencies has been based upon pragmatic administrative decision-making: reducing governmental costs and delays associated with administering representation elections.<sup>7</sup> Concern over minimizing interference by employers and unions in the voting has not been the driving force for the

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elevators, inter-provincial transportation, most railways, postal services, shipping and navigation, telecommunications, and television and radio broadcasting. Canada Labour Code, R.S.C. 1985, c. L-2, §§ 2, 15, 123. It also applies to federal government employees and private sector employees in the Yukon, Northwest, and Nunavut territories. *Id.* §§ 123, 167.

6. Semi-structured telephone interviews of professionals with extensive experience in representation elections were conducted between spring and fall 2010. Some participants consented to being identified while others preferred to remain anonymous or identified only by institutional or professional affiliation. Interview participants included the following individuals: Ernest DuBester, an FLRA Member since 2009 and a former NMB chairman and member from 1993–2001; a CIRB representative (identified as “CIRB Representative”); a CIRB information officer (identified as “CIRB Information Officer”); two management-side labor attorneys with extensive experience before different labor boards including NMB and NLRB (identified as “Management Counsel 1” and “Management Counsel 2”); a union-side labor attorney, George Diamantopoulos from the law firm Seham, Seham, Meltz & Peterson, LLP, who regularly represents unions before NMB; and Benjamin Gordon, Director of Organizing for the Civil Service Employees Association, Local 1000, AFSCME, AFL-CIO, a New York State union that represents both public and private sector employees. Telephone Interview with Ernest DuBester, Member, Fed. Labor Relations Auth. (Apr. 16, 2010); Telephone Interview with CIRB Representative (Sept. 20, 2010); Telephone Interview with CIRB Information Officer (Nov. 29, 2010); Telephone Interview with Management Counsel 1 (Oct. 19, 2010); Telephone Interview with Management Counsel 2 (June 5, 2010); Telephone Interview with George Diamantopoulos, Attorney, Seham, Seham, Meltz & Peterson, LLP (Aug. 5, 2010); Telephone Interview with Benjamin Gordon, Director of Organizing, Civil Serv. Emps. Ass’n, Local 1000, AFSCME, AFL-CIO (Apr. 23, 2010).

Editor’s note: The interviews were conducted under the terms of the Tri-Council Policy Statement and with approval managed by York University’s research office. Under the terms of this approval, the Saint Louis University Law Journal did not have access to the transcripts or recordings of these interviews. The transcripts and recordings remain on file with the authors. For more information regarding the ethics policy under which the interviews were conducted, see CAN. INSTS. OF HEALTH RESEARCH, NATURAL SCIS. & ENG’G RESEARCH COUNCIL OF CAN. & SOCIAL SCIS. & HUMANITIES RESEARCH COUNCIL OF CAN., TRI-COUNCIL POLICY STATEMENT: ETHICAL CONDUCT FOR RESEARCH INVOLVING HUMANS (2010), *available at* [http://www.pre.ethics.gc.ca/pdf/eng/tcps2/TCPS\\_2\\_FINAL\\_Web.pdf](http://www.pre.ethics.gc.ca/pdf/eng/tcps2/TCPS_2_FINAL_Web.pdf).

7. *See infra* note 133 and accompanying text.

adoption of IETV by any of these agencies.<sup>8</sup> Moreover, IETV has been adopted 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 and efficiency imperatives behind IETV and the potential that a change in election format may result in adverse consequences such as lower voter participation. Instead, the literature has focused almost exclusively on changing the electoral format as an essential means toward expanding employee free choice.<sup>9</sup>

While IETV constitutes an important innovation in the representation electoral process, which may help resolve growing budgetary shortfalls and help eliminate concerns over implicit or explicit coercion in on-site elections, it is too early for there to be universal adoption of IETV. Instead, labor relations agencies, in conjunction with employers, unions, and academics, should consider taking experimental steps toward employing IETV to determine 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 pro-active means of outreach to maximize meaningful participation in IETV elections.

#### I. ISSUES RELEVANT TO CHOICE OF ELECTION 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, the election must be accurate, in the sense that it is secure from tampering; is not subject to technical breakdown or error; and encourages all interested eligible voters to participate in the

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8. This may be due to the fact that two of the agencies that have adopted IETV are using it to replace their primary reliance on mail-ballot elections. *See generally* discussion *infra* Part IV.A–B (discussing the adoption of IETV by NMB and FLRA as a way of replacing or substituting for mail-ballot elections). To this point, we have found no indication that the choice to utilize IETV was motivated by concerns related to potential intimidation or coercion in the context of other electoral formats.

9. *See* Herbert, *supra* note 1, at 18 (advocating for the use of Internet and other off-site election formats because it helps limit employer interference and aids in ensuring employee free choice); Sachs, *supra* note 1, at 721 (discussing how NMB's telephone and electronic voting maintains its "commitment to secrecy"); Slinn, *supra* note 1, at 443 (supporting the use of electronic and Internet voting to help protect voter confidentiality).

election.<sup>10</sup> Ideally, an election would be a census of eligible voters in the proposed bargaining unit.<sup>11</sup>

One management counsel, with two decades of experience in NLRB and public sector representation elections, stated that IETV would reduce the potential for an individual employee voting multiple times, citing as an example a hotly contested NLRB multi-site election, which was set aside based upon evidence of potential voter fraud, and the inadequacies of the voter identification procedures utilized by NLRB representatives.<sup>12</sup> The attorney also indicated that IETV would be beneficial by retarding what the attorney described as an increasing rate of spoiled ballots caused by voters signing ballots or writing 'no' in the 'yes' box.<sup>13</sup> During our interview, this management attorney described an increase in the number of employees who report, following a ballot count, that they did not understand the voting instructions.<sup>14</sup> The attorney concluded that this problem is due to voters having insufficient literacy in English and the other languages utilized in written labor board election materials, but acknowledged that IETV may alleviate the language barrier through electronic bilingual instructions.<sup>15</sup> Another perceived problem cited by the attorney is a fear of voting, particularly among immigrant private sector service employees, out of concern of reprisal by the government.<sup>16</sup> This problem was attributed to the fact that many employees have not previously voted in political or other forms of elections and, therefore, may be unfamiliar with the process or its mechanics.<sup>17</sup> In addition, some immigrant workers come from countries of origin that do not conduct free and fair elections, and where violence, intimidation, and retribution are common in such elections. Furthermore, immigrant workers are reluctant to participate in labor board elections out of fear that voting will adversely impact their immigration status despite the confidential nature of such participation and the fact that NLRB and other labor relations agencies

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10. 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 are 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.

11. An earlier suggestion for a labor relations board-administered census of the unit to determine representation questions is set forth in Slinn, *supra* note 1, at 445.

12. Telephone Interview with Management Counsel 2, *supra* note 6.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. Telephone Interview with Management Counsel 2, *supra* note 6.

will not report them to other government agencies.<sup>18</sup> Such fears are probably applicable to all types of election formats, but are arguably more acute in on-site elections when government representatives are physically present in the workplace.

While explanations of the voting mechanics have frequently been a part of pre-election communications by employers and unions with employees, this management attorney reports that, as a result of language and cultural difficulties, employers and their lawyers have had to take on a new role in representation elections: “We have to educate [employees] on how to vote period and help them understand it, [and to understand] you don’t need to be afraid to vote. This is something that has fallen on employers to do.”<sup>19</sup> The literature demonstrates that over the past few decades, unions have also been implementing proactive measures to respond to the increasing linguistic, ethnic, and cultural heterogeneity of the workforce.<sup>20</sup> In NLRB representation elections, however, there is no requirement that notices or ballots be printed in multiple languages.<sup>21</sup> NLRB will translate notice of elections and ballots in other languages and/or provide on-site translators only when a party has demonstrated a sufficient need for multilingual accommodations.<sup>22</sup>

These linguistic, cultural, and political issues underscore one of the strongest rationales for using elections to determine representation: the symbolic value and understanding of voting arising from employees’ familiarity with democratic elections.<sup>23</sup> Such concerns span all voting formats

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18. *Id.* We note, however, that an employee’s fears over the disclosure of her or his immigration status are not unfounded. An employee’s immigration status may become relevant during a labor board administrative hearing and may adversely impact the remedy imposed on an employer for engaging in an unfair labor practice. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 151–52 (2002).

19. Telephone Interview with Management Counsel 2, *supra* note 6.

20. See David L. Gregory, *Union Leadership and Workers’ Voices: Meeting the Needs of Linguistically Heterogeneous Union Members*, 58 U. CIN. L. REV. 115, 149–62 (1989).

21. See *NLRB v. Precise Castings, Inc.*, 915 F.2d 1160, 1164 (7th Cir. 1990); *Superior Truss & Panel, Inc.*, 334 N.L.R.B. 916, 919 (2001); *Norwestern Prods., Inc.*, 226 N.L.R.B. 653, 654 (1976). But see *Marriott In-Flite Servs. Div. of Marriott Corp. v. NLRB*, 417 F.2d 563, 567–68 (5th Cir. 1969) (“An election in which one-third of the electorate has no access to ballots in language that it can understand necessarily falls below the minimum laboratory standards of fairness.”).

22. NLRB, CASEHANDLING MANUAL: REPRESENTATION PROCEEDINGS § 11315.1–2 (2007) [hereinafter NLRB CASEHANDLING MANUAL].

23. PAUL WEILER, RECONCILABLE DIFFERENCES: NEW DIRECTIONS IN CANADIAN LABOUR LAW 38 (1980). Differences in language and cultural backgrounds among workers are also strong reasons for administratively regulated card check certification procedures rather than the generally unregulated voluntary recognition system. See William A. Herbert, *Card Check Labor Certification: Lessons from New York*, 74 ALB. L. REV. 93, 96 n.6 (2010/2011); see also *Lamons Gasket Co.*, 357 N.L.R.B. No. 72 (Aug. 26, 2011) (overruling *Dana Corp.*, 351 N.L.R.B. 434

and are destined to be an increasing problem as the United States and Canadian workforces continue to become more diverse,<sup>24</sup> and with growing proportions of workers coming from countries of origin without well-functioning democratic elections. These issues also highlight the importance of examining whether a particular representation election format encourages or discourages voter participation. Each of these aspects of representativeness may be influenced by the practical realities and the burdens of administering an election, including costs, which fall upon labor relations agencies and the parties.

## II. THE TRADITIONAL REPRESENTATION ELECTION FORMAT LANDSCAPE

With the notable exceptions of NMB, FLRA, and CIRB, two representation election formats are currently in use by labor relations agencies in the United States and Canada: traditional on-site or off-site elections (also called “manual elections”) and mail-ballot elections.<sup>25</sup>

### A. *On-Site Elections*

Traditional on-site balloting involves an election held at the employer’s worksite or another appropriate location.<sup>26</sup> The labor relations agency seeks to obtain the consent of the parties with respect to the date, location, and voting procedure of the election.<sup>27</sup> If the parties are unable to agree, the agency will determine these issues.<sup>28</sup> In contrast to political elections, most labor relations agencies do not conduct manual representation elections at neutral public offices or schools. According to NLRB procedures, “[t]he 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.”<sup>29</sup> If the labor relations agency considers it necessary,

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(2007), which had modified NLRB’s voluntary recognition bar to permit decertification petitions during the first 45 days after recognition).

