



LABOR & EMPLOYMENT DEPARTMENT

ALERT

NLRB GRANTS EMPLOYEES RIGHT TO VETO RECOGNITION AGREEMENTS

By **Brian A. Caufield**

In order to protect employee freedom of choice, the National Labor Relations Board (NLRB) modified its recognition-bar doctrine in *Dana Corporation* to allow employees to negate recognition agreements imposed without their consent. Unions have increasingly bypassed NLRB secret-ballot election procedures, and have used economic power to compel employers to stand aside when unions seek to organize, and to agree to a recognition based on a card check, without asserting their right to an election. The NLRB had found such agreements legitimate and had precluded employees from seeking decertification after a recognition agreement was signed for a reasonable period (generally measured not only by the number of days spent in bargaining, but by what transpired and what was accomplished in those bargaining sessions).

In reversing course, the NLRB will now not honor recognition agreements unless employees are formally notified of their right to file for an election, and 45 days pass without the filing of an election petition by employees or by another union. The NLRB based its decision on the inherent unreliability of authorization cards, in comparison to elections, and the concern that recognition agreements may be the product of common employer and union institutional interests rather than employee free choice.

This decision directly attacks the primary union organizational strategy of the past decade, which is based on bypassing the NLRB and organizing from the top down. In some cases such agreements reflect a union's power in a particular industry or market place. In other cases, they reflect a pragmatic "live and let live" strategy between employers and unions, rejecting the stereotypical view that the interests of labor and management are necessarily adverse.

This decision is also a direct rebuke to the pending legislation, the Employee Free Choice Act, which would allow the NLRB to certify a union as the employees' exclusive bargaining representative without holding an election if the NLRB finds that a majority of an employer's employees have signed union authorization cards. The decision has broad implications for companies who have, or are considering, neutrality agreements (which attempt to privatize representational rights), and are operating under accretion clauses or other agreements that bypass the NLRB's election mechanism.

For more information regarding this *Alert*, please contact the author or another member of the Labor & Employment Practice on the following page.

LABOR & EMPLOYMENT DEPARTMENT ATTORNEYS

Alka Bahal.....973.994.7800.....abahal@foxrothschild.com
 Anne Ciesla Bancroft.....609.895.6739.....abancroft@foxrothschild.com
 Michael Barabander.....973.994.7546.....mbarabander@foxrothschild.com
 Catherine T. Barbieri.....215.299.2839.....cbarbieri@foxrothschild.com
 A. Kyle Berman.....215.661.9483.....aberman@foxrothschild.com
 Heather R. Boshak.....973.994.7508.....hboshak@foxrothschild.com
 Dominick Bratti.....973.994.7528.....dbratti@foxrothschild.com
 Darryll A. Buford.....212.878.7950.....dbuford@foxrothschild.com
 Christine A. Cannella.....973.994.7532.....ccannella@foxrothschild.com
 Chantel D. Carmouche.....702.262.6899.....ccarmouche@foxrothschild.com
 Brian A. Caufield.....973.994.7537.....bcaufield@foxrothschild.com
 Richard B. Cohen.....212.878.7906.....rcohen@foxrothschild.com
 Francis V. Cook.....609.896.4587.....fcook@foxrothschild.com
 Debi F. Debiak.....973.994.7545.....ddebak@foxrothschild.com
 Richard J. Delello.....973.994.7544.....rdelello@foxrothschild.com
 Theodore M. Eisenberg.....973.994.7533.....teisenberg@foxrothschild.com
 Robert Epstein.....973.994.7526.....repstein@foxrothschild.com
 Nicholas Falcone.....973.994.7515.....nfalcone@foxrothschild.com
 David F. Faustman.....415.296.3885.....dfaustman@foxrothschild.com
 Mark W. Fitzgerald.....215.661.9473.....mfitzgerald@foxrothschild.com
 Howard R. Flaxman.....215.299.2068.....hflaxman@foxrothschild.com
 Deanna L. Forbush.....702.262.6899.....dforbush@foxrothschild.com
 Lisa I. Fried-Grodin.....973.994.7513.....lfried-grodin@foxrothschild.com
 David J. Garraux.....215.299.2847.....dgarraux@foxrothschild.com
 Jerold E. Glassman.....973.994.7550.....jglassman@foxrothschild.com
 Steven S. Glassman.....973.994.7506.....sglassman@foxrothschild.com
 Stanley L. Goodman.....973.994.7520.....sgoodman@foxrothschild.com
 Jack Gorny.....609.572.2203.....jgorny@foxrothschild.com
 Brett D. Halloran.....973.994.7578.....bhalloran@foxrothschild.com
 Michael S. Hanan.....609.895.6726.....mhanan@foxrothschild.com
 Beth Hinsdale-Piller.....973.994.7523.....bhinsdale@foxrothschild.com
 Harold L. Hoffman.....973.994.7555.....hhoffman@foxrothschild.com
 William M. Honan.....609.572.2218.....bhonan@foxrothschild.com
 Lynne M. Hook.....310.556.8786.....lhook@foxrothschild.com
 John D. Horowitz.....212.878.7963.....jhorowitz@foxrothschild.com
 973.994.7512

