

Management Alert

NLRB Decisions Significantly Affect Union Organizing Initiatives

As their density in the private sector has steadily diminished, unions have increasingly relied on new strategies to gain additional members. Two of those strategies involve the use of voluntary recognition (*i.e.* card check) agreements and the use of union “salts,” or applicants for employment whose goal is organizing the employer’s workforce if they are hired. The strategies are often intertwined to the extent that “salting” campaigns are frequently used to harass employers into voluntary recognition agreements. These neutrality and card check recognition agreements typically require the employer to remain neutral about the benefits and potential detriments of union membership and to recognize the union automatically if it collects signed authorization cards from a majority of employees in the unit it seeks to represent. Unions thereby bypass the employee’s right to vote on union representation in a secret ballot election conducted by the NLRB. The two decisions discussed below may seriously undermine these union tactics.

Dana Corp., 351 NLRB 29, issued on September 29, 2007, significantly alters the policy and rules regarding challenges to card check recognition of labor unions. Prior to this decision, employees or rival unions were effectively precluded from challenging employer recognition of a union based on a card check. The recognition was insulated from challenges for almost a year under traditional NLRB recognition bar rules and even longer (up to three years under NLRB contract bar rules) if the employer and union entered into a collective bargaining agreement. As a result of the *Dana* decision (a split 3-2 decision), employees or rival unions have the

right to challenge the card check recognition immediately and the NLRB will officially notify employees of that right. *Dana* provides that if a union is recognized pursuant to a card check:

1. The employer and/or union are to notify the NLRB of the recognition.
2. The recognition must be in writing, describe the unit and set forth the date of recognition.
3. The employer must post notices which will be provided by the NLRB, and which will advise the employees of their right to file a decertification petition or support a petition by a rival union.
4. The decertification petition or petition by a rival union must be supported by 30% of the employees in the bargaining unit and must be filed within 45 days of the employees being officially notified of the recognition by the NLRB posting.
5. If a decertification or rival petition is properly filed, the NLRB will conduct an election notwithstanding the recent recognition or any applicable collective bargaining agreement.
6. If no petition is filed within the 45 day posting period the union’s recognition may not be challenged for a “reasonable period,” which based on current Board law can be nearly one year. If the parties enter into a collective bargaining agreement during that reasonable period, the normal contract bar rules will apply.

7. The new rules will be applied only prospectively and may not be used as a basis to disrupt bargaining relationships established prior to the September 29, 2007 decision.

Toering Electric, 351 NLRB 18, another 3-2 decision issued September 29, 2007, significantly altered the standards for finding that a “salt” is a bona fide applicant for employment and entitled to the NLRA’s protections against discrimination in hiring based on union membership. The true purpose of the “salts” applications are not so those individuals will secure employment, but rather to create time consuming, disruptive and expensive legal battles for those unorganized employers. The use of “salts” has been an effective union weapon in corporate campaigns designed to harass employers into agreeing to recognize unions regardless of true employee sentiment as demonstrated in a secret ballot election.

The Board found that for “salts” to avail themselves of the protections of the NLRA, it must be demonstrated that the “salts” themselves actually applied for the positions or specifically authorized someone to apply on their behalf. More importantly, the burden is now on the NLRB’s General Counsel and not the employer to establish that the “salts” have a “genuine interest in securing employment.” If that burden is not met, the “salts” are not employees within the meaning of NLRA and, therefore, are not protected from discrimination in hiring by the NLRA.

Unanswered Issues

The decisions leave unanswered a number of important questions. For example in applying *Dana* and *Toering Electric*:

- How will the NLRB enforce the requirement that employers and unions notify it of voluntary recognitions?
- Is the 45 day “clock” stayed indefinitely until notification is received and the notices are posted?
- What if the employer refuses to post the notices?
- Does the prospective application of *Dana* apply to voluntary recognition agreements which predate the decision but provide for card checks which post date the decision?
- If the voluntary recognition agreement includes neutrality restrictions on the employer, are they enforceable with regard to a subsequent NLRB conducted election?
- What are the elements of a “genuine interest in employment” which the NLRB’s General Counsel must establish to support unfair labor practice charges regarding “salts”?

Impact of Decisions

Unions, based on previous NLRB decisions, have relied heavily and often successfully on the use of “salting” campaigns as one mechanism to compel the use of voluntary recognition agreements. These two decisions may dramatically limit the effectiveness of both “salting” and voluntary recognition agreements. As they have done in response to other recent NLRB decisions, however, unions will undoubtedly be seeking new initiatives and arguments to minimize the impact of these decisions. In particular, the *Dana* decision will likely spur a renewed emphasis by organized labor on the Employee Free Choice Act (EFCA) as a means of using neutrality and card check recognition to organize employees. Indeed, Congressional supporters of the EFCA such as Senator Obama have already issued statements deriding the decisions and arguing that they are additional reasons for union friendly legislation, such as EFCA.

If you have any questions concerning this Management Alert, please contact the Seyfarth Shaw LLP attorney with whom you work or any labor & employment attorney on our website at www.seyfarth.com.

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