24. See Gregory, *supra* note 20, at 150 (recognizing that unions have had an increase in non-English speaking members).

25. In certain circumstances, labor relations agencies will conduct a representation election utilizing a mix of on-site and mail-balloting. See FED. LABOR RELATIONS AUTH., REPRESENTATION PROCEEDINGS CASE HANDLING MANUAL, §§ 28.19, 43.7 (2000) [hereinafter FLRA MANUAL]; NAT’L MEDIATION BD., REPRESENTATION MANUAL § 14 (2009) [hereinafter NMB MANUAL], available at <http://www.nmb.gov/representation/representation-manual.pdf> (delineating NMB’s mail-ballot election procedures only); NLRB CASEHANDLING MANUAL, *supra* note 22, § 11335.1.

26. NLRB CASEHANDLING MANUAL, *supra* note 22, § 11302.2.

27. *Id.* § 11302.

28. *Id.*

29. *Id.* § 11302.2.

balloting may be held at multiple work locations and at multiple times and days.<sup>30</sup>

The use of an employer's premises, however, for conducting a manual election has not been uniformly accepted. As originally enacted in 1937, New York's private sector collective bargaining law, the New York State Labor Relations Act,<sup>31</sup> prohibited the conduct of an election "on the employer's property, during working hours, or with his participation, assistance or supervision."<sup>32</sup> Section 705(4) of the New York State Employment Relations Act<sup>33</sup> retains a clear ambivalence toward utilizing the employer's premises as the location for a manual election by mandating "that no such election shall be conducted under the employer's supervision, or, except as may be required by the board, on the employer's property, during working hours, or with his participation or assistance."<sup>34</sup> Consistent with this law, manual elections have been conducted at various off-site locations, including: the labor relations agency's office,<sup>35</sup> a social hall near the employer's premises,<sup>36</sup> at a location across the street from the entrance to the workplace,<sup>37</sup> and at a storefront used for meetings by union members.<sup>38</sup>

Prior to a scheduled manual election, the employer is required to post at the worksite a hard-copy official notice prepared and issued by the labor relations agency informing employees of the election.<sup>39</sup> On the day of the election, balloting is supervised by an assigned representative or representatives of the labor relations agency.<sup>40</sup> The employer and the union are permitted to have observers present during the voting.<sup>41</sup> Employees file into the room where the election is being conducted to submit paper ballots into a secure ballot box.<sup>42</sup> Prior to voting, employees are checked against the board's

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30. *Id.* §§ 11302.1, .2(a).

31. New York State Labor Relations Act, ch. 443, 1937 N.Y. Laws 1056 (codified as amended at N.Y. LABOR LAW §§ 700–18 (McKinney 2002)).

32. 1937 N.Y. Laws 1062; KURT L. HANSLOWE, PROCEDURES AND POLICIES OF THE NEW YORK STATE LABOR RELATIONS BOARD 102 (1964).

33. In 1991, the name of New York's private sector collective bargaining law was changed from the New York State Labor Relations Act to the New York State Employment Relations Act. Act of June 12, 1991, ch. 166, 1991 N.Y. Laws 2659.

34. N.Y. LAB. LAW § 705(4) (McKinney 2002).

35. *See* Bijoux Watch Case Co., 13 N.Y.S.L.R.B. 76, 76 (1950).

36. *See* N.Y. Infirmary, 27 N.Y.S.L.R.B. 557, 567–68 (1964).

37. *See* Menorah Home & Hosp. for Aged & Infirm, Inc., 32 N.Y.S.L.R.B. 76, 78 (1969).

38. *See* Key Taxi Co., 9 N.Y.S.L.R.B. 259, 261 (1946).

39. *See, e.g., Information Circular No. 7: Applications for Certification*, CAN. INDUS. REL. BD. (2005), [http://www.cirb-ccri.gc.ca/publications/info/07\\_eng.asp](http://www.cirb-ccri.gc.ca/publications/info/07_eng.asp) [hereinafter *Information Circular No. 7*].

40. *See, e.g.,* NLRB CASEHANDLING MANUAL, *supra* note 22, § 11308.

41. *See, e.g., id.* § 11310.

42. *See, e.g., id.* § 11322.

voters list, and, if necessary, contested ballots are segregated for later determination of voter eligibility.<sup>43</sup> At the end of polling, agency staff will remove the ballot box and manually tally the votes.<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup> As noted, one of the management attorneys who was interviewed reports an increase in ballot spoliation resulting from inadequate administrative staffing at election sites, complicated voting instructions, and a growing language barrier resulting from the ethnic diversification of the workforce.<sup>47</sup>

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 William 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.<sup>48</sup> This proverbial home-court advantage, stemming from elections being scheduled at the workplace controlled by one of the active participants in the campaign, is compounded by the unequal legal rights of the employer and employees to distribute information about the election on employer property, along with the general lack of access to the employer’s premises and surrounding private property by non-employee union representatives, both

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43. *See, e.g., id.* §§ 11322.1, 11338.3.

44. *See, e.g.,* NLRB CASEHANDLING MANUAL, *supra* note 22, § 11340.5–.6 (setting forth the formal and informal procedures for counting the ballots). For various agencies’ procedures see, for example, Canada Labour Code, R.S.C. 1985, c. L-2, §§ 29–31; Canada Industrial Relations Board Regulations, SOR/2001-520, § 32 (Can.); *Information Circular No. 7*, *supra* note 39; and FLRA MANUAL *supra* note 25, at § 28.20, and for the British Columbia Labour Relations Board (“BCLRB”) see Labour Relations Regulations, B.C. Reg. 7/93, Part 3 (Can.).

45. *See supra* notes 39–44 and accompanying text.

46. Telephone Interview with DuBester, *supra* note 6; *see, e.g.,* NLRB, QUALITY COMMITTEE’S COMPREHENSIVE REPORT ON QUALITY CASEHANDLING, 30–31 (2009) (reporting examples of errors in on-site and mail-ballot elections).

47. Telephone Interview with Management Counsel 2, *supra* note 6.

48. San Diego Gas & Elec., 325 N.L.R.B. 1143, 1148 (Chairman Gould concurring) (citing his decades of experience as a practitioner and academician along with reported admissions made to him by employer advocates).

before and after the scheduling of the election.<sup>49</sup> The benefits of this employer advantage can be substantially enhanced by the strategic timing of the on-site election. For self-evident reasons, a management lawyer recommends that an employer insist on the election being conducted on payday.<sup>50</sup> 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.<sup>51</sup>

Interestingly, and contrary to what commentators have generally contended, a union organizer identified manual elections as the best means for maximizing employee privacy and security in voting, and described mail-ballot and then IETV elections as the weakest in that regard.<sup>52</sup> He expressed concerns that non-manual voting can be compromised in various ways including misappropriation of the voter identifier code and influence from others present when the employee votes.<sup>53</sup> 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 may eliminate employer surveillance and implicit coercion during the casting of ballots.<sup>54</sup>

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

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49. See *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 538 (1992) (“So long as nonemployee union organizers have reasonable access to employees outside an employer’s property, the requisite accommodation has taken place. It is *only* where such access is infeasible that it becomes necessary and proper to take the accommodation inquiry to a second level, balancing the employees’ and employers’ rights as described in the *Hudgens* [*v. NLRB*, 424 U.S. 507, 522 (1976)] dictum.”); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956) (indicating that an employer’s real property interests generally outweigh any arguable statutory right to non-employee union access to the premises); see also *Guard Publ’g Co.*, 351 N.L.R.B. 1110, 1116 (2007), *enforced in part, rev’d in part*, 571 F.3d 53 (D.C. Cir. 2009) (finding that an employer’s personal property interests generally outweigh any arguable statutory right for union access to employer’s e-mail system); William A. Herbert, *The Electronic Workplace: To Live Outside the Law You Must Be Honest*, 12 EMP. RTS. & EMP. POL’Y J. 49, 73 (2008) (discussing the unequal access to electronic communication after the NLRB’s decision in *Guard Publishing Co.*).

50. ALFRED T. DEMARIA, *HOW MANAGEMENT WINS UNION ORGANIZING CAMPAIGNS* 49 (Robert Freiberg ed., 1980).

51. *Id.*

52. Telephone Interview with Gordon, *supra* note 6. For more information regarding privacy and security issues, see, for example, R. MICHAEL ALVAREZ & THAD E. HALL, POINT, CLICK, AND VOTE: THE FUTURE OF INTERNET VOTING 76–101 (2004); Ben Fairweather & Simon Rogerson, *Internet Voting — Well at Least It’s Modern*, 39 REPRESENTATION 182 (2003); Mieke Loncke & Jos Dumortier, *Online Voting: A Legal Perspective*, 18 INT’L REV. L. COMPUTERS & TECH. 59, 62–67 (2004).

53. Telephone Interview with Gordon, *supra* note 6.

54. *Id.*

a large geographic area, the conduct of a manual election will result in travel and lodging expenses along with the inherent cost in staff time.<sup>55</sup> Such elections may require a number of agency employees to travel long distances, and attend multiple sites to set up, administer the vote, and collect ballot boxes.<sup>56</sup>

One benefit of manual elections that 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 in the course of administering the election. A labor board official indicated to us that, in his experience, the presence of board agents to supervise a manual election is a valuable and important opportunity for the labor board to interact with employers and workers in the workplace.<sup>57</sup> Some labor boards, such as CIRB, conduct extensive pre-vote meetings and administrative dealings with the parties.<sup>58</sup> CIRB regards this, rather than agency-staff presence at on-site elections, as the primary means and opportunity for building relationships with the parties.<sup>59</sup> However, CIRB is distinct from many other labor relations agencies in that it holds relatively few elections and, therefore, can undertake more extensive pre-election interactions with the parties.<sup>60</sup> Although this CIRB practice may help foster relations between the agency and parties, employees are not directly involved, so the practice does not promote a relationship between the agency and employees in the same way that an agency's presence may have at a manual election. In contrast, the physical worksite presence of NLRB representatives is limited to the date of an on-site election or during the public reading of the agency's remedial notice in certain unfair labor practice cases.<sup>61</sup>

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55. Telephone Interview with CIRB Representative, *supra* note 6.

56. Telephone Interview with DuBester, *supra* note 6; Telephone Interview with CIRB Representative, *supra* note 6. The significance of such costs is more acute for smaller agencies, such as FLRA. Unlike NLRB, which has fifty-two regional offices, FLRA has seven regional offices nation-wide. See *Office of the General Counsel Regional Offices*, FED. LAB. REL. AUTH., <http://www.flra.gov/ogc-regional-offices> (last visited Aug. 17, 2011); *Regional Offices*, NLRB, <http://www.nlr.gov/who-we-are/regional-offices> (last visited Aug. 17, 2011). Therefore, an election is usually not located near a FLRA office, imposing substantial travel costs on the agency to hold on-site elections, particularly as multiple agency employees may be required to supervise the election. Telephone Interview with DuBester, *supra* note 6; cf. NLRB, ANNUAL REPORT OF THE NLRB FOR THE FISCAL YEAR ENDED SEPTEMBER 30, 2009, at 21 (2009) (NLRB only spends 10% of its budget on, among other things, travel expenses and interpreter services for non-English speaking voters.).

