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NLRB Permits Micro-Units In Specialty Healthcare Decision

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In one of its most controversial decisions to date, the National Labor Relations Board ("NLRB") has overturned 20 years of precedent and will now permit unions to organize a minority share of an employer's workforce. As a result of this decision, organized labor will be able to establish footholds in businesses where the majority of the employees may not desire to be represented by a union.

On August 26, 2011 the NLRB released its decision in *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011). In *Specialty Healthcare*, the United Steelworkers petitioned for a representational election in a bargaining unit that was very distinct from the typical "wall to wall" unit. For decades, the NLRB has concluded that where employees share a "community of interest" that the appropriate bargaining unit in a representational election should include all of the employees of the employer who are similarly situated. Typically this type of unit is called a "wall to wall" bargaining unit and its common description includes all "production and maintenance" workers employed by the employer excluding clerical, administrative and security employees. This scope of employees insured that the union would be elected where the majority of the employer's employees desired to be represented by a union, but that where a majority of the employees did not desire to be represented, their terms and conditions of employment, and their workplace, would not be impacted by the presence of a labor union. Moreover, the "wall to wall" unit insured that there was not a fracturing of the employer's workforce where several unions represented several small groups of employees making the collective bargaining unmanageable for any of the parties.

This logical and longstanding policy of Democratic and Republican majority labor boards has been scuttled.

In *Specialty Healthcare*, the employer operates a nursing home and rehabilitation center in Mobile, Alabama. Among the job classifications – or job titles – at this facility is a "CNA", or, certified nursing assistant. Rather than seeking to represent all of the employer's employees, the union petitioned for a bargaining unit consisting only of the CNAs. The employer objected on the basis of the NLRB's decision in *Park Manor Care Center*, 305 NLRB 872 (1991) and the Board's longstanding practice of not certifying "fractured" units but insisting that all of the employer's employees who shared a community of interest comprised an appropriate bargaining unit. The NLRB, through a

regional director, initially concluded that this petition was appropriate and directed an election be held amongst only the employer's full and part time CNAs. The employer appealed this decision, in essence, by asking the NLRB to review the regional director's decision. The NLRB not only accepted this obligation but requested briefs from interested parties regarding whether its decision in *Park Manor* and its longstanding practice of certifying only bargaining units of all of the employees with a community of interest should remain the law. Significantly, the NLRB also requested interested parties' positions regarding whether its decision should have application in all industries rather than just the health care industry which maintains unique standards under the National Labor Relations Act.

After inviting and, presumably, considering this argument, the NLRB reversed the *Park Manor* decision and will now permit appropriate units to be petitioned-for and certified even when larger and "more appropriate" bargaining units exist in the employer's workforce.

"Nor is a unit inappropriate simply because it is small. The fact that a proposed unit is small is not alone a relevant consideration, much less a sufficient ground for finding a unit in which employees share a community of interest nevertheless inappropriate."

To that end, the NLRB wrote that it will focus on the community of interest of the employees, the extent of common supervision, interchange of employees, geographic considerations "etc., any of which may justify the finding of a small unit." An employer can challenge the determination regarding the composition of the unit, but the Board will now require that the burden to establish that a bargaining unit is not appropriate will be an "overwhelming" community of interest between the employees in the petitioned-for unit and the larger workforce.

"…when employees or a labor organization petition for an election in a unit of employees who are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or other similar factors) and the Board finds that the employees in the group share a community of interest after considering the traditional criteria, the Board will find the petitioned-for unit to be an appropriate unit, despite a contention that employees in the unit could be placed in a larger unit which would also be appropriate or even more appropriate, unless the party so contending demonstrates that employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit…"

The NLRB did agree that cases may exist where the petitioned-for unit inappropriately "fractured" the workforce. For example, had the union petitioned only for CNAs working the night shift vs. all employees, or only CNAs working on the first floor and not the second floor, but it is eminently clear that the Board will direct elections and certify bargaining units of employees simply because they have one job title or job function and permit the union to ignore the other employees with distinct job titles or functions even when that means that the minority of the employees overall support the union. The reality is that all of the employees will have to deal with the union.

Employers should take no stock in some press suggestions that this decision has limited application to the health care industry. There is no holding or assurance that the rule is limited to the health care industry merely because the case arose within the health care industry. Rather, employers will be well served to heed the opening of Member Brian Hayes dissent which is absolutely accurate:

“Make no mistake. Today’s decision fundamentally changes the standard for determining whether a petitioned-for unit is appropriate in any industry subject to the Board’s jurisdiction.”