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CLIENT ADVISORY

NLRB MODIFIES ITS RECOGNITION-BAR DOCTRINE

A secret ballot election conducted by the National Labor Relations Board (“Board”) is the statutorily preferred method of determining whether a union will become the collective bargaining representative of a unit of employees. An employer that prevails in a Board-conducted election will enjoy a one-year certification bar during which no other union may compel an election. If the union prevails in the Board-certified election, and the union and employer then enter into a contract, the Board’s contract bar rules will prevent another union from petitioning for an election during the term of the contract (to a maximum of three years).

The Board also allows employers to voluntarily recognize a union based on a good faith demonstration of majority status (such as via a “card count” where a neutral party compares authorization cards signed by employees with signature exemplars and then “certifies” majority status). Under the Board’s former recognition-bar doctrine, no other union could petition for an election for “a reasonable time” provided the parties then enter into a contract. The parties would then enjoy the same 3-year contract bar period as the parties to a Board-conducted election have.

On September 29, 2007, in the case of Dana Corporation, 351 NLRB No. 28, the Board modified the recognition-bar doctrine and held that no recognition bar will be imposed after a card-based recognition unless (1) employees in the bargaining unit receive notice of the recognition and of their right, within 45 days of the notice, to file a decertification petition or to support the filing of a petition by a rival union, and (2) 45 days pass from the date of notice without the filing of a valid petition. These rules apply notwithstanding the execution of a collective bargaining agreement following voluntary recognition. If the notice and window-period requirements have not been met, any post-recognition contract will *not* bar an election. The Board cited the need to “strike the proper balance between...protecting employee freedom of choice on the one hand, and promoting stability of bargaining relationships on the other.” Dana Corp., at 1. The union seeking decertification elections had argued that the voluntary recognition bar “places too much unchecked power in the hands of an interested employer and its

chosen 'partner' union...and that the voluntary recognition process is a far less reliable indicia of actual employee preference than the results of a Board secret-ballot election.” Dana Corp., at 2. Conversely, the voluntarily recognized union maintained that without an immediate bar, “the initiation of contract negotiations will be delayed, employers will be reluctant to comply with information requests from the union, and the incentive to enter voluntary recognition agreements will be substantially reduced or eliminated.” Dana Corp., at 3.

SIGNIFICANCE OF RULING

With the growing popularity of so-called “neutrality” agreements, which often culminate not in Board-conducted elections but in card counts or some other certification of majority status, employers who are asked to enter into such agreements should be cognizant of the fact that the outcome may not be as “final” as the parties may have hoped. The Board’s modification of the recognition-bar creates a window period of at least 45 days during which as few as 30 percent of anti-union employees can sign a petition triggering an election to decertify the union after receiving proper notice of the recognition. The required notice will be an official NLRB notice that the employer shall post in conspicuous places at the workplace throughout the 45-day period. The 45-day period for filing a petition after a card-check recognition runs from the posting of the official NLRB notice. If the notice is not given, another union may “raid” the unit, or the employees may decertify the voluntarily recognized union at any time.

If you have any questions, please feel free to contact us.

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