57. Telephone Interview with DuBester, *supra* note 6.

58. Telephone Interview with CIRB Representative, *supra* note 6.

59. *Id.*

60. *Id.*

61. See *J. P. Stevens & Co. v. NLRB*, 417 F.2d 533, 535 n.4 (5th Cir. 1969); *Excel Case Ready*, 334 N.L.R.B. 4, 6 (2001); *U.S. Serv. Indus., Inc.*, 319 N.L.R.B. 231, 232 (1995),

A management lawyer identified a second benefit of on-site elections that we had not anticipated: a board representative present at the time of the vote can explain the process to voters and help those who are having difficulty with the mechanics of balloting.<sup>62</sup> As noted earlier, this lawyer provided an anecdotal perception that the phenomenon of voter balloting problems is becoming more common.<sup>63</sup>

Board presence and interaction with employees can take place when manual elections are conducted at off-site locations as well, such as IETV kiosk voting situated at or near the employer's premises.<sup>64</sup> As noted previously, manual elections under New York's private sector collective bargaining law have been conducted off-site for decades.<sup>65</sup> By making a relatively minor location adjustment of moving the voting off-site the perceived employer advantage associated with on-site workplace elections will be diminished. At the same time, off-site manual voting helps to maintain the same level of voter participation, and enables continued direct board supervision including providing assistance to voters who are having difficulty with the mechanics of the voting process. A management lawyer interviewed expressed a preference for IETV kiosk voting over any other election format because it combines the benefits of IETV with those of on-site elections, while avoiding the key weaknesses of each.<sup>66</sup> The attorney reasoned that IETV reduces the possibility of spoiled ballots, avoids the possibility of multiple voting even in complex elections, and allows board representatives to be available to assist employees who were having difficulty, which enables the employees to vote according to their intention and not accidentally spoil their ballots.<sup>67</sup>

### B. Mail-Ballot Elections

In mail-ballot elections, the agency obtains from the employer the names and addresses of employees on a voter's list or on a set of mailing labels, and mails a ballot package to each eligible voter.<sup>68</sup> Though the contents differ

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*enforced*, 107 F.3d 923 (D.C. Cir. 1997); *Tex. Super Foods, Inc.*, 303 N.L.R.B. 209, 220 (1991); NLRB CASEHANDLING MANUAL, *supra* note 22, § 11308.

62. Telephone Interview with Management Counsel 2, *supra* note 6.

63. *Supra* notes 12–19 and accompanying text.

64. 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 rental and maintenance of such vehicles would result in increased administrative costs for conducting representation elections.

65. *See supra* notes 34–38 and accompanying text.

66. Telephone Interview with Management Counsel 2, *supra* note 6.

67. *Id.*

68. *See, e.g.*, NLRB CASEHANDLING MANUAL, *supra* note 22, §§ 11336.2(a)–(c). For mail-ballot procedures for various boards see, for example, *id.* §§ 11301.2, 11335, 11336 (NLRB

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.<sup>69</sup> 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 eight weeks—and generally at agencies’ discretion.<sup>70</sup> 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.<sup>71</sup> Once the ballots are returned, as with manual elections, agency staff prepare and count ballots by hand, generally in the presence of union and management observers.<sup>72</sup>

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.<sup>73</sup>

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procedures); B.C. Reg. 7/93, § 19 (Can.) (BCLRB procedures); Can. Post Corp., (1990), 82 di 178, 180 (Can. L.R.B.) (stating the requirements for a mail-ballot election); *Information Circular No. 7*, *supra* note 39 (CIRB procedures); *see also* Telephone Interview with CIRB Information Officer, *supra* note 6.

69. *See, e.g.*, B.C. Reg. 7/93, § 19 (Can.); Hudson River Park Trust, 43 N.Y.P.E.R.B. ¶ 3040, 3151–52 (2010); Can. Post Corp., (1990), 82 di 178, 180 (Can. L.R.B.); FLRA MANUAL *supra* note 25, § 28.23.4; NLRB CASEHANDLING MANUAL, *supra* note 22, § 11336.2(c); NMB MANUAL, *supra* note 25, § 14.202; Telephone Interview with CIRB Information Officer, *supra* note 6. New York PERB also requires the voter to sign the interior envelope containing the ballot being returned to ensure reliability. *See, e.g.*, Cnty. of Washington, 42 N.Y.P.E.R.B. ¶ 3021, 3075–76 (2009).

70. NLRB indicates that generally two weeks is appropriate. *See* NLRB CASEHANDLING MANUAL, *supra* note 22, § 11336.2(d). FLRA generally allows three to four weeks for mail-ballot elections. *See* FLRA MANUAL *supra* note 25, § 28.23(a). The BCLRB has no specified length of time for mail votes and has ordered a variety of election return limits. *See, e.g.*, Lally Bros. Holdings Ltd., B.C.L.R.B. No. B338/2005 ¶ 3 (Can.) (allowing one month for mail votes); B.C. Corps of Commissionaires, B.C.L.R.B. No. B309/2003 ¶¶ 2, 12 (Can.) (allowing 14 and 21 days for mail voting). NMB mails the ballot package to eligible voters not less than 21 days before the ballots are to be counted. NMB MANUAL, *supra* note 25, § 14.202. Mail-ballot elections under CIRB generally require six to eight weeks to complete. Telephone Interview with CIRB Representative, *supra* note 6. In *Hudson River Park Trust*, the stipulated mail-ballot election schedule in a PERB supervised election provided for the ballots to be mailed to eligible voters on March 23, 2010 and for the return ballots to be received at PERB’s post office box by April 15, 2010 at 9:30 a.m. 43 N.Y.P.E.R.B. ¶ 3040, 3151 (2010).

71. *See, e.g.*, NMB MANUAL, *supra* note 25, § 14.205 (allowing employees to request a duplicate ballot up to seven days before the end of the voting period).

72. *See, e.g., id.* §§ 14.303, 15.0 (instructing officials to count the ballots in the presence of the observers as the NMB Investigator makes sure that no one interferes with the count).

73. Lengthy elections are contrary to the spirit and rationale of the statutory “quick votes” prevailing in Canada. *See, e.g.*, Pan Fish Can. Ltd., B.C.L.R.B. No. B20/2005, ¶ 6 (Can.) (“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

Nevertheless, diminution of agency staffing levels over the decades has resulted in mail-ballot elections being a more common feature in some jurisdictions.<sup>74</sup> At all times, though, the agency retains discretion over whether to conduct a mail-ballot election, with geography and work schedules the two most prominent criteria.<sup>75</sup> 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.<sup>76</sup> 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.<sup>77</sup> In some complex elections, however, this format can potentially require fewer agency and union resources than on-site elections.<sup>78</sup>

In sufficiently large elections, which are otherwise appropriate for using IETV, there can be significant cost-savings for the labor relations agency, especially if the election would otherwise be conducted by mail ballot. A typical CIRB mail-ballot election results in the agency expending approximately \$5.00 per vote.<sup>79</sup> The comparative cost per vote to CIRB was

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Board on an expedited basis. Typically the Board only orders a mail ballot vote where the employees at issue are located at various and separate geographical locations.”).

74. See, e.g., *San Diego Gas & Elec.*, 325 N.L.R.B. 1143, 1147 (1998) (Chairman Gould concurring) (finding the mail-ballot format appropriate “in all situations where the prevailing conditions are such that they are necessary to conserve Agency resources and/or enfranchise employees”); *Paul Zahn Music, Ltd.*, 49 N.Y.S.E.R.B. 136 (Dec. 9, 1993) (modifying the format for a private sector representation election from an on-site format to a mail-ballot format “as the most efficient use of our resources in this matter.”).

75. For agency policies regarding holding mail-ballot elections, see Canada Labour Code, R.S.C. 1985, c. L-2, §§ 29–31 (ordering that the Board has the right to determine the method of conducting elections as well as counting and collecting ballots); Canada Industrial Relations Board Regulations, SOR/2001-520, § 32 (Can.) (a Board officer will conduct the vote and give directions as to the proper conduct of holding the vote); NLRB CASEHANDLING MANUAL, *supra* note 22, § 11301.2; *Information Circular No. 7*, *supra* note 39. For an approach representative of Canadian labor boards, see *Pan Fish Can. Ltd.*, B.C.L.R.B. No. B20/2005, ¶¶ 3, 6 (Can.).

76. See NLRB CASEHANDLING MANUAL, *supra* note 22, § 11301.2; see also *Aldergrove Neighbourhood Servs. Soc’y*, B.C.L.R.B. No. B456/2001, ¶ 17 (Can.) (“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.’” (quoting *Finning Ltd.*, B.C.L.R.B. No. B75/93 (Can.))); *Can. Post Corp.*, (1990), 82 di 178, 186–88 (Can. L.R.B.) (stressing that the voting method chosen should result in the most number of employees being able to vote, which sometimes can only be achieved through mail-ballot voting).

77. See *supra* notes 68–72 and accompanying text.

78. Telephone Interview with DuBester, *supra* note 6.

79. Telephone Interview with CIRB Representative, *supra* note 6.

much lower in the two IETV elections it has conducted. In one election, involving a unit of 896 employees, the cost to the agency was \$3.29 per vote.<sup>80</sup> In the other IETV election, involving a smaller unit of 677 eligible voters, but requiring the extra cost of bilingual electronic messages and ballot packages, the cost was \$5.26 per vote.<sup>81</sup>

Decisions from NLRB reveal a clear lack of unanimity over the desirability of the mail-ballot format as a substitute for on-site elections and express concern that cost-savings should not be the determining factor in favor of utilizing the mail-ballot format. In *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 twenty employees working at eight different locations eighty miles apart.<sup>82</sup> While the Board reiterated 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.<sup>83</sup> 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.<sup>84</sup> In dissent, Members Hurtgen and Brame expressed strong support for the continued use of on-site elections over the mail-ballot alternative.<sup>85</sup> 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 diminished participation.<sup>86</sup> In support of the latter concern, the dissent cited a 1994 NLRB General Counsel Memorandum indicating that overall, about 20% fewer eligible voters had participated in mail-ballot elections (68.14%) than in on-site elections (87.9%).<sup>87</sup>

Following the decision in *San Diego Gas and Electric*, § 11301.2 of the NLRB's Casehandling Manual was amended to reaffirm the Board's

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80. *Id.*

81. *Id.* We note that these example costs do not include the cost of staff time to prepare the mail-ballot packages, and sort and count the ballots after they are returned.

82. *San Diego Gas & Elec.*, 325 N.L.R.B. 1143, 1145 (1998).

83. *Id.* at 1145.

84. *Id.* at 1146-47.

85. *Id.* at 1149-50.

86. *Id.* at 1150-51 (Members Hurtgen & Brame dissenting).

