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NLRB Chisels Away at Micro-Units

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The controversial - and often confusing - "micro-units" of unions have caused headaches for employers because of a lack of definition from the National Labor Relations Board.

But a recent ruling will help employers understand a micro-unit classification, and has laid out a test for the NLRB to determine whether something is a micro-unit or not.

In 2011, the NLRB issued a decision which made it easier for unions to improve their chances of winning a union election by targeting a smaller subset of a larger workforce - a "micro-unit." The NLRB gave unions significant control to pick and choose the groups of employees they wanted to represent in the workplace, and they usually chose the small group where they knew they would have support. In 2017, the NLRB rejected the use of micro-units and held that a union can target a portion of a larger workforce only if the union's petitioned-for unit shares a "community-of-interest" sufficiently distinct from excluded employees. The problem with the 2017 case is it did not explain how the "community of interests" should be weighted. That created confusion and prompted the need for the NLRB to clarify how the shared and distinct interests should be weighed in a community of interests analysis.

Recently, the NLRB clarified the test by laying out a new three-step process for determining an appropriate bargaining unit under that standard. In this new process, to conclude that a proposed unit is appropriate, the NLRB must:

- Consider whether the proposed unit shares an internal community of interest.
- If the employees share an internal community of interest, the NLRB must then comparatively analyze and weigh the interest of those within the proposed unit and the shared and distinct interests of those excluded from the unit.
- Consider its prior decisions on appropriate units in the particular industry involved.

Using this three-step test, the NLRB reversed a regional director's decision to allow a micro-unit of a union at the Boeing Company. In the case, the International Association of Machinists Union filed a petition seeking an election for a bargaining unit of about 178 employees out of a total workforce of over 2,700 employees. The NLRB's regional director held that this petitioned-for unit, composed of only two classifications, was appropriate under the National Labor Relations Act. Following an election - which the union won - Boeing successfully appealed, arguing that the two classifications were not an appropriate bargaining unit because they shared a community of interests with its larger workforce.

With the new process, the NLRB concluded the proposed unit at Boeing did not share an internal community of interest, and that it inappropriately excluded other employees with shared interests as they were stationed on the same production line as the petitioned-for classifications.

Takeaways

This test invites employers to challenge the scope and composition of petitioned-for units. Employers facing representation elections should capitalize on the NLRB's return to the traditional standard and where appropriate, seek modifications of proposed units based on the shared and distinct interests of the included and excluded employees.

Employers should work with labor counsel to ensure their practices and policies favors the avoidance of micro-units. If you have any questions concerning micro-units or how this latest decision could affect your business, please contact me or any member of the Barley Snyder Labor Law Practice Group.