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NLRB RESURRECTS CONTROVERSIAL STANDARD GIVING UNIONS MORE LEEWAY TO ORGANIZE 'MICRO UNITS'

Insights
Dec 15, 2022

The National Labor Relations Board (NLRB) just made it easier for labor unions to organize smaller bargaining units known as "micro units" that can include small sub-sets of the overall workforce. The Board's move, which overturns a Trump-era standard adopted in 2017, is significant because it could help organized labor establish footholds in businesses where only a small group of employees are seeking union representation. Specifically, to establish a micro unit under the Board's December 14 decision in *American Steel Construction, Inc.*, the employees in the petitioned-for unit only need to constitute a "readily identifiable" group and share a "community of interest." This could mean, for example, that departments within the overall operation may be able to organize regardless of their level of integration with the overall workforce. The Board's decision — while not surprising — places a nearly impossible burden on employers to prove that a petitioned-for unit inappropriately excludes other employees who share interests with the micro unit. From now on, they would need to show that the excluded employees share an "overwhelming" community of interest with employees in the original group. Here's what the ruling means for employers.

The Board's Standard Shifts Again

The Majority Ruling

As you likely know, NLRB standards change with the political tides, and the new standard adopted by yesterday's *American Steel* decision is no different. In a 3-2 case, the

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Democrat-controlled Board returned to the Obama-era standard in *Specialty Healthcare*, making it easier for unions to organize a diminutive share of an employer's workforce. *Specialty Healthcare* was considered one of the most controversial NLRB decisions at the time it was decided in 2011, as it overturned 20 years of Board precedent, giving rise to a proliferation of representation petitions (and union election victories) within micro units.

Under the *Specialty Healthcare* standard — and now under *American Steel* — a union's ability to organize smaller units of employees was significantly expanded, allowing unions to define a bargaining unit based on the extent of the union's organizing. If a union petitions for an election among a particular group of employees, it merely needs to show the group represents a "readily identifiable" group based on job classifications, departments, functions, work locations, skills, or similar factors. The burden then shifts to the employer to demonstrate that additional employees "share an overwhelming community of interest" with the petitioned-for employees, a standard that as they learned under the Obama Board, is virtually impossible for employers to meet.

Two Board Members Dissent

Notably, employers received a big win in 2017 when the Board abandoned the "overwhelming" community-of-interest standard. At that time, the NLRB stated that "there are sound policy reasons for returning to the traditional community-of-interest standard that the Board has applied throughout most of its history, which permits the Board to evaluate the interests of all employees – both those within and those outside the petitioned-for unit – without regard to whether these groups share an 'overwhelming' community of interests."

At that time, the NLRB also reaffirmed that the community-of-interest test required "the Board in each case to determine whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment and are separately supervised."

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In the most recent ruling in *American Steel*, the Republican Board members disagreed with the majority and would have maintained the Trump-era standard. They wrote that "by returning to *Specialty Healthcare*, the majority guts that standard, undermines labor-relations stability, and shackles the Board in fulfilling" certain duties under the National Labor Relations Act.

What Does the Latest Decision Mean for Employers?

As a result of the Board's decision in *American Steel*, an employer's ability to combat fractured bargaining units has been significantly impeded. Unions will once again be able to tactically establish a bargaining unit consisting of a small subsection of employees to get one "foot in the door" before extending their efforts to the rest of the workforce.

Moreover, the NLRB majority noted that its decision to reinstate *Specialty Healthcare* applies retroactively to all pending cases. Thus, employers may need to adjust their strategic efforts in ongoing cases in light of the decision.

Depending on the nature of your operation, it could be difficult to develop and implement strategies to thwart micro-unit organizing. Nonetheless, employers should do what they can to maximize the integration and interdependence of various working units. Once an employer identifies its optimum unit — which is often the largest potential unit — it should then identify potential micro units within the larger group. Every effort should then be made to functionally integrate it with the larger unit. In a broader sense, when possible, employees in the desired unit should ideally share the same personnel policies, benefit programs, and wage administration, and should be evaluated under the same review process.

Conclusion

Fisher Phillips will continue to monitor this and other labor-related issues and provide updates where necessary, so make sure you are subscribed to Fisher Phillips' Insight System to receive the most up-to-date information directly in your inbox. If you have any questions, we encourage you to consult with your Fisher Phillips attorney, the authors of this Insight, or any member of our Labor Relations Group.