87. *San Diego Gas & Elec.*, 325 N.L.R.B. at 1151 & n.4 (Members Hurtgen & Brame dissenting); see also *Shepard Convention Servs., Inc. v. NLRB*, 85 F.3d 671, 675 (D.C. Cir. 1996) (overturning a Board decision ordering the holding of a mail-ballot election); *London's Farm Dairy, Inc.*, 323 N.L.R.B. 1057, 1058 (1997) (citing the NMB experience of conducting mail-ballot elections where reports of improprieties are rare).

preference for manual elections, to set forth the factors to be considered in determining whether the mail-ballot format was appropriate in a given case, and to specify that:

[a]s 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.<sup>88</sup>

In contrast, other agencies, such as NMB and FLRA, have historically conducted mail-ballot elections, reflecting the particular characteristics of the industries, worksites, and bargaining units under their respective jurisdictions. 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.<sup>89</sup> FLRA, which is the labor relations agency responsible for most United States federal government employees, often holds elections for nation-wide units.<sup>90</sup> On-site elections are extremely difficult and costly to supervise because they 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.<sup>91</sup> Therefore, mail-ballot elections became the norm for both agencies.<sup>92</sup>

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.<sup>93</sup>

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88. NLRB CASEHANDLING MANUAL, *supra* note 22, § 11301.2.

89. See PAUL, HASTINGS, JANOFSKY & WALKER LLP, AN INTRODUCTION TO THE RAILWAY LABOR ACT 28 (2004), available at <http://apps.americanbar.org/labor/annualconference/2007/materials/data/papers/v2/012.pdf>; *supra* note 5.

90. See *supra* note 5; see, e.g., Press Release, Fed. Labor Relations Auth., FLRA Office of General Counsel Announces Results of TSA Election (Apr. 20, 2011), available at [http://www.flra.gov/webfm\\_send/461](http://www.flra.gov/webfm_send/461).

91. FLRA MANUAL, *supra* note 25, §§ 28.20–.21.1 (outlining the manual ballot procedures and providing for multiple voting locations and times).

92. Telephone Interview with DuBester, *supra* note 6.

93. *Id.* Such concerns underpin the NLRB's *Peerless Plywood* rule that prohibits captive audience speeches twenty-four hours prior to the scheduled election. *Peerless Plywood Co.*, 107 N.L.R.B. 427, 429 (1953). Because last-minute election campaign speeches to groups of workers on the 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." *Id.* at 429–30. Similarly, one factor BCLRB considers in distinguishing between lawful and unlawful captive audience meetings is whether or not workers have an opportunity to reflect and make inquiries

While it may be the case that mail-balloting fosters reliability by offering voters the potential for greater periods of reflection, 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—ballots are received and returned through the postal system—means that, unlike manual 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 actually filled out the ballot, and that it was done without pressure or interference.<sup>94</sup> A management-side lawyer indicated that employers have great concerns about improper union influence over and interference with NMB mail-ballot elections in some instances.<sup>95</sup>

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 non-IETV ballots, other difficulties can arise. Employees may not receive the ballot packages, ballots returned by mail may not be received by the board, or receipt of the ballot may be delayed and received after the due date. Difficulties related to mail delivery of ballot packages and returned ballots are especially problematic in the conduct of large elections.<sup>96</sup> Also, agencies rely on employers to provide contact information and voter lists,<sup>97</sup> creating the possibility that incorrect or incomplete information will be inadvertently supplied to the agency.

One management lawyer interviewed described mail-ballot elections as the worst format because of the uncertainties about who actually voted and mailed in the ballot, along with the potential for ballot spoliation and a lower participation rate by employees inexperienced in voting or who lack sufficient literacy skills.<sup>98</sup>

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between the meeting and the election. *Simpe 'Q' Care Inc.*, B.C.L.R.B. No. B161/2007 ¶¶ 72–73, 78–79 (Can.).

94. Employers and unions are not permitted to collect the ballots from workers to submit them to the board. *See* NMB MANUAL, *supra* note 25, §§ 14.202, 14.303–.305. Voters must individually mail ballots back to NMB. *See id.*; Telephone Interview with Management Counsel 1, *supra* note 6.

95. Telephone Interview with Management Counsel 1, *supra* note 6.

96. Telephone Interview with DuBester, *supra* note 6; *see also* Hudson River Park Trust, 43 N.Y.P.E.R.B. ¶ 3040, 3153 (2010) (“Among the inherent aspects of a mail-ballot election is the potential for eligible voters to fail to follow our instructions along with the potential for delayed delivery or the loss of ballots by the United States Postal Service.”).

97. *See, e.g.*, NLRB CASEHANDLING MANUAL, *supra* note 22, § 11336.2(a).

98. Telephone Interview with Management Counsel 2, *supra* note 6.

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.<sup>99</sup> Care must be taken in interpreting these statistics, and, as discussed in the final part of this article, more investigation of this phenomenon is needed when contemplating IETV elections; nevertheless, it is an important issue to be explored.

The limited, but consistent, evidence of relatively lower voter participation rates in mail-ballot as compared to on-site elections spans more than one labor board. In 1972, during hotly contested decertification elections involving two state-wide units of New York State 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 the holding of elections.<sup>100</sup> 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.<sup>101</sup> New York 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.<sup>102</sup> In its decision, PERB expressed an intention 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.”<sup>103</sup>

In 1973, PERB’s Office of Research issued a report analyzing the level of voter participation in both elections on the basis of agency and geography.<sup>104</sup> The report found that in PST, 63.9% of eligible voters participated in the mail-ballot election.<sup>105</sup> In ISU, 54.5% of eligible ballots were cast on-site as compared with 40.5% through mail-ballots.<sup>106</sup> However, these statistical variations were due, in part, to factors such as geographic location.<sup>107</sup> Since this 1973 report, PERB has continued to conduct mail-ballot or on-site

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99. See, e.g., *Voter Participation In Mail Versus On-Site Elections: Report on New York State Employee Elections December 1972*, PERB NEWS (N.Y. State Pub. Employment Relations Bd., Albany, N.Y.), July–Aug. 1973, at 3, 4.

100. State of New York, 5 N.Y.P.E.R.B. ¶ 3056, 3097–98 (1972).

101. *Id.*

102. *Id.* at 3099; *Voter Participation In Mail Versus On-Site Elections*, *supra* note 99, at 2.

103. *State of New York*, 5 N.Y.P.E.R.B. at 3099.

104. See *Voter Participation In Mail Versus On-Site Elections*, *supra* note 99, at 2–3.

105. *Id.* at 3.

106. *Id.*

107. See *id.*

representation elections, depending on the unit's size and other considerations, finding each format to be effective and reliable.<sup>108</sup>

Recent statistics from NLRB and CIRB 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 NLRB's 4305 representation elections were conducted by mail-ballot or mixed on-site/mail-ballot.<sup>109</sup> The overall voter participation rate in all representation elections over this period was 80% (224,247 of 280,295 eligible voters cast ballots).<sup>110</sup> The participation rate in on-site elections was 81.57%, but only approximately 65% in mail or mixed on-site/mail elections.<sup>111</sup> In the 2008–09 and 2009–10 fiscal years, CIRB reports an 82% participation rate for on-site elections compared to a 65% rate for mail-ballot elections.<sup>112</sup>

### III. 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 be 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.<sup>113</sup> To meet those concerns, there must be 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 effect 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

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108. Hudson River Park Trust, 43 N.Y.P.E.R.B. ¶ 3040, 3152–53 (2010).

109. FED. LABOR RELATIONS AUTH., OFFICE OF THE GEN. COUNSEL, MEMORANDUM GC 08-05, REPORT ON THE MIDWINTER MEETING OF THE ABA PRACTICE AND PROCEDURE COMMITTEE OF THE LABOR AND EMPLOYMENT LAW SECTION 8 (2008).

110. *Id.*

111. *Id.* at 8–9.

112. Telephone Interview with CIRB Representative, *supra* note 6.

113. See LALITA ACHARYA, LIBRARY OF PARLIAMENT, INTERNET VOTING 5, 8 (2003); *cf. supra* note 9 and accompanying text (discussing current IETV scholarship's focus on improving employee free choice).

impact on the outcome.<sup>114</sup> At the same time, there is hope that a move to IETV will result in greater participation by younger voters.<sup>115</sup> 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.<sup>116</sup> Moreover,

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114. Cf. Alicia Kolar Prevost & Brian F. Schaffner, *Digital Divide or Just Another Absentee Ballot?: Evaluating Internet Voting in the 2004 Michigan Democratic Primary*, 36 AM. POL. RES. 510, 513 (2008) (suggesting that the 2000 Arizona Democratic primary's use of Internet voting negatively impacted minority voting rights as "Whites and people of higher socioeconomic status are more likely to use Internet voting than their counterparts").

115. Cf. INTERNET POLICY INST., REPORT OF THE NATIONAL WORKSHOP ON INTERNET VOTING: ISSUES AND RESEARCH AGENDA 24–25 (2001) (suggesting that Internet voting in political elections results in a higher turnout in young voters).

116. See, e.g., *id.*; R. Michael Alvarez, Thad E. Hall & Alexander H. Trechsel, *Internet Voting in Comparative Perspective: The Case of Estonia*, 42 PS: POL. SCI. & POL. 497, 501 (2009) (suggesting that the Estonian e-voting system does not introduce "undemocratic bias"); Fairweather & Rogerson, *supra* note 52, at 192–93; Jill E. Fuller, *Equality in Cyberdemocracy? Gauging Gender Gaps in On-Line Civic Participation*, 85 SOC. SCI. Q. 938, 954 (2004); Rachel Gibson, *Elections Online: Assessing Internet Voting in Light of the Arizona Democratic Primary*, 116 POL. SCI. Q. 561, 567–69 (2001–02); Susan Henry, *Can Remote Internet Voting Increase Turnout?*, 55 ASLIB PROC. 193, 200–02 (2003); Martin Hilbert, *The Maturing Concept of E-Democracy: From E-Voting and Online Consultations to Democratic Value Out of Jumbled Online Chatter*, 6 J. INFO. TECH. & POL. 87, 104 (2009); Jerry Kang, *E-Racing E-Lectons*, 34 LOY. L.A. L. REV. 1155, 1157 (2001) (predicting the current digital divide to close substantially in the long term); Kate Kenski, *To I-Vote or Not to I-Vote?*, 23 SOC. SCI. COMPUTER REV. 293, 297–301 (2005); Brian S. Krueger, *Assessing the Potential of Internet Political Participation in the United States*, 30 AM. POL. RES. 476 (2002); Alan D. Smith & John S. Clark, *Revolutionising the Voting Process Through Online Strategies*, 29 ONLINE INFO. REV. 513, 521–23 (2005); Frederic I. Solop, *Digital Democracy Comes of Age: Internet Voting and the 2000 Arizona Democratic Primary Election*, 34 PS: POL. SCI. & POL. 289 (2001); Alexander H. Trechsel, *Inclusiveness of Old and New Forms of Citizens' Electoral Participation*, 43 REPRESENTATION 111, 116–17 (2007); Allison A. Stacker, Comment, *Cyber-Elections and the Minority Voter's Response*, 4 N.C. J. L. & TECH. 475, 481–85 (2003); Deborah M. Phillips & Hans A. von Spakovsky, *Gauging the Risks of Internet Elections*, COMM. ACM, Jan. 2001, at 73, 76–78 (2001).

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. 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, *supra* note 116, at 578–80. Nevertheless, overall election turnout increased by over 500%, and one pair of commentators pointed out that turnout actually increased among African-American, Hispanic, and Native American communities. Smith & Clark, *supra* note 116, at 521.

