NLRB UPDATE: Key NLRB Precedents Likely to Fall Under Liebman Board

7/23/2009

Earlier this year, Ford & Harrison began our series *NLRB Update,* analyzing 10 critical decisions issued by the Bush-appointed National Labor Relations Board ("NLRB" or "Board") that likely will be overturned in the next few years if reconsidered by an Obama-appointed Board now chaired by Wilma Liebman. Member Liebman's new position as Board Chair is particularly important, as she issued dissents in most of the critical pro-employer decisions issued under the Bush-era labor Board, challenging the reasoning and conclusions reached by the Board majority. Careful analysis of Liebman's dissenting opinions in these major decisions provides a legal roadmap – charting the likely course the Liebman Board will take if it is able to reconsider these issues.

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Part I of this series analyzed *IBM Corp.*, 341 NLRB 1288 (2004), concerning the representation rights of non-union employees. This analysis is available on the Ford & Harrison web site at: http://www.fordharrison.com/shownews.aspx?show=5074.

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In Part II, we analyzed *Guard Publishing Co. (Register Guard)*, 351 NLRB 1110 (2007), concerning the employer's right to restrict employee use of company e-mail to preclude union related communications. This analysis is available on the Ford & Harrison web site at: http://www.fordharrison.com/shownews.aspx?Show=5094.

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In Part III, we analyzed *BE&K Construction Co.*, 351 NLRB 451 (2007), in which the Board held that an employer's unsuccessful but reasonably based lawsuit against a union does not constitute unlawful interference of Section 7 rights – even if the lawsuit has a retaliatory motive. This analysis is available on the Ford & Harrison web site at: http://www.fordharrison.com/shownews.aspx?show=5120.

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In Part IV below, we analyze *Dana Corp.*, 351 NLRB 434 (2007), in which the Board overruled forty-year-old Board precedent to hold that an employer's voluntary recognition of a labor union des not bar a decertification petition or the petition of a rival union filed within forty-five days of the voluntary recognition.

NLRB UPDATE PART IV: NLRB ESTABLISHES NEW RULES FOR VOLUNTARY RECOGNITION THAT FAVOR "REAL" EMPLOYEE FREE CHOICE Dana Corporation, 351 NLRB 451 (2007). On September 29, 2007,

the NLRB issued its much anticipated *Dana Corporation* decision. In *Dana Corp.*, the Board modified its long-standing recognition bar doctrine, and held that an employer's voluntary recognition of a labor organization does not bar a decertification petition or a petition by a rival union filed within 45 days of the unit employees' receiving notice of the voluntary recognition. Under the Board's prior recognition bar policy first announced in *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966), an employer's voluntary recognition based on a showing of majority status barred the filing of both decertification and rival union petitions "for a reasonable time." By barring any petitions for a "reasonable time" after voluntary recognition, the Board intended to promote labor relations stability by insulating the union from challenges to its status while it negotiated its first contract. In *Dana*, the Board effectively overturned *Keller Plastics*. According to the Board, labor stability did not require the immediate imposition of an election bar following voluntary recognition. Rather, the Board found the interest "of protecting employee freedom of choice on the one hand, and promoting the stability of the bargaining relationships on the other" warrants delaying the imposition of the recognition bar for a 45-day period, during which the employees can decide whether they want to seek a Board conducted election. In addition to modifying the recognition-bar doctrine, the *Dana* decision further established a new procedure for properly notifying bargaining unit employees of a voluntary recognition to trigger the 45-day period. Under the new procedures, the employer or union that is a party to a voluntary recognition must "promptly notify" the Regional Office of the Board concerning the voluntary recognition. Thereafter, the Regional Office will send a Notice to the employer that must be posted throughout the 45-day period specifically informing the employees of their right to either file a decertification petition or a petition in favor of a different union. Upholding the principles of workplace democracy in connection with employees' rights to choose or decline unionization, the majority stated: The preference for the exercise of employee free choice in Board elections has solid foundation in distinctions between the statutory process for resolving questions concerning representation and the private voluntary recognition process. For a number of reasons, authorization cards are "admittedly inferior to the election process." *Dana*, at 438 (citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 603 (1969)). **Current Status of the Law**: When an employer voluntarily recognizes a union based upon the union presenting signed authorization cards from a majority of employees (which typically occurs pursuant to a "card-check neutrality agreement"), within 45 days of recognition the employees can file a decertification petition or a rival union can file a representation petition to replace the voluntarily recognized labor union. **Liebman Dissent**: Members Liebman and Walsh dissented, claiming that longstanding Board precedent acknowledged that the "recognition bar achieves the appropriate balance" between the NLRA's goals of preserving employee free choice of bargaining representatives and encouraging the collective bargaining process. Moreover, the dissent criticized that "[t]he majority's modifications upset that delicate balance." According to the dissent, the majority decision "cuts voluntary recognition off at the knees" and creates a disincentive for employers to agree to voluntary recognition because of the uncertainty created if employees can later file a decertification petition. The dissent also suggests that recognition based on majority cards is actually preferable to secret ballot elections because the voluntary recognition requires a majority of cards from all employees while election only requires a majority of the votes cast. Accordingly, the dissent would return to the "recognition bar" doctrine the Board initially established in *Keller Plastics*. **Significance**: When issued in 2007, *Dana Corp.* was particularly unpopular with organized labor because it undermined the

prevalent union organizing tactic of using comprehensive corporate campaigns to force employers into signing neutrality/card check and voluntary recognition agreements. The *Dana* decision is also directly contrary to the card-check provisions of the organized labor's primary legislative objective – the Employee Free Choice Act (EFCA). In the event the EFCA is passed in its current form – with mandatory recognition based on majority card check – the *Dana* decision may be moot. If EFCA proceeds without the card-check provisions, however, the Board could potentially reconsider the revised "recognition bar" procedures set forth in *Dana Corp*. and possibly set the stage for establishing the card-check certification through the Board's decision and rule-making authority rather than through the legislative process. For more information concerning the Ford & Harrison *NLRB Update* and the Board precedents likely to be overturned under the Liebman Board, contact the Ford & Harrison attorney with whom you usually work, or the author of this Alert, John Bowen, a partner in our Minneapolis office at jbowen@fordharrison.com or 612-486-1703. **LOOK FOR PART V OF *NLRB UPDATE* NEXT MONDAY**