Inside The Beltway

Keeping You Informed

A publication of Nixon Peabody LLP's Washington, DC office

March 16, 2011

Critical developments in labor and employment law

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NLRB's request for briefing on appropriate bargaining units is troubling and signals all employers to conduct detailed reviews

Executive Branch/Administration
National Labor Relations Board—"appropriate unit" for union election and representation

On December 22, 2010, in *Specialty Healthcare and Rehabilitation Center of Mobile*, 356 NLRB No. 56, the National Labor Relations Board (NLRB) invited briefing on determining appropriate bargaining units for nonacute health care facilities. Among the questions raised, two are particularly troubling for employers generally:

> (1) "Where there is no history of collective bargaining, should…a unit of all employees performing the same job at a single facility…be presumptively appropriate as a general matter."
>
> (2) "Should the Board find a proposed unit appropriate if…the employees in the proposed unit are 'readily identifiable as a group whose similarity of function and skills create a community of interest.'"

At stake are the statutory directives in Sections 9(b) and 9(c)(5) of the National Labor Relations Act (Act) to define units by employer, craft, plant, or subdivision and not to consider the extent of union organizing as determinative. Should the NLRB "reinterpret" these provisions as suggested by the questions raised, it will launch a dramatic resurgence in union organizing targeting smaller bargaining units at any workplace. This may diminish employers' efficiencies and productivities due to multiple, conflicting contracts, increased work interruptions, and significant restrictions on operating flexibilities as well as compromising the employees' collective bargaining leverage.

In 1989, following extensive hearings, the NLRB adopted a rule delineating eight appropriate units for acute care hospitals, which was subsequently approved by the Supreme Court in *American Hospital Assn. v. NLRB,* 499 U.S. 606 (1991). However, the NLRB concluded in *Park Manor Care Center, Inc.*,

305 NLRB 872 (1991) that it would return to case-by-case adjudication, not rulemaking, to determine appropriate units in the nonacute health care industry due to greater diversity of service offerings and jobs and a lack of sufficient industry-wide data. The NLRB proceeded to apply its longstanding "community of interests" analysis to determine whether a petitioned-for unit was appropriate.

The following are the community of interest factors the NLRB has historically considered in evaluating the appropriateness of a prospective unit:

- Similarities in wages or compensation;
- Similar hours of work;
- Similar employment benefits;
- Common supervision;
- Degree of similar qualifications, training, and skills;
- Similarities in job functions and amount of working time spent away from the employment or plant;
- Frequency or amount of integration with the work functions of other employees or interchange with them; and
- History of collective bargaining, if any.

See *Kalamazoo Paper Box Corp*., 136 NLRB 134 (1962).

That the NLRB raised general questions of applicability beyond just the nonacute health care industry is surprising given its recent decision in *Wheeling Island Gaming, Inc*., 355 NLRB No. 127 (August 27, 2010). Chairman Liebman and former member Schaumber upheld a Regional Director's decision finding that a unit limited only to poker dealers excluding craps, roulette, and blackjack dealers was not appropriate for collective bargaining purposes. However, in dissent, member Becker argued that the Act requires only *an* appropriate unit, not the only or ultimate or most appropriate unit. Becker argued that "all employees [are] doing the same job and working in the same facility. Absent compelling evidence that such a unit is inappropriate, the Board should hold that it is an appropriate unit." Unquestionably, Becker's argument favors whatever a union can organize and deliberately ignores the statute's express admonition that "[i]n determining whether a unit is appropriate…the extent to which the employees have organized shall not be controlling." Becker argues that "[i]f the proposed unit has a rational basis rooted in the employer's policies and practices so that employees in the unit share a community of interest, it is neither 'too narrow' nor 'too broad'…[and] if…the parties' experience with collective bargaining suggests to them that bargaining would be more productive in a larger or differently contoured unit, the parties [union and employer] are free to change the unit to better suit their mutual interests."

Becker argues for instant unit legitimacy to avoid delay in scheduling an election to assure a union's institutional presence at any cost—small, fractured units that may compromise employees' leverage at the bargaining table and that may damage an employer's operating efficiency, flexibility, and productivity due to conflicting demands from multiple union represented units.

Briefs were due on or before March 8, 2011. On the same day, Congressman Kline, Chairman of the House Committee on Education and the Workforce and Congressman Issa, Chairman of the House Committee on Oversight and Government Reform formally requested that the NLRB Chairman provide extensive empirical data regarding *all* representation case data for any employers and unions in any industry from 2000 to the present, post the data on the NLRB public webpage, and extend the

deadline for briefing by interested parties until 60 days following the public data posting. The reason the Committee Chairmen provided underscores the critical importance of the appropriate unit concept :

> While the case [*Specialty Healthcare*] involved nursing homes directly, the National Labor Relations Board…requested comments generally on the appropriate standard for determining bargaining units, including empirical descriptions of interested parties' experiences under existing law. **As the composition of potential bargaining units is one of the most important decisions leading up to an election, any change to the existing standard must be fully vetted and understood before it is adopted.** [Emphasis added]

Employers should pay close attention to the NLRB's forthcoming decision because, apart from voluntary recognition, union representation begins following an election victory by employees considered by the NLRB to be eligible voters having been found to be included in "an appropriate unit." In view of the Board's questions suggesting a significantly new direction, employers should be wary of too many job titles, too many pay grades, too many reporting chains, and too many work groups. Unit analysis is critical to enabling a clear, precise presentation of work assignment commonalities to complement and defend the nature, purpose, unique organization, and competitive properties of the business. Not all nursing homes, retail operations, manufacturing operations, etc. are the same. Part of an employer's competitive edge can be attributed to how its workforce is structured and managed. By careful analysis and redesign, employers may create fewer but larger defensible groups or "appropriate units" to protect against union cherry-picking to "get in the door" and organize additional sub-groups later. Alternatively or additionally, unique groups by skill or function can be segregated to avoid merger into a larger, more generic employee group susceptible to unionizing.