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. See Alicia Kolar Prevost & Brian F. Schaffner, *Digital Divide or Just Another Absentee Ballot?: Evaluating Internet Voting in the 2004 Michigan Democratic Primary*, 36 AM. POL. RES. 524–25 (2008). They suggest that these results are explained by foresight and advanced planning tending to be

differences in views exist about whether the digital divide and its associated problems will decrease over time as more people gain Internet access,<sup>117</sup> or whether growing Internet access alone is insufficient to bridge the divide, which also depends on access to other resources.<sup>118</sup>

A European study regarding electoral participation concluded that the participation decision, as opposed to an individual's choice in the election, is primarily affected by the levels of available information, freedom of communication, and respect for the electoral system.<sup>119</sup> At the same time, IETV in political elections has not resulted in any known increase in voter participation.<sup>120</sup> Furthermore, concerns remain over the security of IETV systems, the opportunities for breaching voter privacy, and the prospects for improper influence and coercion of voters where voting takes place outside of polling stations.<sup>121</sup>

#### IV. INTRODUCING IETV AT LABOR RELATIONS AGENCIES

At present only three labor relations agencies in the United States and Canada utilize IETV representation voting: NMB, FLRA, and CIRB. Each of these agencies apparently receives sufficient budgetary allocations to cover the inherent start-up costs associated with studying and/or implementing IETV. A fourth agency, NLRB, has announced that it is exploring the feasibility of utilizing IETV in conducting representation elections.<sup>122</sup>

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used more often by people with a higher socio-economic status, rather than the technological hurdle of the Internet. *Id.*

117. ACHARYA, *supra* note 113, at 7–8.

118. Krueger, *supra* note 116, at 479 (“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.”).

119. Francesco Sobbrío & Pietro Navarra, *Electoral Participation and Communicative Voting in Europe*, 26 EUR. J. POL. ECON. 185, 200–01 (2010).

120. See ACHARYA, *supra* note 113, at 8 (noting that “[s]ince Internet voting is in its infancy” it is not clear whether it would increase voter participation).

121. See ALVAREZ & HALL, *supra* note 52, at 76–101; Fairweather & Rogerson, *supra* note 52, at 193 (“In the case of Internet voting, many of the security issues . . . have hardly been addressed at all.”); Loncke & Dumortier, *supra* note 52, at 62–67; see also Internet Voting Comment Period, 34 N.M.B. 200, 202–08 (2007) (addressing concerns about security, links between the voter and his vote, vote verification, and access to the Internet for an Internet election).

122. Kris Maher, *Labor Board Explores Electronic Voting*, WALL ST. J. (June 15, 2010), <http://online.wsj.com/article/SB10001424052748703685404575306992906763792.html>. In addition, the American Arbitration Association (“AAA”) conducts IETV representation elections pursuant to agreements reached between an employer and a labor organization. See Votenet Solutions & Am. Arbitration Ass’n, *In the Matter of Proposed Rule: Guidelines for the Use of*

Unlike Canadian boards and NLRB, NMB and FLRA have a history of routinely conducting their elections by mail-ballot due to the size and geographic scope of the bargaining units. Beginning in 2002, NMB adopted telephonic voting, and then added Internet voting in 2007.<sup>123</sup> This combination of telephonic and Internet voting has replaced mail-balloting as NMB's standard election format.<sup>124</sup> FLRA is following in NMB's footsteps in the use of IETV.<sup>125</sup> In February 2010, FLRA completed its first telephonic and Internet election involving two unions competing to represent a unit of fourteen eligible employees of the U.S. Department of Navy, Naval Weapons Station, Seal Beach Detachment in southern California.<sup>126</sup> Since that time, FLRA has conducted nine additional IETV representation elections.<sup>127</sup> With one significant exception, the at-issue bargaining units were comprised of less than fifty eligible employees.<sup>128</sup> The largest IETV election conducted by FLRA involved a nation-wide unit of federal employees working at airports throughout the United States.<sup>129</sup> Notably, one management attorney we interviewed strongly supported the adoption of IETV for public-sector representation elections as a far more efficient alternative to mail-ballot elections.<sup>130</sup> Like FLRA, CIRB has only recently begun utilizing IETV for representation elections.<sup>131</sup>

Though current discussions of IETV center on the opportunity it may provide for encouraging greater employee privacy and freedom from the coercive influence of employers or unions,<sup>132</sup> 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

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*Electronic Voting Systems in Union Officer Elections RIN 1215-AB84 and 1245-AA04* (2011) (comment in response to Department of Labor Guidelines for the Use of Electronic Voting Systems in Union Officer Elections, 76 Fed. Reg. 1559 (request for information notice Jan. 11, 2011)), available at <http://www.regulations.gov/#!documentDetail;D=LMSO-2011-0001-0032>.

123. Telephone Electronic Voting, 29 N.M.B. 482, 482 (2002); Introduction of Internet Voting/Mock Election, 34 N.M.B. 71, 71 (2007).

124. *Introduction of Internet Voting/Mock Election*, 34 N.M.B. at 71.

125. See Julia Akins Clark, Gen. Counsel, Fed. Labor Relations Auth., Remarks at the American Bar Association Section of Labor and Employment Law 2009 Annual Luncheon (Dec. 3, 2009), available at [http://www.flra.gov/dec\\_03](http://www.flra.gov/dec_03).

126. Telephone Interview with DuBester, *supra* note 6; Press Release, Fed. Labor Relations Auth., FLRA Successfully Completes Representation Election with Internet and Telephone Voting (Feb. 23, 2010), available at [http://www.flra.gov/webfm\\_send/228](http://www.flra.gov/webfm_send/228).

127. Telephone Interview with DuBester, *supra* note 6.

128. E-mail from Ernest DuBester, Member, Fed. Labor Relations Auth. to authors (Apr. 25, 2011) (on file with authors) (providing a chart of FLRA e-voting elections).

129. See Press Release, Fed. Labor Relations Auth., *supra* note 90.

130. Telephone Interview with Management Counsel 2, *supra* note 6.

131. Telephone Interview with CIRB Representative, *supra* note 6.

132. See *supra* note 3 and accompanying text.

interest in administering more efficient, lower-cost representation elections were the main factors driving adoption of the IETV voting format.<sup>133</sup>

The importance of the relative cost of different types of voting depends upon the particular types of elections, the procedural requirements, and the characteristics of the industries, proposed units, and voters in elections that an agency must administer. These considerations partly explain why NMB was an early adopter of this technology and raise considerations for other boards contemplating adopting IETV. Large, national mail-ballot elections posed a formidable administrative burden on NMB as the mailing packages had to be prepared and mailed to voters, and the ballots had to be tallied by hand by NMB staff.<sup>134</sup> At NMB, one practical consequence of these larger elections was that all available mediation staff (approximately fifteen people at the time) and all the legal staff would spend almost a whole day counting ballots.<sup>135</sup> A further difficulty with NMB mail-ballot elections, and one that was a particular challenge in large elections, was the reliability of mail delivery.<sup>136</sup> Issues arose about employees not receiving the ballot package, or perhaps ballots were returned but not received in time to be counted.<sup>137</sup> The labor intensive and costly nature of this process prompted NMB to seek more efficient options for administering elections.<sup>138</sup>

#### A. *National Mediation Board*

In the mid-1990s, NMB began exploring the possibility of telephonic electronic voting and Internet voting, as a less costly alternative to mail-ballot elections, and consulting with technological experts and contractors as well as with the labor-management community.<sup>139</sup> However, it was not until after the anthrax contamination crisis of 2001, when unions insisted that members not handle mail from Washington D.C., including NMB ballot packages, that NMB implemented telephone voting in September 2002.<sup>140</sup> In that case, the use of telephone voting was only with the consent of the parties.<sup>141</sup>

A management attorney indicated to us that, at the time that NMB adopted telephonic electronic voting, employer advocates were concerned about the possibility of union interference and manipulation of the voting process,

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133. Telephone Interview with DuBester, *supra* note 6.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. Telephone Interview with DuBester, *supra* note 6.

139. *Id.*

140. *Id.*; Telephone Electronic Voting, 29 N.M.B. 482, 482 (2002).

141. Telephone Interview with DuBester, *supra* note 6. DuBester recalled that the conversion from mail-ballot to IETV elections resulted in an approximate 30% reduction in NMB's costs in conducting a representation election. *Id.*

similar to their concerns over the mail-ballot election format.<sup>142</sup> NMB's "majority of the unit" rule for determining representation elections at that time, which treated the failure to vote as a vote against representation, resulted in greater employer concerns about employees understanding the electoral process.<sup>143</sup>

In early 2007, when 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 for interested parties.<sup>144</sup> During the 90-day comment period, NMB received only three submissions.<sup>145</sup> The Port Authority of New York and New Jersey expressed concern that NMB's instructions were not clear that to vote "no" the employee need not cast a vote.<sup>146</sup> NMB agreed to clarify its instructions to the voters.<sup>147</sup> The International Association of Machinists and Aerospace Workers raised concerns about the security of the system, the privacy of voter identification numbers, and that the digital divide would disenfranchise voters without familiarity or access to the Internet.<sup>148</sup> Another union expressed concern about the secrecy of Internet ballots.<sup>149</sup> 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.<sup>150</sup> During our separate interviews with a management lawyer and a union lawyer who participated in the pilot project, both stated that by the end of the project they were satisfied that NMB resolved any concerns that they had about IETV.<sup>151</sup> In fact, the management attorney described NMB's adoption of Internet voting as "almost a non-event."<sup>152</sup>

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142. Interview with Management Counsel 1, *supra* note 6. An example offered was a union inviting workers to a common location to vote, which raised concerns that individual voters could be influenced in their votes—or whether to vote at all. *Id.*

143. *Id.* This management lawyer stated that in NMB mail-ballot elections, 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. *Id.*

144. Introduction of Internet Voting/Mock Election, 34 N.M.B. 71, 71–72 (2007).

145. *Id.* at 72; Internet Voting Comment Period, 34 N.M.B. 200, 200 (2007) (indicating that comments were received from the Port Authority of New York and New Jersey, the International Association of Machinists and Aerospace Workers ("IAM"), and from the Sheet Metal Workers International Association ("SMWIA")).

146. *Internet Voting Comment Period*, 34 N.M.B. at 200.

147. *Id.* at 202.

148. *Id.* at 200–01.

149. *See id.* at 207–08.

150. *Id.* at 202–04.

151. Telephone Interview with Management Counsel 1, *supra* note 6; Telephone Interview with Diamantopoulos, *supra* note 6.

152. Telephone Interview with Management Counsel 1, *supra* note 6.

As the system now operates, a third party contractor administers telephonic and Internet elections for these agencies.<sup>153</sup> 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.<sup>154</sup> Only the NMB Election Administrator is aware of voters' identification numbers and name.<sup>155</sup> Voters either call in using a touch-tone phone or Internet through the agency's website.<sup>156</sup> Votes are electronically tallied and results provided to the parties in writing.<sup>157</sup>

In May 2010, NMB published a final rule, which became effective June 10, 2010, substantially modifying its voting procedure to comport with the practices of other labor relations agencies in the United States and Canada.<sup>158</sup> Under the new rule, a majority of the valid ballots cast will determine an NMB representation election, replacing the prior rule that treated a failure to vote as a vote against representation.<sup>159</sup> In November 2010, NMB conducted a nationwide IETV election of flight attendants under the new rule, which provides important and relevant data for analyzing the impact of IETV on voter participation.<sup>160</sup> Of the 19,887 eligible voters, 18,760 valid votes were counted demonstrating a participation rate of 94.3%.<sup>161</sup> The very high participation rate in this NMB election provides some promising, but preliminary, evidence to support use of the IETV electoral format.

