

PUBLICATION

Employers Entering Card-Check Agreements May Have More Union Problems Than They Bargained For

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Since late September, employers who granted recognition to a union based on a "neutrality" or "card check" agreement could soon find themselves in the midst of a new union organizing campaign.

Thanks to a recent decision of the National Labor Relations Board (NLRB), employees who became represented through a "card check" - a process to determine if a majority of employees want to be represented by a union - now have the right to ask the NLRB to conduct a federally-supervised election to see if the results of the card check should stand or fall.

Here is the way it works:

- The employer enters into an agreement with a union in which it agrees to recognize and bargain with the union if the union can demonstrate that it has the support of a majority of the employees employed in a bargaining unit (group) that the union seeks to represent.
- As a part of the agreement, or in a separate agreement, the employer agrees to provide union organizers with a list of names and addresses of its employees and agrees to permit organizers, without opposition from the employer, to solicit employees to sign cards authorizing the union to act as the employees' bargaining representative.
- Armed with the two agreements and the list of employees, union organizers go onto the employer's site and urge employees to sign the union's authorization cards.
- Once the union obtains cards signed by a majority of employees, it will offer to submit the cards to a neutral third party authorized to determine if signatures on the cards are authentic and if the union holds a majority of valid cards.
- If the neutral third party certifies that the union, in fact, has obtained majority support, the employer will recognize the union as the exclusive bargaining agent of the employees and begin bargaining with the union for a labor contract.

Although the NLRB has a procedure for "decertifying" a union, employees dissatisfied with the results of a card check have, in past years, found it difficult to get the NLRB to conduct a decertification election. All of that changed recently when the NLRB announced a new rule.

In *Dana Corporation/Metaldyne Corporation*, 351 NLRB No. 28 (September 29, 2007), the NLRB modified its rule concerning decertification elections by holding that where an employer voluntarily recognizes a union pursuant to a card check, employees will have a period of 45 days in which to file a petition with the NLRB seeking a secret ballot election.

Under the *Dana* decision, an employer that grants voluntary recognition to a union based upon a card check must promptly notify the NLRB's regional office, in writing, of the grant of recognition. Once notification is received, the NLRB will send to the employer an official NLRB notice for posting in the workplace.

The NLRB's notice will inform employees that they may, within 45 days of the date that the NLRB notice is posted, file a petition seeking a secret-ballot election to determine whether employees desire to be represented

by the union. If the notice requirement has been met, the NLRB will proceed to conduct an election even if the company and the union have, in the meantime, entered into a labor contract.

The new 45-day rule will only be applied "prospectively." Thus, the new rule will only be applied to recognition agreements entered into after the date of the decision in *Dana*, i.e., September 29, 2007.

Prior to the issuance of the decision in *Dana*, employees that had obtained union representation through a card check could not petition the NLRB for a decertification election until the employer and the union had bargained for what the NLRB called "a reasonable period of time." There was no fixed "window period" for filing a petition and the issue of what constituted a reasonable period of time became the subject of extensive case-by-case litigation. Another feature of the new 45-day rule is that during the 45-day window period, a union other than the union recognized pursuant to a card check may separately petition the NLRB to represent the unit employees. If another union files its own petition then it must demonstrate that it has the support of at least 30% of the employees.

For employers, the new 45-day rule could result in the conduct of two organizing campaigns among its employees within a relatively short period of time. Thus, once a union has successfully conducted a card check campaign, it could shortly thereafter be faced with a new campaign conducted under election safeguards prescribed by the NLRB. Under NLRB procedures, litigation over the final outcome of an election can become lengthy, with some cases taking several years to resolve.