NLRB Dramatically Changes Rules Regarding Union Recognition

Insights
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In a decision that overturns more than 40 years of precedent, the National Labor Relations Board announced yesterday that the "recognition bar," which precludes a decertification election for 12 months after an employer recognizes a union, *does not apply* when that recognition is voluntary, based on a card check. *Dana Corp.; Metaldyne Corp*. 351 NLRB No. 28 (2007).

Labor Law 101
Here's the background on which this case is built.

In the typical scenario, a union files an petition with the NLRB seeking representation of the employees in a company. The Board conducts a secret-ballot election in which employees vote their preference on the union representation issue. The original petition must be supported by a "showing of interest" among the voting group, which means that at least 30% of the affected employees have expressed interest, usually by signing a card, in union representation.

If the majority of voters express their preference for union representation, the union is certified by the Board, and the employer must then negotiate in good faith for a "reasonable period of time," to try and reach a collective bargaining agreement with the union. This reasonable period of time is, in almost all cases, held to be 12 months.

During that 12-month period of time, the Board enforces a rule barring any other elections from being held in the same bargaining unit. In other words, even if there is evidence that the union has lost all support among the employees, the company's obligation to bargain continues. The Board will not process any petition seeking to decertify the union, nor any petition in which a different union seeks certification.

In recent years, the concept of "card check agreements" has gained increasing currency. Under this type of agreement, a company agrees with a union ahead of time that it will voluntarily recognize the union, if the union can present it with evidence (such as employee-signed cards) that a majority of employees want union representation. Unions obviously love the idea, since they can muster employee support over a much longer period of time, and are not accountable for anything they say (or fail to say) to win employees' support.

Employers who enter into such agreements do so for a variety of reasons, including obtaining union concessions at one facility, avoidance of the negative publicity engendered by a union's "corporate

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campaign," political pressure, and the like.

The question presented to the Board in these two consolidated cases is whether the 12-month recognition bar should apply when the recognition is based on a voluntary card check. Overturning a 1966 decision, the Republican-controlled Board ruled in a 3-2 decision, that the bar should not apply. Instead it fashioned a new 45-day rule that will apply to all such cases on a prospective basis.

The New Standard

Under the new rule, if a company extends voluntary recognition to a union based on authorization cards – even if it is done pursuant to a previously-signed neutrality agreement – the Board will not apply its 12-month recognition bar doctrine unless employees have been formally notified of the proposed recognition, and have been given 45 days in which to file a petition with the Board, either attempting to decertify the recognized union, or to certify a rival union, via a secret ballot election.

The Board's reasoning was straightforward and hard hitting. The decision noted that "the freedom of choice guaranteed to employees [by the National Labor Relations Act] is better realized by a secret election than a card check." The reason? There is a substantial difference between elections and card solicitations as reliable indicators of employee sentiment.

The difference is obvious: representation elections are supervised by neutral NLRB agents, while "card signings are public actions, susceptible to group pressure exerted at the moment of choice." In addition, union card-solicitation campaigns "have been accompanied by misinformation or a lack of information about employees' representational options," including the purpose for which the card will be used and the consequences of voluntary recognition.

Finally, an election presents "a clear picture of employee voter preference at a single moment," while card signings "take place over a protracted period of time," during which employees "can and do change their minds about union representation."

The new rule goes into effect immediately for future cases, but does not affect the Dana and Metaldyne employees who actually brought the case. While Board decisions do not actually bind U.S. Circuit Courts of Appeals, they are given great deference, and can only be overturned by the U.S. Supreme Court, or by a subsequent Board decision. There is no indication yet whether this decision will be appealed.

Why Should You Care?

The decision has obvious and immediate importance to companies who are signatories to (or who are considering entering into) neutrality or card-check agreements with a union. Any recognition based on a company's voluntary agreement will not be a bar to a decertification effort until proper notice has been given to employees and the 45-day period has expired.

But what about companies who are not contemplating entering into such an agreement? A proposed change to the law, called the Employee Free Choice Act (EFCA) has been making its way through

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Congress. This new law would allow, or perhaps require, recognition of unions by a company that is presented with a sufficient number of "voluntarily" signed union authorization cards. Other controversial provisions of the law would require companies and unions that cannot reach a first contract to submit their dispute to mandatory binding arbitration.

So far, this bill has been opposed by Republicans with enough energy to keep it from making it to the President's desk. Future Congresses, and a Democratic President, could certainly change that picture. But even now, various Republican legislators who may have been unsure about the bill may find enough political cover in this decision to vote in favor of the EFCA. After all a Republican-controlled NLRB has now imposed a reasonable sounding 45-day escape clause for employees who might be disinclined to support a union.

How events will fall out in the future is, of course, impossible to predict. Certainly, all employers who have entered into such a card check or neutrality agreement need to rethink what their response will be to a request for voluntary recognition. And all employers are well advised to review their labor relations policies to ensure they are doing everything needed to keep employees loyal, happy and productive, and to reduce the need to turn to outsiders of any kind to get their problems solved.

For more information contact any office of Fisher Phillips.

This Legal Alert provides an analysis of a recent decision by the National Labor Relations Board. It is not intended to be, nor should it be considered as, legal advice for any specific fact situation.

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