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In Honor of the Labor Day Weekend!

Here is "the latest" from the NLRB

As NLRB Chairman Wilma B. Liebman departs after almost 14 years of service under three U.S. Presidents, the NLRB will once again be short-handed as there will be only three members. Before she left, however, Chairman Liebman and the two other Democratic appointees decided three important cases overruling previous pro-employer decisions.

Appropriate Bargaining Unit Determinations

In a 3-1 decision in *Specialty Healthcare and Rehabilitation Center of Mobile*, the Board found that Certified Nursing Assistants at a nursing home may comprise an appropriate bargaining unit without including all other non-professional employees. This overrules the Board's 1991 decision in *Park Manor*, which had adopted a special test for bargaining unit determinations in nursing homes, rehabilitation centers, and other non-acute health care facilities. The majority stated that the appropriate unit determinations for employees in non-acute care medical facilities will be subject to the same "community of interest" standard traditionally applied to other workplaces. In *Specialty Healthcare*, the NLRB ruled that where an employer argues that a proposed unit inappropriately excludes certain employees, the employer will be required to prove that the excluded employees share "an overwhelming community of interest" with employees in the proposed unit.

In dissent, NLRB Member Brian Hayes stated that he would adhere to *Park Manor*, "which established a balanced legal standard maintained in non-acute care health care unit cases without controversy for 20 years (and without any objection from the party seeking review in this case)." He also disagreed that the majority's statement of the "community of interest" test was consistent with Board precedent. In his view, "the majority accepts as the definitive standard for unit determinations in all industries an 'overwhelming community of interest' test that will make the relationship between petitioned-for unit employees and excluded co-workers irrelevant in all but the most exceptional circumstances."

As Member Hayes points out, the test approved by the majority not only impacts cases in the non-acute health care area, but all employers. If the "overwhelming community of interest" standard, which the majority says is "existing" law, is followed, it would mean that in almost all cases, the union's petitioned for

unit will likely be deemed appropriate, despite the fact that Section 9(c)(5) of the NLRA itself says that the extent of the union's organizing is not controlling. This decision could result in a union going into any employer and picking off distinct groups of employees in a plant or office, petitioning for an election in that small unit, then moving on to the next group. Couple this decision with the NLRB's expected issuance of the proposed "quickie election" rules, and employers will have little opportunity to defend against the fracturing of its workforce into many small units of employees who have a "community of interest" among themselves, to the exclusion of other employees who will also be impacted by the decisions of the unit petitioned for by the union. The standard set forth by the majority effectively eliminates Section 9(c)(5) from the Act.

Voluntary Recognition Based on Authorization Cards Upheld: *Dana Corp*. Reversed

On August 30, the NLRB released its long-awaited decision in *Lamons Gasket Co.*, reversing its four-year-old decision in *Dana Corp.*, 351 NLRB 434 (2007). In *Dana Corp.*, the Board ruled that when an employer granted voluntary recognition to a union based on a card-based majority without having an NLRB supervised election, in order for the voluntary recognition to bar a subsequent challenge by dissenting employees, the employer had to post an official NLRB notice advising the employees of their right to file a petition supported by at least 30% of the bargaining unit calling for a secret ballot election. The employees had 45 days in which to file the petition following the posting of the notice.

Lamons Gasket Co. reverses this holding by stating that when an employer grants, and a union accepts, voluntary recognition based on voluntary and uncoerced evidence of majority support, that voluntary recognition may not be challenged for a reasonable period of time. It establishes the "reasonable period of time" as no less than six (6) and no more than twelve (12) months after the parties' first bargaining session.

In reversing *Dana Corp.*, the NLRB has moved one step closer to administratively enacting the Employee Free Choice Act (EFCA) that Congress failed to pass. You may recall that one of the key provisions of EFCA was card-based recognition without an election. While not accomplishing that goal completely, this decision moves in that direction by giving protection to card-based recognition.

Successorship Bar Ressurrected and Strengthened

In yet another reversal of NLRB precedent, the NLRB has overruled *MV Transportation*, 337 NLRB 770 (2002), by holding that, in a successorship situation, an incumbent union's status as the exclusive bargaining agent is irrebuttable for a specified period of time.

Successorship is a doctrine whereby an employer acquires the assets of another employer, there is a substantial continuity between the two business operations, and the new employer hires a majority of its employees from its predecessor's ranks. A bargaining obligation arises when it is "perfectly clear" that the employer intends to retain the predecessor's employees or, after the successor has hired a substantial and representative component of its employees, that workforce is comprised of a majority of the predecessor's unionized workforce and the union makes a demand for recognition. In a successorship situation, the employer is free to disavow the existing collective bargaining agreement. If it is a "perfectly clear" situation, the successor's bargaining obligation is immediate, and it may not unilaterally change terms and conditions of employment without bargaining with the incumbent union. If it is not a "perfectly clear" situation, the successor is free to unilaterally establish initial terms and conditions of employment without bargaining.

Under *MV Transportation*, if the employer extended recognition to a union in a successorship situation where the union had been certified for more than one year, and the employer did not adopt the predecessor's collective bargaining agreement, the employees could file a decertification petition if they no longer wanted the union to represent them. Or, if the union no longer had the support of a majority of the successor's bargaining unit employees, and the employer had objective, good faith evidence of that loss of support, the employer could either file an RM petition calling for a secret ballot election or simply withdraw recognition. This was so because the successorship doctrine is based on the assumption that a union continues to enjoy majority support among the new workforce in the same proportion as the predecessor's workforce, regardless of the fact that the assumption may be false.

Now, in *UGL-UNICCO Service Company*, the NLRB has ruled that a union's majority status in a successorship situation will be immune from challenge for a specified period, which will depend on the circumstances of the successorship situation. Where the successor employer expressly adopts the existing terms and conditions of employment as the starting point for negotiations, the successorship bar is six (6) months from the date of the first bargaining session. In a situation in which the successor unilaterally establishes different terms and conditions, the union will enjoy a minimum of six (6) and a maximum of twelve (12) months, depending on certain other circumstances, in which to bargain, during which time a petition will not be entertained nor will withdrawal of recognition be permitted. In a situation in which the employees do not have an open period to file a decertification petition because of the successorship bar and the subsequent negotiation of a multi-year contract, a contract bar of up to two (2) years will be imposed.

These decisions demonstrate "the true power" of getting to choose the majority of the NLRB, which currently lies with the Democratic Party.

Happy Labor Day!

As always, if you have any questions about these or any other NLRB decisions (past, present or future!), please contact Bill Trumpeter, or any member of our Labor Relations Practice Group.