Regardless of how the NLRB eventually rules in the *Specialty Healthcare* case, and of how the courts may treat the issue on review, it is essential to analyze all factors and dimensions of the "community of interests" standard. Employers should create easily comprehended reporting structures, job groups, and corresponding pay grade structures that make sense for operational purposes and that survive an NLRB appropriate unit finding or present manageable units should a union prevail in an election. Obviously, fewer but larger employee units usually make union organizing more difficult. Most importantly, protecting against multiple units reduces conflicting outcomes, increased risk of work stoppages, and negative operating results.

Contact John Raudabaugh to discuss a Unit Analysis.

National Labor Relations Board—Acting General Counsel recommends additional remedies in first contract bargaining cases

In a February 18, 2011, Memorandum, the NLRB's Acting General Counsel supplemented remedies for first bargaining cases by directing notice reading where the employer's unlawful conduct at or away from the table undermined union support. An earlier 2008 Memorandum directed notice reading where an employer refused to bargain, rejected all of the union's proposed bargaining dates, made unilateral changes, and refused to provide information; engaged in surface bargaining, engaged in bad faith bargaining and discriminated against a steward and union members; failed to execute an

agreed-upon contract; dealt directly with unit employees, withdrew recognition, and blamed unilateral changes regarding employee bonuses on the union.

National Labor Relations Board—Acting General Counsel requests NLRB to reconsider mitigation doctrine

On March 11, 2011, the Acting General Counsel requested the NLRB to overturn two Bush II NLRB decisions "burdening discriminates and subjecting them to a higher level of scrutiny in establishing a reasonable search for work." In *Grosvenor Resort*, 350 NLRB 1197 (2007), the NLRB held that discriminates must begin their job search within two weeks or suffer a concomitant reduction in backpay. Dissenting member Walsh argued that job search efforts by discriminates should be evaluated from an overall standard of reasonableness without specific time targets. In *St. George Warehouse,* 351 NLRB 961 (2007), the NLRB altered the burden of proof by requiring the employer to only show that there were substantially equivalent jobs in the relevant geographic area and relieving the employer from having to prove that the discriminate unreasonably failed to apply for the available jobs. Should the NLRB overturn these two cases, it will presumably return to prior precedent as affirmed in *Phelps Dodge Corp. v. NLRB*, 313 US 177 (1941).

National Labor Relations Board—Acting General Counsel changes calculation of backpay

In *Jackson Hospital Corporation d/b/a Kentucky River Medical Center*, 356 NLRB No. 8 (2010), the NLRB significantly changed its policy on remedial backpay by requiring daily compounding of interest. The Acting General Counsel's March 11, 2011, Memorandum addresses details of computing gross backpay and provides for reimbursement of expenses incurred in searching for work even if the discriminate had no earnings and for a tax component to reimburse discriminates for excess federal and state income taxes owed as a result of receiving a lump-sum backpay award covering more than one year of backpay.

Legislative Branch/Congress—Senate

The National Right-to-Work Act, S. 504, was introduced on March 8, 2011, to eliminate special treatment for union shops, which are currently permitted in states that have not enacted right to work laws.

The Non-Federal Employee Whistleblower Protection Act of 2011, S. 241, was introduced on January 31 to expand whistleblower protections to non-federal employees whose disclosures involve misuse of federal funds.

The Secret Ballot Protection Act of 2011, S. 217, was introduced on January 27, 2011, to require employer recognition of labor organizations only by majority vote in a secret ballot election conducted by the NLRB. Note companion H.R. 972.

Legislative Branch/Congress—House

The Secret Ballot Protection Act, H.R. 972, was introduced on March 9, 2011, to require employer recognition of labor organizations only by majority vote in a secret ballot election conducted by the NLRB. Note companion S. 217.

Davis-Bacon Repeal Acts, H.R. 745 and 746, were introduced on February 16, 2011, to eliminate prevailing wage rate mandates on federally subsidized construction projects.

The Working for Adequate Gains for Employment in Services Act (WAGES Act), H.R. 631, was introduced on February 10, 2011, to establish a base minimum wage for tipped employees.

On January 12, 2011, the Living American Wage Act (LAW Act), H.R. 283, was introduced to require the adjustment of the minimum wage every 4 years to ensure that annual income is not less than 15 percent higher than the federal poverty threshold for a family of two.

The Protecting America's Workers Act, H.R. 190, was introduced on January 5, 2011, expanding coverage, increasing protections for whistleblowers, increasing penalties, and providing rights for victims or their family members under the Occupational Safety and Health Act.

The Labor Relations First Contract Negotiations Act of 2011, H.R. 129, was introduced on January 5, 2011, to require mediation and, ultimately, binding arbitration, if a first contract is not achieved within 60 days of the NLRB certification of the union as the bargaining representative.

H.R. 128 was introduced on January 5, 2011, to require site-controlling employers to maintain a site log for all recordable injuries and illnesses occurring among all employees on the particular site whether the employees are employed directly or by contractors or temporary help or employee leasing services.

For further information on the content of this alert, please contact your Nixon Peabody attorney or:

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