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The Uncertain Future of Micro-Units Under The NLRA

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The Uncertain Future of Micro-Units Under The NLRA

By Tom Luetkemeyer

The stage is set for reconsideration and possible reversal of the NLRB's decision in *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), which allows "micro-units" of employees to organize a union. Two current developments likely will impact the future designation of micro-units under the National Labor Relations Act. The first is the appointment and anticipated confirmation of two new nominees to the National Labor Relations Board. The second is the potential passage of the Representation Fairness Restoration Act, which would overrule *Specialty Healthcare*, a key Obama-era National Labor Relations Board ("NLRB") decision on micro-units.

The impact of *Specialty Healthcare* was immediate and significant. The decision

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overruled 80 years of consistent application of the "community of interest" standard in making unit determinations. Through the decision, the NLRB sanctioned the approval of micro-units, which gives a distinct tactical organizing advantage to organized labor. Under *Specialty Healthcare*, an employer opposing the designation of a micro-unit would have to demonstrate that an alternative grouping of employees would share an "overwhelming community of interest." So far, those determinations generally have not gone in the employers' favor. Combined with the NLRB's rules on quickie elections, which significantly reduces the amount of time in which a union may organize, employers find themselves at a distinct disadvantage when a union attempts to identify and then organize a small subset of an employer's workforce in which it perceives it has majority support. The NLRB's actions have led to the creation of a micro-unit, for example, in a Macy's department store, which included fragrance and cosmetic sales personnel but excluded all other floor sales employees.

It is important to note that regardless of whether *Specialty Healthcare* is overruled, employers, particularly healthcare entities, will have to deal with and react to micro-unit designations for the foreseeable future. This is due to the practical reality of how the NLRB operates and how cases come before the Board. *Specialty Healthcare* will not be overruled until a representation petition is approved and a dispute makes its way before a newly constituted Board. That could be six months or up to two years; one cannot predict with any more certainty. In the meantime, employers must continue to remain vigilant with respect to organizing activity at its sites.

Healthcare entities are particularly vulnerable to the formation of micro-units due to the greatly varying types of employees and professionals who make up their workforce. However, the concept of micro-units has extended to other industries, such as retail and printing and manufacturing employers. As indicated above, in Macy's, Inc. and Local 1445 United Food and *Commercial Workers Union*, 361 NLRB No. 4 (2014), the Board approved a micro-unit comprised solely of cosmetics and fragrance employees. In DPI *Secuprint, Inc.,* 362 NLRB No. 172 (2015), the Board approved the exclusion of offset-press employees from a unit that included offset bindery, hourly pre-press and digital press employees. More often than not, employers are confronted with units which fracture an employer's workforce. Employees who may work side by side and in proximity to each other, and perhaps are even supervised by the same managers, may find that some of their ranks are covered by a collective bargaining obligation while others have no such restraints or benefits.

Employers which have an existing bargaining relationship with a micro-unit will continue to have to deal with the union in bargaining. Those that have negotiated and executed contracts are barred from making any legal challenges to the contract within the first year. Therefore, employers can mitigate some of the adverse results which flow from a fractured workplace brought about by an approved micro-unit through good faith but hard bargaining. That strategy does not come without risks, however, given that a group or employees in a micro-unit can elect to strike and disrupt operations in response to hard bargaining. Micro-units also might lead to increased organizing once a "beachhead," so to speak, is established by a union.

Legislative help should be on the way. The Representation Fairness Restoration Act, recently proposed by Senator Johnny Isakson (R-GA), seeks to reverse *Specialty Healthcare* and require the board to follow pre-*Specialty Healthcare* criteria, which deems a proposed unit to be appropriate for collective bargaining only if the employees in the proposed unit share a community of interest. As of the writing of this article, the bill has not yet advanced through the Senate.

This alert has been prepared by Hinshaw & Culbertson LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.