Curtiss T. Jameson.....973.994.7552.....cjameson@foxrothschild.com
 Sarah Beth Johnson.....609.572.2217.....sjohnson@foxrothschild.com
 Henry J. Lanzalotti.....215.661.9463.....hlanzalotti@foxrothschild.com
 Steven K. Ludwig.....215.299.2164.....sludwig@foxrothschild.com
 Nicole K. Manning.....973.994.7565.....nmanning@foxrothschild.com
 Desmond Massey.....973.994.7511.....dmassey@foxrothschild.com
 James A. Matthews, III*.....215.299.2762.....jmatthews@foxrothschild.com
 Ian D. Meklinsky.....609.895.6756.....imeklinsky@foxrothschild.com
 215.299.2758
 Jedd E. Mendelson.....973.994.7553.....jmendelson@foxrothschild.com
 Jonathan Meyers.....973.994.7535.....jmeyers@foxrothschild.com
 Christina K. Olivella.....415.364.5546.....colivella@foxrothschild.com
 Stephen A. Ploscowe.....973.994.7500.....sploscowe@foxrothschild.com
 Keith Reinfeld.....973.994.7547.....kreinfeld@foxrothschild.com
 Carolyn D. Richmond.....212.878.7983.....crichmond@foxrothschild.com
 Karl A. Romberger, Jr.....215.661.9433.....kromberger@foxrothschild.com
 Kenneth A. Rosenberg.....973.994.7510.....krosenberg@foxrothschild.com
 Suzanne J. Ruderman.....973.994.7566.....sruderman@foxrothschild.com
 Barnett Satinsky.....215.299.2088.....bsatinsky@foxrothschild.com
 Donia F. Sawwan.....973.994.7570.....dsawwan@foxrothschild.com
 Randall C. Schauer.....610.458.4967.....rschauer@foxrothschild.com
 Ian W. Siminoff.....973.994.7507.....isiminoff@foxrothschild.com
 Christina A. Stoneburner.....973.994.7551.....cstoneburner@foxrothschild.com
 Min S. Suh.....215.299.2801.....msuh@foxrothschild.com
 Jeffrey T. Sultanik.....215.661.9407.....jsultanik@foxrothschild.com
 Mark E. Tabakman.....973.994.7554.....mtabakman@foxrothschild.com
 Lauren A. Talan.....973.994.7514.....ltalan@foxrothschild.com
 Marvin L. Weinberg.....215.299.2836.....mweinberg@foxrothschild.com
 Cheryl J. Weller.....973.994.7502.....cweller@foxrothschild.com
 Randal S. White.....215.918.3610.....rwhite@foxrothschild.com
 Robert S. Whitehill.....412.394.5595.....rwhitehill@foxrothschild.com
 Beatrice S. Williams.....973.994.7803.....bswilliams@foxrothschild.com
 Luke P. Wright.....609.895.6738.....lwright@foxrothschild.com

* Co-Chair



Fox Rothschild LLP
 ATTORNEYS AT LAW

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