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NLRB Boosts 'Micro Units' With Macy's Decision

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In 2011, the National Labor Relations Board (NLRB) issued a memorable decision in Specialty Healthcare and Rehabilitation Center of Mobile. The ruling, which was eventually upheld by a federal court of appeals, dealt a blow to employers: establishing a tougher standard for those seeking to prevent small collective bargaining groups known as "micro units," or "micro unions," from forming in their workplaces.

Another ruling by the labor board handed down on July 22 expanded on the Specialty Healthcare decision, showing that the board will apply the same rules to retail workers looking to form a micro unit that it did to health-care workers. In its 3-1 Macy's decision, the NLRB granted a victory to the United Food and Commercial Workers International Union, and opened a door to further micro union organizing efforts in the retail industry.

Jeffery Meyer, partner at Kaufman Dolowich & Voluck, told



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CorpCounsel.com that while it's no shock that the labor board made this decision, given its generally pro-labor bent, the outcome raises plenty of issues for employers that want to avoid unionization. "This is not surprising coming from the board as it's currently comprised, but even to make this jump into a non-health-care field is concerning," he said.

As its name implies, the micro unit in question in the Macy's case is relatively small. There are 41 unionizing employees in the cosmetics and fragrances departments of a Saugus, Mass.,

Macy's department store. The group, which comprises less than a third of the total workers at the store, met opposition in its unionization efforts from Macy's, which argued that any collective bargaining unit should incorporate all of the store's employees, or at least most of them. Macy's supported a bigger collective bargaining unit because in most cases unionization happens more readily with fewer employees.

In its ruling that said the cosmetics and fragrance workers can in fact unionize, the NLRB

relied on a “community of interest” test, determining that the members of the micro unit are a readily identifiable group that has enough concerns in common to legally band together. However, it also applied a much newer standard straight out of Specialty Healthcare: the idea that in order to prove that the rest of the workers should be part of the unit too, the employer has to demonstrate that they share “an overwhelming community of interest” with the original group.

Meeting the burden of proving that the community of interest is “overwhelming” across a business or a store appears to be close to impossible at this point, Steve Bernstein, a partner at Fisher & Phillips, told CorpCounsel.com. “That might explain why you’ve seen such a strong opposition within the business community,” he said. “It’s hard to conceive of a set of facts that is going to meet this standard.”

The ruling in Macy’s will likely make the unionization landscape more problematic for employers, but for retail employees looking to unionize it may provide an opportunity to divide and conquer. “Everyone understands it’s much easier to unionize smaller units, it’s just historically a given fact,” Donald Schroeder, a member at Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, told CorpCounsel.

com. He explained that in smaller units, there tend to be stronger alliances, which makes it easier to petition and win elections.

Having micro units certified instead of the whole organization or more of the organization at once will also open up more avenues for unionization efforts, noted Meyer. “You’re letting the union in the door with a relatively small burden, with a very small group that has shown union leanings,” he said. “Then, you’re giving them a template to go after every other subset [of employees].”

Then there’s the potential, articulated in a statement by the National Retail Federation, which filed an amicus brief in the case, for the presence of multiple bargaining units in one business or retail store, and all of the problems that might entail.

“It’s a logistical nightmare and would create a huge amount of headaches for retailers because [the bargaining units] will be pitting themselves against other ones,” said Schroeder. “It will just create a huge distraction.”

With rules that are becoming increasingly favorable to unionization, it’s getting harder for employers to head off these small units. However, there are steps companies can take to make it less likely that miniunits will be able to take hold. According to Schroeder, uniformity across employees is key.

Employers can do their best to centralize supervisory and reporting structures, make pay practices and other policies more uniform, and create centralized labor relations. This will help make a case for broader “wall-to-wall” unionization attempts more convincing.

Bernstein recommended that retailers keep their employees moving in order to avoid the sort of specialization or impression of specialization that makes it easier to designate a micro unit. Giving an employee the chance to work at several different counters in a retail store or on different shifts, for example, can help. “I think it’s increasingly important in light of these decisions to rotate your employees, to cross train them, which in many ways benefits them as well. It gives them more versatility in their skill set,” Bernstein said.

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