The flight attendants' union in that election, however, filed a motion with NMB requesting a new election based, in part, upon allegations of employer computer-based misconduct and surveillance.<sup>162</sup> Although the employer

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153. Telephone Interview with DuBester, *supra* note 6.

154. *Frequently Asked Questions: Representation*, NAT'L MEDIATION BD., OFF. OF LEGAL AFF., <http://www.nmb.gov/representation/faqs-ola.html> (last visited Sept. 3, 2011); see NMB MANUAL, *supra* note 25, §§ 13.201–203.

155. See *Frequently Asked Questions: Representation*, *supra* note 154.

156. *Id.* (“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.”).

157. See *id.*; NMB MANUAL, *supra* note 25, at § 13.306.

158. See Representation Election Procedure, 75 Fed. Reg. 26,062, 26,088–89 (May 11, 2010) (codified at 29 C.F.R. §§ 1202, 1206 (2010)).

159. *Id.*

160. See *NMB to Investigate Delta-AFA Election*, ATLANTA BUS. CHRON. (June 2, 2011, 12:31 PM), [http://www.bizjournals.com/atlanta/news/2011/06/02/nmb-to-investigate-delta-afa-election.html?surround=etf&ana=e\\_article](http://www.bizjournals.com/atlanta/news/2011/06/02/nmb-to-investigate-delta-afa-election.html?surround=etf&ana=e_article).

161. Report of Election Results, Representation of Emps. of Delta Air Lines, Inc., N.M.B. No. R-7254 (Nov. 3, 2010) (on file with the authors); see *NMB to Investigate Delta-AFA Election*, *supra* note 160.

162. Ass'n of Flight Attendants' Supplemental Motion for Board Determination of Carrier Interference at 1–3, 25, Representation of Emps. of Delta Air Lines, Inc., N.M.B. No. R-7254 (Nov. 23, 2010).

strongly opposed the union's motion,<sup>163</sup> NMB has commenced an on-site investigation concerning the union's allegations of employer interference, and the results of that investigation may touch upon important issues that have not been previously determined by a labor relations agency following an IETV election.<sup>164</sup> NMB's decision may further inform the discussion over the efficacy of electronic voting in representation elections, particularly with respect to security and privacy.

Among the union's allegations to NMB is a claim that the employer encouraged employees to vote on computers located in the employer's offices and crew lounges and within view of supervisors, thereby transforming those locations into open on-site polling places unsupervised by NMB staff.<sup>165</sup> According to the union, whenever an employee logged onto the employer's intranet, he or she was met with a pop-up regarding the election including links to an employer video and the NMB homepage with a hyperlink to the Internet voting website.<sup>166</sup> In addition, the union alleges that the employer posted campaign materials on or near these sites, and that voting statistics suggest a possible security breach.<sup>167</sup> It also asserts that by encouraging voting on employer computers, the employer was able to electronically monitor which employees voted, creating the impression of surveillance because the employer's policies place employees on notice that computer use is subject to employer monitoring.<sup>168</sup> As a remedy, the union requests that NMB conduct a re-run election by mail-ballot or, in the alternative, impose a prohibition against the use of the employer's intranet system, computers, and work areas in Internet voting.<sup>169</sup>

In response to the motion, the employer made multiple allegations of its own regarding the union's alleged misconduct during the election.<sup>170</sup> With respect to the union's allegations, the employer submitted sworn statements from its representatives denying that it monitored employee voting through its

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163. See Response of Delta Air Lines, Inc. to AFA's Supplemental Motion for Board Determination of Carrier Interference, Representation of Emps. of Delta Air Lines, Inc., N.M.B. No. R-7254 (Dec. 21, 2010) [hereinafter Response of Delta Air Lines, Inc.] (on file with the authors).

164. E-mail from Mary L. Johnson, Gen. Counsel, Nat'l Mediation Bd., to Ass'n of Flight Attendants & Delta Air Lines, Inc., Participants of NMB Case No. R-7254 (June 1, 2011), available at [http://afl.salsalabs.com/o/4042/c/573/images/6-1-11\\_Letter\\_Re\\_Investigation.PDF](http://afl.salsalabs.com/o/4042/c/573/images/6-1-11_Letter_Re_Investigation.PDF); Mike Esterl, *Labor Board Broadens Delta Probe*, WALL ST. J. (June 6, 2011, 8:01 PM), <http://online.wsj.com/article/SB10001424052702304474804576369762641111264.html>.

165. Ass'n of Flight Attendants' Supplemental Motion for Board Determination of Carrier Interference, *supra* note 162, at 4–5, 22–23.

166. *Id.* at 4–6.

167. *Id.* at 22–24, 27–28.

168. *Id.* at 25–27.

169. *Id.* at 75–77.

170. See Response of Delta Air Lines, Inc., *supra* note 163, at 9–27.

computer system and denying that it knows who voted or how they voted.<sup>171</sup> Furthermore, it asserts that the union's motion is unsupported by any evidence of a security breach or an attempt by the employer to engage in computer-based monitoring or surveillance by supervisors.<sup>172</sup> With respect to the pop-up seen by employees upon logging on to workplace computers, the employer notes that an employee has the option to close the pop-up or wait ten seconds for the pop-up to disappear.<sup>173</sup> The employer opposes the union's proposed prohibition against the use of an employer's computer system for IETV voting on the grounds that such a prohibition would decrease the available means for voting and would require an employer to further police the use of its computer equipment.<sup>174</sup>

### B. Federal Labor Relations Authority

FLRA is responsible for labor relations involving non-postal federal employees with both large and small units.<sup>175</sup> Unlike NLRB, which exercises a preference for single facility bargaining units,<sup>176</sup> and also unlike NMB, which generally certifies system-wide or national units resulting in many multi-location units,<sup>177</sup> FLRA does not prefer any particular unit size or configuration in determining appropriateness.<sup>178</sup> As a result, although the majority of bargaining units certified by FLRA cover a single worksite, there is also a substantial proportion of units with a national scope and multiple, widely dispersed worksites.

FLRA has only seven regional offices in comparison to NLRB's fifty-two regional offices, and NMB's two offices in Washington D.C. and Chicago.<sup>179</sup> Therefore, it is common that FLRA does not have an office located near the worksite. Consequently, on-site elections often entail substantial travel costs

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171. *Id.* at 30. The employer describes the union's claims as a "thinly disguised attack on the integrity and security of the NMB's procedures for telephone and Internet voting – not only in the election at issue here, but in every election that has been or will be conducted under those procedures." *Id.* at 28.

172. *Id.* at 27–30.

173. *Id.* at 30–31.

174. *Id.* at 29.

175. *See supra* note 5.

176. *See, e.g.,* WeCare Transp., LLC, 353 N.L.R.B. 65, 66 (2008).

177. Telephone Interview with DuBester, *supra* note 6.

178. FED. LABOR RELATIONS AUTH., OFFICE OF GEN. COUNSEL, REPRESENTATION CASE LAW GUIDE, § 1-1.B (2000), available at [http://www.flra.gov/webfm\\_send/27](http://www.flra.gov/webfm_send/27) [hereinafter REPRESENTATION CASE LAW GUIDE].

179. *Agency Operating Hours*, NAT'L MEDIATION BD., <http://www.nmb.gov/publicinfo/hours/operation.html> (last visited Aug. 23, 2011) (providing office hours for the D.C. and Chicago offices); *Office of the General Counsel Regional Offices*, FED. LAB. REL. AUTH., <http://www.flra.gov/ogc-regional-offices> (last visited Aug. 17, 2011); *Regional Offices*, NLRB, <http://www.nlr.gov/who-we-are/regional-offices> (last visited Aug. 17, 2011).

for the agency. For this reason, FLRA has historically relied heavily on mail-ballot elections, with about two-thirds of all representation elections conducted by mail-ballot and, until recently, the balance conducted on-site.<sup>180</sup> Based upon the fact that a reasonable proportion of representation elections involve geographically dispersed units, and the likelihood that an election location will be far from an agency office, IETV is an attractive electoral format for FLRA.

In 2009, FLRA began investigating using IETV, including consulting with the NMB on its IETV experience.<sup>181</sup> Based upon NMB's positive experience with IETV, FLRA decided to begin utilizing this election format.<sup>182</sup> By early 2010, FLRA had set up an IETV system that essentially reflects the NMB system, including using the same third-party contractor used by NMB to conduct telephonic and Internet elections.<sup>183</sup>

FLRA held its first IETV election, on the consent of the employer and two competing unions, over a two-week period in January and February 2010, involving a bargaining unit of fourteen employees in Corona, California, located approximately 500 miles from the agency's San Francisco office.<sup>184</sup> All eligible voters participated in the election, with all but one voter selecting the telephonic balloting option, and one choosing to cast a ballot through the Internet.<sup>185</sup> Votes were counted the next day, and no objections were filed during the ten-day objection period.<sup>186</sup>

FLRA regarded its first IETV election as a success, and now includes IETV as an option for conducting elections.<sup>187</sup> However, while NMB has adopted IETV as the primary election format, it is unclear whether FLRA will embrace IETV as its primary representation election format, given the particular characteristics of its bargaining units.<sup>188</sup> With one major exception, the ten IETV representation elections conducted by FLRA have involved units comprised of less than fifty employees.<sup>189</sup>

In March and April 2011, FLRA conducted its biggest IETV election, involving a bargaining unit of approximately 43,000 transportation security

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180. See Press Release, Fed. Labor Relations Auth., *supra* note 126 (noting that FLRA traditionally exclusively utilized mail-ballot or on-site polling); see also REPRESENTATION CASE LAW GUIDE, *supra* note 178, § RCL 7.B.4 (providing mail ballots as an option if employees are geographically dispersed); Telephone Interview with DuBester *supra*, note 6.

181. Press Release, Fed. Labor Relations Auth., *supra* note 126.

182. Telephone Interview with DuBester, *supra* note 6.

183. *Id.* FLRA may ultimately contract with another IETV service provider, after the procurement process is conducted. *Id.*

184. See Press Release, Fed. Labor Relations Auth., *supra* note 126.

185. Interview with DuBester, *supra* note 6.

186. Press Release, Fed. Labor Relations Auth., *supra* note 126.

187. Telephone Interview with DuBester, *supra* note 6; Press Release, Fed. Labor Relations Auth., *supra* note 126.

188. Telephone Interview with DuBester, *supra* note 6.

189. E-mail from DuBester, *supra* note 128.

officers (“TSO”) employed by the United States Transportation Security Administration (“TSA”) at airports nation-wide.<sup>190</sup> Two public-sector unions, which already represent workers in other federal departments, competed to be the representative of the unrepresented TSO unit.<sup>191</sup> On February 9, 2011, an election agreement was entered into between TSA and the two unions, which defined the appropriate unit as “[a]ll full[-time] and part-time non-supervisory personnel carrying out screening functions.”<sup>192</sup> Pursuant to the agreement, FLRA mailed ballot information packages to each voter at her or his last known address.<sup>193</sup> The ballot information package contained a notice of election by telephone and Internet, along with voting instructions, an individualized voter identification number (VIN), and a personal identification number (PIN).<sup>194</sup> The election agreement did not contain any provisions regarding the electronic distribution of the election materials by FLRA, the electronic posting of the election notice, or a prohibition against utilizing worksite computers for voting. TSA was required, under the agreement, to provide the last known mailing address for each voter.<sup>195</sup> There was no provision in the agreement for electronic campaigning by TSA or the competing unions.

