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A legal update from Dechert's Labor and Employment Group

National Labor Relations Board Requires Union and Non-Union Employers to Post Notice of Employee Rights and Overturns Three Key Cases

The National Labor Relations Board (the "Board") has been extremely active in recent months and the last week of August was no exception. First, the Board issued a new rule that requires virtually every employer to post a notice of an employee's rights under National Labor Relations Act ("NLRA"). The notice is required regardless of whether or not the employer is a union workplace. Second, on August 26, 2011, the Board issued three decisions disregarding prior precedent, in order to achieve pro-union policy goals. In the first two decisions, *UGL-UNICCO Service Company*, 357 NLRB No. 76 (Aug. 26, 2011), and *Lamons Gasket Company*, 357 NLRB No. 72 (Aug. 26, 2011), the Board overturned two recent decisions and resurrected the so-called "successor" and "recognition" bar doctrines. These doctrines give unions a "reasonable period" following a change in corporate ownership or an employer's voluntary recognition of a union during which the union's representative status cannot be challenged. In the third decision, *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (Aug. 26, 2011), the Board overruled a 1991 decision concerning appropriate bargaining units in the healthcare industry and adopted a stringent test for determining whether a bargaining unit proposed by a union inappropriately excludes certain employees. Employers will need to take notice of both the new notice requirement and the Board's reversal of its prior decisions and take appropriate steps to minimize the chance of future problems.

Employers Must Post NLRA Rights Notice in the Workplace and Online

The Board recently issued a final rule requiring most private employers to post a notice of employee NLRA rights in the workplace and on the internet or intranet if the employer normally posts personnel policies there. The Board published the proposed rule in the December 22, 2010 *Federal Register* and the final rule (along with the model notice) in the August 30, 2011 *Federal Register*. Citing a need to fill an alleged NLRA knowledge gap among employees, the Board passed the final rule with a 3-1 vote, with the only Republican on the Board dissenting. Many people felt that without any express authorization in the NLRA, the Board did not have the authority to issue a notice-posting rule.

The scope of the notice rule is quite broad. The Board's rule covers most private employers with the exception of those in the agricultural, railroad and airline industries and employers who fall below a certain gross annual volume of sales that varies from industry to industry. The requirement applies to all covered workplaces.

Even employers who do not have any unionized employees must post the notice. The notice provides a long list of rights under the NLRA as well as information about how to contact the Board and to file a complaint. It is similar to other workplace notices that employers must post, and the rule requires that the new notice be posted no less prominently than the other notices. (The Board eliminated a requirement in the proposed rule that would have required employers to email the notice to all employees.) In addition to paper and electronic posting, the rule requires that, if 20 percent of workers are not proficient in English, the employer must post the notice in English as well as the language spoken by those workers. If an employer fails to post the required notice, the Board will treat the violation as a potential unfair labor practice and when combined with other allegations, the noncompliance may serve as "evidence of unlawful motive."

Employers should determine if they are covered by the new requirement and, if so, ensure that they have posted the notice no later than November 14. Employers can obtain the notice free of charge by contacting the NLRB offices or by downloading the notice from the Board's website, http://www.nlrb.gov.

Revival of Successor and Recognition Bar Doctrines

In *Frank Brothers Co. v NLRB*, 321 U.S. 702 (1944), the U.S. Supreme Court recognized the general principle that "a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed." Based on this principle, the Board has on numerous occasions fashioned several "bar" doctrines that grant a properly chosen union a period of time in which it may deal with an employer without the threat of decertification in response to a challenge from employees or a rival union.

UGL-UNICCO

In *MV Transportation*, 337 NLRB 770 (2002), the Board determined that the successor bar doctrine, which afforded a union an insulated period of bargaining following a merger, sale or other corporate transaction, was inconsistent with employees' right to free choice guaranteed by Section 7 of the National Labor Relations Act. In reaching this conclusion, the Board recognized that the changes that accompany corporate transactions create "anxiety" among the affected employees, but concluded that the "fundamental statutory policy of employee free choice has paramount value, even in times of economic change."

Shortly after the election of President Obama and the appointment of several new Board members, the Board announced its intention revisit *MV Transportation*. On August 26, 2011, the Board (with Chairman Liebman and Members Becker and Pearce in the majority) issued its decision in *UGL-UNICCO*, re-establishing the general successor bar doctrine and defining its parameters.

An employer is a successor under the NLRA when there is "substantial continuity" between the two operations and when the new employer hires a majority of its employees from the predecessor's workforce. The Supreme Court has held that while a successor is required to recognize and bargain with an incumbent union, it is not required to adopt its predecessor's collective bargaining agreement and may, in most cases, unilaterally set the initial terms and conditions of employment without bargaining with the union. According to the Board, because of these principles, "it seems reasonable for the law to mitigate those [destabilizing] consequences, as a 'successor bar' does."

Accordingly, "where the successor has abided by its legal obligations to recognize an incumbent union," but has not adopted the predecessor's collective bargaining agreement:

> the union is entitled to a reasonable period of bargaining, during which no question concerning representation that challenges its majority status may be raised through a petition for an election...nor, during this period, may the employer unilaterally withdraw recognition from the union based on a claimed loss of majority support.

The Board then went on to define what constitutes a "reasonable period," articulating a two-part standard based on whether a successor exercises its legal right to set the terms and conditions of employment following a corporate transaction. Under this standard, where an employer expressly adopts the existing terms and conditions of employment in effect at the time of the transition, the incumbent union shall be insulated from challenge for six months, measured from the date of the first bargaining session between the successor and the union. In contrast, where a successor "unilaterally announces and establishes initial terms and conditions of employment before proceeding to bargain...the 'reasonable period of bargaining' will be a minimum of 6 months and a maximum of one year." The precise

term of the insulated period shall be determined based on the "multifactor analysis" described in *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001). Among the factors to be considered are the complexity of the issues being negotiated, the number of bargaining sessions, the amount of progress made during bargaining and whether the parties are at impasse.

