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Aftershocks from D.C.'s "Labor Law Earthquake" Likely to be Felt Throughout the U.S. Hospitality Industry

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On August 23, 2011 the Washington D.C. area experienced a 5.9 magnitude earthquake. A week later, a “labor law earthquake” of far greater magnitude had its epicenter in a federal agency in D.C. In the coming weeks and months, its aftershocks will be felt by unprepared employers, particularly those operating hotels, restaurants, spas and clubs in the hospitality industry.

In an opinion that America’s largest private sector labor union called a“monumental victor[y] … for unions,” the National Labor Relations Board (“NLRB” or “Board”) upended decades of precedent and placed virtually all employers at risk of organizing by so-called “micro unions.” The decision, *Specialty Healthcare and Rehabilitation Center*, 357 NLRB No. 83 (Aug. 26, 2011), was made public on August 30, 2011.

At issue in the case was the appropriate standard to be applied in determining the scope of a bargaining unit which the United Steelworkers sought to represent. The union had petitioned the NLRB to represent a unit consisting solely of 53 certified nursing assistants (“CNAs”) employed by a skilled nursing facility. The employer, on the other hand, asserted that the unit should include not only the CNAs, but all other nonprofessional service and maintenance employees at its skilled nursing facility.

For the past 20 years the Board consistently approved facility-wide “service and maintenance units” consisting of nonprofessional service and maintenance employees. Nevertheless, casting aside its own 20 year-old precedent, in *Specialty Healthcare* the Board majority laid out a radical new standard which will allow unions to organize employees in groups as little as two individuals, even when those individuals share a community of interest with other (excluded) employees. Obviously, this will make it much easier for unions to organize employees, as they can selectively choose which groups, and perhaps even which employees, they wish to represent.

Under the new standard, organized employees need only be “readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors)” and share a community of interest. Previously, a union bore the burden of showing that the unit it sought to represent had interests sufficiently distinct from other employees to exclude those other employees from the unit. Under the new standard, an employer bears the burden of showing that the excluded employees share an “overwhelming community of interest” with the employees in the petitioned-for unit – a burden which Member Hayes described as “virtually impossible.”

It is a truism that a union normally does not petition to represent those employees it has been unsuccessful in organizing, but instead will “propose the unit it has organized.” *Laidlaw Waste Systems, Inc. v. NLRB*, 934 F.2d 898, 900 (7th Cir. 1991). In direct contrast to the command of the National Labor Relations Act that “the extent to which employees have organized shall not be controlling” in determining whether a unit is appropriate, *Specialty Healthcare* allows a union to pick and choose the employees it chooses to represent (i.e., those it can persuade) and to organize them in small groups based only on negligible differences with other employees.

Plainly, as the dissent recognized, this case had nothing to do with employees’ free choice, and everything to do with “reversing the decades-old decline in union density in the private American work force.” Combined with the NLRB’s recent mandate that employers post a notice informing their employees of the right to organize, and its proposed rule shortening the timeframe in which employers may respond to union organizing, the intended result is clear. As Member Hayes noted, “the majority seeks to make it virtually impossible for an employer to oppose the organizing effort either by campaign persuasion or through Board litigation.”

Clearly, as a result of the *Specialty Healthcare* decision, hospitality employers face greater risk that unions will target small groups of employees, as noted by the dissent, under the announced standard, the NLRB’s regional directors “will have little option but to find almost any petitioned-for unit appropriate.” Once a union successfully gets its foot in the door, it will next seek to organize further small groups of sympathetic employees, while ignoring those employees who disagree with its message. For example, while the housekeeping department may be cross-trained with the front desk staff to provide guest service and truly share a "community of interest", unions could now focus on on department, or employees within a department to organize, rather than an entire group of employees at a hotel. Similarly, a union could organize the front of the house resturant staff, and then work its way to the back of the house employees. In light of the recent aggressive organizing tactics by UNITE HERE, hospitality employers would be well served to carefully analyze their operations and take immediate steps to address any potential vulnerabilities.