Micro-Units Are Dead: Labor Board Returns To Traditional "Community Of Interest" Factors For Union Elections

Insights
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One day after overturning the Obama-era's joint-employer standard and in the waning days of Philip Miscimarra's Chairmanship, the National Labor Relations Board struck down the pro-union use of micro-units, a tool used to more easily organize a workplace. In a case in which Fisher Phillips partners represented the employer, the Board overruled the 2011 case of Specialty Healthcare & Rehabilitation Center of Mobile in a 3-2 decision, reinstating the traditional community-of-interest standard for determining an appropriate bargaining unit in union representation cases (*PCC Structurals, Inc.*).

This decision further tilts the scales back toward an even playing field for employers and unions, bringing balance back to the labor landscape. Unionized employers should review this decision in consultation with their labor counsel to determine how to adjust their practices.

Specialty Healthcare **Standard, Explained**

Specialty Healthcare was considered one of the most controversial NLRB decisions at the time it was decided in 2011, overturning 20 years of Board precedent. The decision allowed unions to organize a minority share of an employer's workforce so that organized labor could establish footholds in businesses where the majority of the employees might not have desired to be represented by a union.

Under the *Specialty Healthcare* standard, the union's ability to organize smaller units of employees – referred to as "micro-units" – was significantly expanded, allowing unions to define a bargaining unit based on the extent of the union's organizing. If a union petitioned for an election among a particular group of employees, it merely needed to show the group it organized represented a "readily identifiable" group based on job classifications, departments, functions, work locations, skills, or similar factors. The burden then shifted to the employer to demonstrate that additional employees "shared an overwhelming community of interest" with the petitioned-for employees, an almost impossible standard for employers to meet.

Several months ago, Fisher Phillips attorneys predicted that this standard was in line to overturned by the newly constituted Labor Board. "The roadmap for overruling *Specialty Healthcare* has been clearly laid out," we said, "and the mischief caused by rote-and-verse application of its test is soon

likely to be ameliorated if not in its entirety, then at least in substantial part." This prediction came true with Friday's landmark decision in *PCC Structurals.*

Background

In case arising out of a Portland, Oregon-based manufacturing facility, the Regional Director applied the *Specialty Healthcare* standard to find that the petitioned-for unit of approximately 100 welders – who were part of a larger group of approximately 2,500 production workers – shared a "community of interest" and thus represented an appropriate unit for purposes of a union election. The Regional Director found that the welders shared a distinct community of interest despite the fact that they are spread across different departments and report to different supervisors who also supervise other production workers. Further, all production workers – including the welders – worked similar hours, were paid on the same wage scale, received the same benefits, were subject to the same handbook and work rules, wore similar attire and protective gear, worked under the same safety requirements, and participated in ongoing training regarding harassment, safety, and other matters.

The Regional Director rejected the employer's contention that the rest of the production workers shared an "overwhelming community of interest" with the welder-only micro-unit, and therefore should have been included in the unit. The Regional Director made this decision despite acknowledging that the functional integration of the employer's operations weighed in favor of finding an overwhelming community of interest between the welders and the rest of the production employees. The employer appealed the September 22, 2017 election result, and the matter was quickly heard by the NLRB.

New Labor Board Reverts To Old Standard

A team of Fisher Phillips lawyers argued that the *Specialty Healthcare* standard was inappropriate because it forced the Board to cede its statutory obligation to determine the appropriate unit to the union. As they argued, "Under *Specialty Healthcare*, the Board's statutory obligation to determine the appropriate unit has been reduced to 'rubber stamping' any petitioned-for unit that comes across its desk."

In a December 15 decision, the Board agreed, finding that the *Specialty Healthcare* standard improperly detracts from the Board's statutory responsibility to make appropriate bargaining unit determinations. The Board determined that the *Specialty Healthcare* standard discounted – or eliminated altogether – any assessment of whether shared interests among employees *within* the petitioned-for unit are sufficiently distinct from the interests of *excluded* employees to warrant a finding that the smaller petitioned-for unit is appropriate.

The Board went on to criticize *Specialty Healthcare* by pointing out that, under its test, if the petitioned-for employees were deemed readily identifiable as an appropriate group and shared a community of interest among themselves, "this inward-looking inquiry is controlling, *regardless* of the interests of *excluded* employees, except for the rare instances where it can be proven that the excluded employees share[d] an 'overwhelming' community of interests with employees in the petitioned-for unit." The Board determined that this aspect of *Specialty Healthcare* undermined

petitioned-for unit." The Board determined that this aspect of *Specialty Healthcare* undermined fulfillment of the Board's responsibility to "assure" to employees "in each case" their "fullest freedom" in the exercise of Section 7 rights. As a result, the Board concluded that *Specialty Healthcare* inappropriately created a regime under which "the extent of union organizing [is] 'controlling' or at the very least gives far greater weight to that factor than statutory policy warrants because … the petitioned-for unit is deemed in appropriate in all but rare cases."

What Is The Impact Of This Decision?

To be clear, the *PCC Structurals* decision means that the Board has now abandoned the "overwhelming" community-of-interest standard. In the decision, the Board 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."

By overturning *Specialty Healthcare,* the Board reaffirmed that the community-of-interest test requires "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."

What Does This Mean For Employers?

This is a big win for employers who have fought to level the playing field once again by overturning *Specialty Healthcare*. As a result of this decision, employers' ability to combat fractured units has been restored. Unions will no longer be able to establish a bargaining unit by organizing a small group of employees in an effort to infiltrate the rest of the workforce.

If you have questions about this decision or how to adjust your strategic efforts in light of this restored standard, contact the attorneys who secured this victory — Rick Grimaldi, Lori Armstrong Halber, or Todd Lyon — or any of the attorneys in our Labor Relations Practice Group.

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