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Legal Alert: NLRB Poised to Overturn Two Critical Bush-Era Board Decisions

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Recently, the National Labor Relations Board signaled its willingness to overturn two Bush-era decisions on union representation. We previously outlined how the Obama-appointed Board, now chaired by Wilma Liebman, likely would reconsider and overrule the 2007 NLRB decision in *Dana Corp.*, 351 NLRB 434 (2007), regarding employees' right to challenge the union's representation after a company's voluntary recognition of the labor union. (See our July 23, 2009 Legal Alert, "Key NLRB Precedents Likely to Fall Under Liebman Board," http://www.fordharrison.com/shownews.aspx?show=5148.)

The NLRB recently granted Requests for Review in two consolidated decisions that "raise substantial issues concerning voluntary recognition arising under the Board's decision in *Dana Corp*" and invited interested parties to file briefs addressing, among other things, "whether the Board should modify or overrule *Dana*." In a similar vein, the Board also recently granted a Request for Review in a number of consolidated cases that "raise substantial issues regarding whether the Board should modify or overrule *MV Transportation,*" 337 NLRB No. 129 (2002), regarding the duration of a successor employer's obligation to negotiate with the predecessor's incumbent union, and invited interested parties to file briefs addressing whether the Board should reconsider or modify that 2002 decision.

***Dana Corp* and the Recognition Bar**

Dana Corp modified the Board's long-standing "recognition bar doctrine" as applied to an employer's voluntary recognition of a labor union based on majority status. Prior to *Dana Corp*, when an employer voluntarily recognized a union based on signed authorization cards from a majority of employees, usually pursuant to a "card-check neutrality agreement," both decertification and rival union petitions challenging this representation could not be filed "for a reasonable time." In *Dana Corp*., the NLRB modified this doctrine and held that a decertification petition or rival union petition could be filed within 45 days of a company's voluntary recognition of a union. The NLRB also required the employer to post for the 45-day period a Notice informing the employees of their right to either file a decertification petition or a petition in favor of another union. If the notice is posted and no petition is filed within 45 days, no decertification or rival union petitions can thereafter be filed "for a reasonable time."

As a member of the NLRB, Wilma Liebman, dissented in *Dana Corp*. Now as Board Chairman, Liebman and the new Board have recently granted Requests for Review in *Rite Aid Store #6473 and Lamons Gasket Company*,

355 NLRB No. 157 (2010), which raise substantial issues concerning voluntary recognition under *Dana Corp*. While not prejudging what the NLRB will decide, the Board's statements in both its grant of the Requests for Review and its solicitation of briefs, when considered in conjunction with the Liebman dissent in *Dana Corp* are interesting. In concurring with the Request for Review, Chairman Liebman quotes a commentator's view that "the '*Dana* rule rests on a number of factual and policy premises, none of which are clearly stated or actually defended in the [majority] opinion.'" Similarly she admits that the same commentator said her own dissent in *Dana* "'suffers from a lack of unchallenged empirical support for its positions.'" In its invitation for briefs on modifying or overruling *Dana Corp*, the Board said it has an obligation "to continually evaluate whether its decisions and rules are serving their intended purposes, and this is particularly true of **novel rules**, such as those adopted in *Dana*, with which there was no experience at the time of adoption." (Emphasis added.) On another interesting note, the Board signaled that it is open to applying a modification or overruling of *Dana Corp* **retroactively** as well as prospectively.

***MV Transportation* and the Successor-Bar Doctrine**

In *MV Transportation*, the Board re-established its long-standing position that when a company buys another employer's unionized work force, the previously recognized union is only entitled to a rebuttable presumption of majority support among the workforce. 337 NLRB 770 (2002). This presumption can be rebutted by a decertification petition, an employer petition, or a rival union petition, and none of these efforts are barred by the presumption. *MV Transportation* overturned *St. Elizabeth Manor, Inc.*, 329 NLRB No. 36 (1999), and its "successor-bar doctrine," under which the successor employer "stands in the shoes" of the predecessor vis-à-vis the union and thus "incurs an obligation to bargain with the incumbent union for a reasonable period of time, during which the union's majority status is immune to challenge through a decertification effort, an employer petition, or a rival union petition."

As a member of the NLRB, Liebman dissented in *MV Transportation* and voted with the majority in *St. Elizabeth Manor, Inc*. On the same day that it issued the order regarding *Dana Corp* above, Chairman Liebman and the new Board also granted a Request for Review in *UGL-UNICCO Service Company*, 335 NLRB No. 155 (August 27, 2010), and other consolidated cases that raise substantial issues regarding whether the Board should modify or overrule *MV Transportation*. In concurring with the Request for Review, Liebman recognized that "My own prior views on the successor-bar doctrine are a matter of record" but "I am open to being persuaded either that my prior position was wrong or that even if *MV Transportation* was mistaken, it should nevertheless be left in place." However, she later wrote that "elimination of the successor-bar doctrine has made it possible for successor employers unilaterally to withdraw recognition from a union without ever engaging in bargaining and without employees ever having voted in a secret ballot election to decertify the union. How that result promotes either collective bargaining or employee free choice – much less strikes a balance between the two – is hard to see." As with the Board's invitation in *Dana* Corp, the Board also cited its obligation "to continually evaluate whether its decisions and rules are serving their intended purposes" in its invitation for briefs on whether to reconsider or modify *MV Transportation*. Since *MV Transportation* re-established a long-standing

Board position, the language implies that the current Board's view of its "obligation" to re-evaluate its decisions is not limited to untested "novel rules."

Bottom Line for Employers

These recent NLRB moves could signal that the Obama Board is willing to overturn critical Bush-era NLRB decisions. In discussing the *Dana Corp.* decision in the recent Requests for Review, Chairman Liebman quoted the U.S. Supreme Court's observation that "an initial agency interpretation is not instantly carved in stone" and that agency interpretations can change based on, among other things, "a change in administration." In addition, the Board's language about its obligation to "continually evaluate" its decisions both in the case of "novel rules, such as those adopted in *Dana*" as well as the re-establishment of long-standing rules as in *MV Transportation* further reinforces the impression that there's a new sheriff in town.

For more information concerning these or other precedents likely to be overturned by the NLRB, please contact the Ford & Harrison attorney with whom you normally work. David P. Maram is the author of this Alert.