Finally, the Board held that where a successor and a union successfully reach an agreement on a collective bargaining agreement, and where there was no "open period" during the final year of the predecessor employer's agreement in which a decertification petition could have been filed, the applicable "contract bar" period will be a maximum of two years.

Republican Board Member Brian Hayes dissented from the decision, asserting that the Board's decision functioned solely "to service the ideological goal of insulating union representation from challenge wherever possible." Hayes further objected to the Board's "additional twist of defining a reasonable bar period as dependent upon whether a successor has exercised its legal right under [Supreme Court precedent] to set initial terms and conditions of employment."

Lamons Gasket

In this case, the Board (again through a majority of Liebman, Becker and Pearce) overturned the 2007 decision in *Dana Corp.*, 351 NLRB 434 (2007), in which the Board modified the long-standing "recognition bar" doctrine by establishing a 45-day "window period" following an employer's voluntary recognition of a union during which employees are permitted to file a decertification petition. *Dana* also imposed a requirement that employers post an official notice informing employees of their right to challenge the employer's voluntary recognition.

The *Lamons Gasket* Board scuttled the rules established in *Dana*, concluding that the "extraordinary process" created in that case "undermined employees' free choice by subjecting it to official question and by refusing to honor it for a significant period of time, without sound justification." Further, the majority concluded that empirical evidence concerning employee challenges to voluntary recognition established that the rationale for the *Dana* decision was unsupported. Specifically, the Board noted that 1,333 requests for *Dana* notices had been submitted as of May 2011, 102 election petitions were subsequently filed and 62 elections held. In "only" 17 of those elections, the Board stated, did employees vote against continued representation by the recognized union.

In terms of defining the period of the "recognition bar," as in *UGL-UNICCO*, the Board held that the period must be no less than six months and no more than one year, and that the specific period in each case must be determined based on consideration of the factors articulated in *Lee Lumber*.

Member Hayes again dissented, claiming that the majority's decision "is a purely ideological policy choice, lacking any real empirical support and uninformed by agency expertise." The Board's decision, Hayes contended, "conveys a pronounced ideological agency bias disfavoring the statutory right of employees to refrain from supporting collective bargaining, to receive adequate information about the election process, and to have the option of resolving questions concerning representation through the preferred method of a Board-supervised election." Hayes also asserted that the very statistical upon which the majority relied for its decision in fact supports the conclusion that *Dana* was correctly decided: "The statistics show that in one in every four elections held, an employee majority voted against representation by the incumbent recognized union."

Establishment of Presumption in Favor of Union-Defined Bargaining Units

The primary issue in *Specialty Health Care and Rehabilitation Center of Mobile* was the proper standard for determining the appropriate bargaining unit in a nursing home setting. With respect to that issue, the Board (with a majority of Liebman, Becker and Pearce) overturned its 1991 decision in *Park Manor Care Center*, 305 NLRB 872 (1991), concluding that the standard established in *Park Manor*—that bargaining units in the nonacute health care context should be determined based on consideration of "pragmatic or empirical community of interests" in light of the evidence gathered by the Board in issuing rules regarding bargaining units in the acute care context in 1989—was "obsolete" and that bargaining units in the nursing home setting should be evaluating using the Board's traditional "community of interests" standard.

Perhaps more significantly (at least outside the health care context), the Board also addressed the proper standard for evaluating the proper scope of a bargaining unit where an employer contends that the unit proposed

by the union improperly excludes certain employees. With respect to this question, the Board began by noting that "given that the statute requires only *an* appropriate unit, once the Board has determined that employees in the proposed unit share a community of interest, it cannot be that the mere fact that they also share a community of interest with additional employees renders the smaller unit inappropriate." Instead, the Board held, in order to demonstrate that a proposed unit is inappropriate, an employer must demonstrate that the excluded employees share "an overwhelming community of interest with the petitioned-for employees." The majority went on to state that employees inside and outside a proposed unit share an overwhelming community of interest where the proposed unit is a "fractured unit," that includes only an "arbitrary segment" of what would be an appropriate unit.

Board Member Hayes dissented from the majority's decision, asserting that "today's decision fundamentally changes the standard for determining whether a petitioned-for unit is appropriate in any industry subject to the Board's jurisdiction." In additional to contending that *Park Manor* was correctly decided, Hayes objected to the fact that the majority's rule "will make the relationship between the petitioned-for unit employees and excluded coworkers irrelevant in all but the most exceptional circumstances." This rule, Hayes wrote, "encourages unions to engage in incremental organizing in the smallest units possible," and seems likely to result in "extraordinary fragmentation of the workforce for collective-bargaining purposes."

Conclusion

While the Board's decisions in *UGL-UNICCO*, *Lamons Gasket* and *Specialty Healthcare* each addressed the rules applicable to fairly narrow factual circumstances, the decisions are significant in their reflection of the current Board's willingness to abandon long-standing Board rules in order to increase the frequency and success of unionization. Similarly, although there is no express NLRA authorization for the Board to create notice posting requirement, the Board has now done so with a requirement that reaches both union and non-union workplaces. Employers must be cognizant of the Board's expansive interpretation of the NLRA and its apparent eagerness to revisit settled law and to regulate all workplaces in order to further its policy goals.

Practice group contacts

If you have questions regarding the information in this update, please contact the Dechert attorney with whom you regularly work, or any of the attorneys listed. Visit us at www.dechert.com/employment.

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