

**NLRB LETS SOME AIR OUT OF VOLUNTARY RECOGNITION MOVEMENT**

On September 29, 2007, the National Labor Relations Board (“NLRB”) modified its longstanding recognition–bar doctrine. The NLRB’s modification to its 40 year practice of barring election petitions following voluntary recognition of a union should slow union organizing efforts in certain circumstances.

**Voluntary Recognition Under NLRA**

Under the National Labor Relations Act (“NLRA”), a union can become the exclusive bargaining representative of a group of employees – the “bargaining unit” – in two ways: (1) through an NLRB-conducted secret ballot election; or (2) by voluntary recognition – where the union presents evidence (typically signed cards indicating the employees “authorize” the union to be their exclusive bargaining representative) that a majority of the employees in the proposed bargaining unit want the union to be their exclusive bargaining representative. The cards usually are examined by a mutually-acceptable third party and, if the third party is satisfied the cards are valid and that a majority of employees in the proposed bargaining unit want the union as their exclusive bargaining representative, the employer then voluntarily recognizes the union as the exclusive bargaining representative without an election.

One significant difference is that a union chosen through an NLRB election is certified by the NLRB while the voluntarily recognized union is not. The certified union enjoys a presumption of continued majority support for at least one year and, as a result, petitions to decertify the union are barred for at least one year following certification – the certification bar.

**Recognition Bar**

Since 1966, there also has been a bar to election petitions following voluntary recognition of a union; however, the recognition bar precludes filing an election petition not for one year, but for an unspecified “reasonable” period of time following the voluntary recognition, measured by what transpired and what was accomplished in the bargaining sessions that follow voluntary recognition. In some cases the recognition bar can be enforced to bar election petitions for more than a year following the voluntary recognition.

**Contract Bar**

If a contract is executed following certification or voluntary recognition, the contract bars election petitions. No petition may be filed during the term of a contract, with certain exceptions.

**Modifications to Recognition Bar in *Dana Corp.***

Following the NLRB’s September 29, 2007 decision in *Dana Corp.*, an election petition now can be filed and will be processed if it is filed within 45 days following a voluntary recognition. The petition can be filed either by an employee (or a group of employees) or by a rival union seeking to become the exclusive bargaining representative. Moreover, written notice of the voluntary recognition must be given to the NLRB, which, in turn, will prompt the Board to provide to the employer and the union a written notice to employees regarding the voluntary recognition. The Board-prepared

notice must be posted in conspicuous locations in the workplace and will advise the employees of the voluntary recognition and of their right to file an election petition within 45 days after the voluntary recognition. The 45 day window for filing election petitions does not commence until the notice has been posted, and if notice is not provided to the employees, a contract executed following the voluntary recognition will not bar an election petition.

Once the notice is posted and during the 45 day period, employers are in a position similar to the one they occupy when they hear rumblings on the shop floor of the possibility of a decertification petition – they must exercise caution as to how involved (if at all) they become in guiding or in any way assisting employees in filing a decertification petition. Generally, employers cannot be involved in gathering support for and/or filing a decertification petition. Sometimes the notice will trigger an election petition within 45 days following voluntary recognition; sometimes no petition will be filed.

That is not to say employers have no ability to influence whether an election petition is filed during the 45 day window and/or the outcome of any election that follows the petition. In *Dana Corp.* the NLRB majority expressly noted that employers are free to devote the 45-day period following the posting to persuading bargaining unit employees of the merits (or lack thereof) of a collective bargaining relationship by expressing their views about the perceived benefit of a collective bargaining relationship through non-coercive means.

#### **Impact of Modifications to Recognition Bar**

At this early stage following the decision, we are uncertain whether the NLRB's decision in *Dana Corp.* will be felt by most employers. Employers are never required to agree to voluntarily recognize a union, and they have an inherent right to decline a request for voluntary recognition and to force the union to gather support for an election petition and prove its majority support through a secret ballot election.

We rarely recommend that employers grant voluntary recognition on the basis of signed authorization cards or other show of support. In our view (based on personal experience) the process of gathering signed authorization cards is inherently unreliable. As the NLRB discussed in *Dana Corp.*, signing an authorization card is a very public act subject to various group pressures to conform or be singled out for noncompliance. The process of soliciting signatures for authorization cards is often filled with misinformation and/or incomplete information and is regularly abused. An NLRB-conducted secret ballot election – where individuals privately can express their preference for a union or to have no union – is much preferred.

Conversely, we are certain the decision immediately will be felt by unions in their organizing efforts. Unions around the country have increasingly turned to voluntary recognition in their organizing efforts – typically with an agreement from the targeted employer to determine majority status through a card-check, and sometimes with an agreement that the employer will remain neutral during the union's efforts to secure signatures and support before the formal request for recognition. Unions with sufficient economic or political clout have used the threat (express or implied) of disrupting the employer's business as the leverage that forces employers to agree to forego their otherwise absolute right to force the union to seek representative status through an election. Indeed, the voluntary recognition movement has gained so much steam that Congress came reasonably close in 2007 to passing the Employee Free Choice Act, which would have, among other amendments to the NLRA, required the NLRB to *certify* a union as the exclusive bargaining representative without an election so long as a majority of employees in the proposed bargaining unit had signed valid authorizations. Although Congress ultimately may legislate around *Dana Corp.*, we believe the decision will slow down the voluntary recognition movement, since there is now an express requirement that employees be notified of their right to have a secret ballot election, something unions may not

be disclosing to employees while gathering authorization card signatures.

We stand by our standard advice – unless there are very compelling reasons, employers should not generally grant voluntary recognition to a union, but instead should force the union to file a petition and demonstrate it has the support of a majority of the employees through a secret ballot election. If granting voluntary recognition falls under one of the exceptions to our general recommendation, the employer should make sure to promptly notify the NLRB and secure the appropriate notice and then should make sure the notice is posted prominently throughout the areas where bargaining unit employees work on a daily basis. The employer then should take full advantage of its opportunity to properly persuade employees that they do not need union representation.

As with virtually everything which ultimately goes before the NLRB, each situation will be driven by facts. Your labor counsel should be consulted immediately upon learning an organizing effort is underway or even being contemplated so that the circumstances specific to your place of employment can be discussed in detail and the best avoidance strategy can be devised to fit your circumstances.

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