The IETV voting in the TSA election commenced on March 9, 2011, the same day that the ballot information packages were mailed to eligible employees.<sup>196</sup> The voting period ended on April 19, 2011 and the vote count took place on the following day.<sup>197</sup> The ballot provided eligible voters with three choices: the selection of one of the two competing unions or a vote in favor of no union.<sup>198</sup> Only 19,575 of the 43,000 eligible TSO employees participated in the election with one union receiving 8369 votes, the other union receiving 8095 and 3111 workers voting for no union.<sup>199</sup> As a result of the fact that neither union received a majority of the votes cast, a runoff election has been scheduled by FLRA.<sup>200</sup>

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190. Press Release, Fed. Labor Relations Auth., *supra* note 90; Joe Davidson, *Coming Soon: A Historic Vote On Union Representation*, WASH. POST, Nov. 16, 2010, at B3. *See generally*, U.S. Dep’t of Homeland Sec. Transp. Sec. Admin., 65 F.L.R.A. 242 (2010) (allowing the election to proceed).

191. Press Release, Fed. Labor Relations Auth., *supra* note 90.

192. Fed. Labor Relations Auth., Election Agreement at 2, 3, Nos. WA-RP-10-0033; WA-RP-10-0036 (Feb. 9, 2011) [hereinafter Election Agreement] (on file with the authors).

193. *Id.* at 4.

194. *Id.*

195. *Id.*

196. Press Release, Fed. Labor Relations Auth., *supra* note 90.

197. *See id.*

198. Election Agreement, *supra* note 192, at 1.

199. Press Release, Fed. Labor Relations Auth., *supra* note 90

200. *Id.*; *see also* Steven Greenhouse, *Vote to Unionize Airport Screeners*, N.Y. TIMES, Apr. 20, 2011, at B3.

At present, it is unclear why the participation rate in the TSA election was less than 50%. According to the president of one of the competing unions, the low turnout was caused by FLRA not utilizing on-site balloting.<sup>201</sup> However, it is too early to reach such a conclusion, especially with respect to a unit of employees that had never previously been given the right to participate in a representation election. It would be mere speculation to attribute the low participation rate to the hostility by the prior U.S. government administration to collective bargaining or the means utilized for outreach to eligible voters by FLRA and the two unions. Nevertheless, the participation rate in the TSA election does raise obvious concerns about the possible effect of use of IETV on voter participation that must be examined in future research.

### C. *Canada Industrial Relations Board*

CIRB is similar to NMB, FLRA and NLRB in that it has a nation-wide jurisdiction. Like NMB and FLRA, it deals with a specific group of industries, including cross-provincial and international transportation, which tend to have geographically dispersed units.<sup>202</sup> Certifications by CIRB are primarily determined by card check, with a representation election required only in circumstances where the applicant union obtains signed membership cards from less than a specified percentage of employees in the proposed unit (35–50%).<sup>203</sup> In contrast, decertification petitions require an election in all cases.<sup>204</sup> Because of this, representation elections are less common at CIRB than at U.S. labor agencies. The CIRB elections that do occur—certification applications with divided support, decertifications, and raids by competing unions—tend to be highly-charged events.<sup>205</sup> Geographically dispersed cases are fairly common, although, unlike NMB and FLRA, the units involved tend to be small—generally 200 or fewer employees.<sup>206</sup> In contrast to NMB and FLRA,

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201. Emily Long, *TSA Union Election Heads to Runoff*, GOVERNMENTEXECUTIVE.COM (Apr. 20, 2011), <http://www.govexec.com/dailyfed/0411/04201112.htm>.

202. See Canada Labour Code, R.S.C. 1985, c. L-2, §§ 2, 15, 123, 167; *supra* note 5 (describing CIRB's jurisdiction).

203. *Organizing in the Federal Sector*, CAN. UNION OF PUB. EMPS., [http://cupe.ca/updir/Unionizing\\_in\\_Federal\\_sector\\_cr-0.pdf](http://cupe.ca/updir/Unionizing_in_Federal_sector_cr-0.pdf) (last visited Sept. 3, 2011).

204. Among Canadian labor boards only CIRB and four provincial labor boards employ card-check certification processes; labor boards in the remaining five provinces use mandatory representation votes for certifications. Slinn, *supra* note 1, at 412–13. For example, in the 2009–10 fiscal year, CIRB held only twenty-six representation votes (18 on-site and 8 mail-ballot). Special Data Request Response from Can. Indus. Relations Bd. to authors (on file with authors). In the United States, New York has the longest continuous history of utilizing card-check certification in both the public and private sectors. See generally Herbert, *supra* note 23 (describing the development of collective bargaining and certification measures in New York).

205. Telephone Interview with CIRB Representative, *supra* note 6.

206. *Id.*

CIRB has relied primarily on on-site elections and, where necessary, mail-ballot elections.<sup>207</sup>

In 2008, CIRB began investigating using IETV and looked to NMB as a model for introducing this type of process.<sup>208</sup> CIRB representatives visited NMB, and had the opportunity to test the system and experience a mock election.<sup>209</sup> Based upon this positive experience, CIRB retained an outside company with experience in running IETV elections for unions among other clients.<sup>210</sup>

Since 2009, CIRB has conducted two IETV elections and has considered using the IETV format in two other cases.<sup>211</sup> Unlike NMB, CIRB does not use IETV as an automatic substitute for election processes.<sup>212</sup> In the two IETV elections conducted by CIRB, participation rates have been 88% and 74.2% of eligible voters.<sup>213</sup> In both IETV elections the Internet and telephonic options were each well used by voters, and voters' preferences among the two alternatives were remarkably similar in both elections. Internet balloting was selected by 40% and 39% of the voters, while 60% and 61% opted for telephonic balloting in the first and second elections, respectively.<sup>214</sup> In the only IETV election for which relevant information is available, voters between the ages of 18 to 29 preferred the Internet option; voters between 30 and 39 selected Internet and telephonic balloting in equal numbers; and, voters 40 and over preferred telephonic balloting.<sup>215</sup> This experience supports the inclusion of the telephonic voting option in IETV elections to ensure participation by those without Internet access or uncomfortable with voting on-line.

CIRB approaches the utilization of IETV on a case by case basis, with consideration given to an array of factors including: the necessity for a timely election; the size of the unit and the relative cost for conducting the election; geographic dispersion; and the level of adversity between the parties.<sup>216</sup> For example, if it is a highly contested election that has been accompanied by unfair labor practice charges or other concerns, CIRB may decide to conduct an on-site election with the presence of board agents. If it is a small, but

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207. See *Information Circular No. 7*, *supra* note 39.

208. Telephone Interview with CIRB Representative, *supra* note 6.

209. *Id.*

210. *Id.*

211. *Id.* The first two IETV elections were cases involving raids. *Id.* The next two elections that CIRB considered for the IETV format were certification cases. *Id.* Also note that, rather than conducting a mock election for the labor and management community as NMB did, CIRB ran a supervised pilot vote in a displacement election. *Id.*

212. *Id.*

213. Telephone Interview with CIRB Representative, *supra* note 6.

214. *Id.*

215. *Id.* Note that the group aged 18–29 was small, containing fewer than 15 voters. *Id.*

216. *Id.*

geographically dispersed unit, CIRB may employ IETV as a cost-effective method of conducting the election. With only five regional CIRB offices,<sup>217</sup> travel costs for attending on-site elections can be substantial. IETV elections involve fixed costs that make it difficult for CIRB to offer this format for elections involving units of less than 300 employees.<sup>218</sup> IETV elections also involve additional costs based upon the number of voters arising from the preparation and sending of vote instructions packages.<sup>219</sup> These costs are further increased if materials and online messages are provided in more than one language.<sup>220</sup> IETV may be especially useful in the Canadian “quick-vote system” because it allows the board to quickly and easily segregate ballots and tally outcomes.<sup>221</sup>

Feedback from CIRB’s client consultation committee about the use of IETV has been positive. The parties involved in the first two IETV elections have indicated that they were pleased with the process and support continued use of IETV by CIRB.<sup>222</sup>

While a U.S. union attorney stated during an interview that unions welcome having a third-party administer the IETV election, suggesting that it reduces any perceived politicization of the process,<sup>223</sup> the reaction to CIRB conducting IETV elections has been quite different. The fact that a CIRB agent monitors the voting throughout the election, and the board’s returning officer has access to an audit function permitting periodic testing of the system during the election, has been important in gaining confidence among the parties that CIRB remains in control, thereby ensuring integrity throughout the voting period.<sup>224</sup> This difference in attitudes and concerns may stem from the fact that parties appearing before CIRB tend to have prior labor relations

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217. *Contact Us*, CAN. INDUS. REL. BD., [http://www.cirb-ccri.gc.ca/contact\\_eng.asp](http://www.cirb-ccri.gc.ca/contact_eng.asp) (last visited Aug. 27, 2011).

218. Telephone Interview with CIRB Representative, *supra* note 6.

219. *Id.*

220. *Id.*

221. *Id.* Most Canadian jurisdictions requiring representation elections for union certification require that the vote take place within a statutory time limit. See GEORGE W. ADAMS, CANADIAN LABOUR LAW ¶¶ 7.910–960 (2d. ed. 2002) (describing Canadian certification procedures and noting the speed with which representation voting occurs). This is generally five to ten days after the certification application is held. See *id.* ¶ 7.960. Consequently, labor board hearings in disputes such as on the scope of the unit or voter eligibility are held after the election. See *id.* ¶ 7.1420. In such cases, ballots will be double-enveloped and the ballot box will be sealed pending determination of the outstanding issues. See, e.g., Aldergrove Neighbourhood Servs. Soc’y, B.C.L.R.B. No. B456/2001, ¶¶ 12, 28 (Can.) (ordering the ballots sealed pending resolution of outstanding issues).

222. Telephone Interview with CIRB Representative, *supra* note 6.

223. Telephone Interview with Diamantopoulos, *supra* note 6.

224. Telephone Interview with CIRB Representative, *supra* note 6.

experience and, even if a particular employer is not unionized, it likely operates in an industry with a history of unionism.

*D. National Labor Relations Board*

Unlike the experiences at NMB, FLRA and CIRB, NLRB's preliminary step toward IETV has been met by sharp opposition. For example, in his dissent in *UGL-UNICCO*, disagreeing with a procedural decision granting a request for review from a Regional Director's decision regarding successorship, then NLRB Board Member Schaumber took the opportunity to attack the posting of a June 2010 NLRB notice requesting information about a secure electronic voting service.<sup>225</sup> Although NLRB's solicitation had no relationship to the issue at hand, Member Schaumber strongly criticized the agency's notice, charging that:

[NLRB] recently solicited requests for information on electronic voting technology, specifically including technology to be used for remote voting, that could erode the sanctity and privacy of the ballot booth and subject the process of voting to scrutiny and coercion by interested parties, the same defects that often taint unsupervised card checks.<sup>226</sup>

At present, it is unknown whether NLRB will adopt an IETV format and, if it does, the protocols that it will apply to the new electoral format. However, during an interview, a management attorney expressed some favor to the idea of initially implementing IETV for NLRB representation elections involving highly educated and skilled employees, similar to the employees subject to NMB jurisdiction.<sup>227</sup> In contrast, attorneys with a prominent management firm have expressed criticism of NLRB's preliminary step toward exploring the possible emulation of NMB in the use of IETV, suggesting that the use of this relatively new electoral technology is inherently pro-union.<sup>228</sup>

## V. DISCUSSION AND CONCLUSION

As with other forms of non-manual election formats, IETV raises concerns about the possibility of improper influence or interference by peers, family, unions, or employers. Despite the express fears of former NLRB Member Schaumber, however, it appears that NMB may have successfully navigated

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225. 355 N.L.R.B. No. 155, 2010 WL 3421934, at \*3 (Aug. 27, 2010); NLRB, *Secure Electronic Voting Service, Solicitation Number: RFI-NLRB-01*, FEDBIZOPPS.GOV (July 9, 2010, 4:07 PM), [https://www.fbo.gov/index?s=opportunity&mode=form&id=107db4b6d2c97f65c56c4f00f72c704c&tab=core&\\_cview=1](https://www.fbo.gov/index?s=opportunity&mode=form&id=107db4b6d2c97f65c56c4f00f72c704c&tab=core&_cview=1).

226. *UGL-UNICCO*, 2010 WL 3421934, at \*3.

227. Telephone Interview with Management Counsel 2, *supra* note 6.

228. See Stephen Smith & Reid Carron, *NLRB: Is Electronic Voting on the Horizon?*, ASAP, 1-2 (June 2010), [http://www.littlerlaw.com/PressPublications/Documents/2010\\_06\\_Labor\\_NLRB\\_ElectronicVoting.pdf](http://www.littlerlaw.com/PressPublications/Documents/2010_06_Labor_NLRB_ElectronicVoting.pdf).

these potential problems, and early IETV experiences at CIRB and FLRA have also been promising. We have found no reported NMB decisions finding interference or privacy breaches in the use of the IETV format. Nor are there any reported cases involving technological security breaches. Nevertheless, NMB's decision to commence an investigation into the allegations made in the flight attendants' union's motion concerning employer interference, monitoring, surveillance, and a possible security breach during the 2010 nation-wide IETV election, may result in significant precedent and may provide guidance regarding safeguards necessary for the future utilization of the IETV format. This case should be examined in the broader context of the views expressed by the management and union counsel we interviewed, with lengthy experience before NMB, who reported that they were not aware of any such problems with NMB's use of IETV, and stated that in their experience, IETV raises fewer privacy and security concerns than mail-ballot elections.<sup>229</sup> Meanwhile, IETV offers several potential advantages by granting employees the opportunity to protect their voting from employer and union scrutiny through the use of a personal computer or telephone, providing a longer period for voters to make a free and informed choice than on-site manual voting, and may offer significant cost savings to the labor relations agency.<sup>230</sup>

Although there is some evidence to suggest that use of the mail-ballot format may result in a lower voter participation rate, the very high voter participation rate in NMB's 2010 election under its new representation rule<sup>231</sup> is a promising sign that IETV does not necessarily have the participation-

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229. Telephone Interview with Management Counsel 1, *supra* note 6; Telephone Interview with Diamantopoulos, *supra* note 6. Nonetheless, concerns over security and confidentiality in IETV should not be ignored. In 2007, a United States District Court concluded that the electronic voting system used in an internal union election violated the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401–531 (2006), which is a federal law that regulates internal union elections. *Chao v. Allied Pilots Ass'n*, No. 4:05-CV-338-Y, 2007 WL 518586, at \*12 (N.D. Tex. Feb. 20, 2007), *vacated pursuant to settlement* (June 13, 2007). In *Chao v. Allied Pilots Association*, 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. *Id.* at \*8. 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 marker to link Allied members' votes stored in the vote database with their identity stored in the member database.

*Id.* The court decision was later withdrawn suggesting that the case was settled between the parties.

230. Herbert, *supra* note 1, at 18; Telephone Interview with Management Counsel 1, *supra* note 6. Some IETV critics in the management bar, however, believe that extending the voting period constitutes a negative attribute of the IETV format. See Smith & Carron, *supra* note 228, at 2–3.

231. See *supra* notes 159–161 and accompanying text.

reducing effect that apparently accompanies the mail-ballot format. The initial foray by CIRB into IETV also supports this conclusion. However, the participation results in the TSA election conducted by FLRA in 2011<sup>232</sup> suggest that IETV might retard voter participation in certain cases. Until the TSA rerun election is completed and the voter participation rates in both elections are analyzed, it would be premature to reach a final conclusion about the relationship between IETV and participation in those elections.

It is important to highlight the fact that of the three labor relations agencies that have utilized IETV offer both telephonic and Internet options, none have offered only Internet balloting. The limited evidence available from these elections suggests that the telephonic option is well-used by voters, and the availability of both types of balloting may have contributed to the high election participation rates. As described by NMB, early in its experience with IETV, “there has not been one allegation that employees do not have access to telephones.”<sup>233</sup> 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 . . . employees temporarily working overseas.”<sup>234</sup> Therefore, perhaps concerns over possible negative effects from technological access can, and have been, overcome by offering both IETV voting options.<sup>235</sup>

The administrative choice of format for determining a question of representation is a central issue in 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 format is complex and dependent on the particular agency’s jurisdiction and circumstances, few would oppose a format that diminishes government costs, maximizes participation, and expands voter freedom. NMB and FLRA have embraced IETV as a cost-saving alternative to their respective traditions of conducting mail-ballot representation elections, and CIRB has added IETV to its traditional on-site and mail-ballot elections, when it deems it appropriate. Behind these agencies is NLRB, which just began to explore the issue, but has a legacy of skepticism toward even mail-ballot elections.<sup>236</sup> In contrast, election officials in the political arena are increasingly embracing IETV as a means for encouraging greater voter participation. In order to determine

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232. *See supra* notes 190–200 and accompanying text.

233. Internet Voting Comment Period, 34 N.M.B. 200, 205 (2007).

234. *Id.*

235. The AFL-CIO also referred favorably to NMB’s adoption of Internet voting as expanding workers’ access to voting. *See* Comments of the Transp. Dep’t, AFL-CIO at 1, 25–26, Nat’l Mediation Bd. Representation Election Procedure, No. C-6964 (Jan. 4, 2010), available at <http://www.ttd.org/vertical/Sites/{6F59B120-2C3D-4AB1-B7AE-6DB7D7864685}/uploads/{7B8857D7-B4CA-4445-8E4C-C9274DA0ED54}.pdf>.

236. *See supra* Part IV.D.

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 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.

The present study suggests several areas for further examination relevant to a consideration in the expanded adoption of IETV. First, all forms of IETV entail substantial initial and per-vote costs. This may mean that it is not a cost-effective alternative for all labor relations agencies at this point or cost-effective for conducting a particular election. Although budgetary concerns have been the driving factor in the adoption of IETV, cost should not be the only, or even the governing, factor in determining whether to utilize IETV. CIRB's approach of considering multiple factors before conducting an IETV election may be a prudent approach to be considered by other agencies.

Second, there needs to be a better understanding of the relationship between election format and participation rate. As noted above, it is important that voter participation be maximized to ensure that election results reflect the wishes of the entire unit. Of even greater importance is the selection of an election format that does not impede participation but ensures security and privacy. Although it appears that the IETV format may result in a high participation rate in representation elections in relatively small units, there is not sufficient empirical evidence at the present time to reach a final conclusion about the relationship between IETV and voter participation. A careful examination of the 2011 TSA elections, including the factors influencing participation rates in the initial and rerun elections, will be necessary for a greater understanding of the relationship between IETV and voter participation. In addition, NMB's decision on the union's pending motion to set aside the 2010 flight attendants election may shed additional light on appropriate procedures and safeguards to be employed when labor relations agencies employ an IETV format.

Based upon our discussions with interview participants, increased experimentation with the IETV format and protocols, beyond NMB's model, constitutes an important avenue for future inquiry. In particular, the IETV kiosk format is deserving of exploration. The IETV kiosk format would utilize a portable electronic voting booth, which can be situated on-site or off-site at a location determined by the labor relations agency, supervised by an agency representative. This format offers many of the advantages of an NMB-style IETV election: fewer spoiled ballots, greater employee privacy in voting, and some reduced agency costs resulting from electronic ballot tallying. At the same time, agency staff present at an IETV-kiosk election could educate and

assist voters with the process and provide an opportunity for the agency to foster a relationship with its constituency.

Finally, our interviews suggest that the adoption of IETV may provide a bridge to overcoming the cultural and linguistic barriers to employee participation in representation elections, especially among immigrant workers. These are important concerns that merit further investigation along with more effective agency efforts to inform employees about the process and to encourage participation. This may require communicative innovations by agencies aimed at ensuring that employees receive timely neutral information about the election in an appropriate contemporary multi-language format emphasizing the new means for conducting the election. Among the possible communicative innovations could be an initial oral presentation to the workforce by a board representative after the scheduling of the IETV election to explain the new procedure, to answer questions from the workforce, to help determine whether multi-lingual options should be made available, and to aid in narrowing the digital divide. Other communicative innovations by labor relations agencies may include Internet and intranet postings of the election notice and voting instructions and/or direct e-mail distribution of the election information.<sup>237</sup>

Fundamentally, the necessary ingredients for the development and implementation of successful technological innovation in representation elections must include a pragmatic assessment of the costs to the agency, the reasonable acceptability by employers, unions and employees, along with studying the experiences of other agencies such as NMB, FLRA and CIRB, and examining and experimenting with alternative IETV formats and protocols such as kiosk voting.

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237. We recognize, however, that issues such as electronic postings and e-mail distributions within the workplace under collective bargaining laws remain hot button legal issues in the private sector. *See, e.g.,* J & R Flooring, Inc., 356 N.L.R.B. No. 9, 2010 WL 4318372, at \*1 (Oct. 22, 2010), *enforced*, Nos. 08-17089, 10-72727, 10-73561, 2011 WL 3796272 (9th. Cir. Aug. 29, 2011) (modifying NLRB's procedure and practice by requiring a remedial notice to be distributed electronically by the employer when that is the "customary means of communicating with employees"); *Trs. of Columbia Univ.*, 350 N.L.R.B. 574, 574 (2007) (rejecting a union's request for the workplace e-mail contact information of unit employees in a representation election); *Guard Publ'g Co.*, 351 N.L.R.B. 1110, 1110 (2007) (holding an employee does not have a right to use an employer's e-mail system for Section 7 purposes); Herbert, *supra* note 49, at 73 (discussing *Guard Publishing Co.*).