NLRB Continues its Mission to Revamp Labor Law: Modifies standard for determining appropriate bargaining units in non-acute health care facilities

September 14, 2011 by Todd L. Sarver

In our January 10, 2011 Alert, Inch by Inch, Row by Row--NLRB Looks to Facilitate Organizing in Non-Acute Health Care Facilities, we advised you that the National Labor Relations Board was re-evaluating how it determines an appropriate bargaining unit in non-acute health care facilities. In *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (Member Hayes dissenting…again), the Board found that Certified Nursing Assistants (CNAs) may comprise an appropriate bargaining unit without including other nonprofessional employees. In doing so, the Board overruled *Park Manor Care Center, Inc.,* 305 NLRB 872, 875 (1991) as "obsolete."

The Board historically has taken a more flexible approach to what constitutes an appropriate bargaining unit for unionization of non-acute health care facilities, opting to evaluate appropriate bargaining units on a case-by-case basis. *See* 29 CFR § 103.30(g). Under this case-by-case approach, the Board has typically applied a "pragmatic" (sometimes called "empirical") community-of-interest standard, grouping employees by, among other things, similarity of wages and hours, extent of common supervision, frequency of contact with other employees, areas of practice, and patterns of bargaining in a non-acute care setting.

The practical result of this approach has been the frequent certification of broader bargaining units of all non-professional service and maintenance employees, such as dietary aides, cooks and clerks. The Board's rationale in certifying such broader bargaining units has been that non-acute health care facilities that provide long-term care rather than medical treatment of a specific illness are more functionally integrated than acute health care facilities, where the division of labor is far more explicit. Under this rationale, non-acute health care facilities' broader focus on the day-to-day general well-being of patients and staffing models that involve employees of varying skill levels working interchangeably in providing services justified such bargaining units.

In *Specialty Healthcare*, though, the Board scrapped this approach and announced that it would use its "traditional" community-of-interest test. In evaluating the appropriateness of a unit under the traditional community-of-interest test, the Board considers variables such as similarity of wages, benefits, skills, training, contact with other employees, interchange of employees, supervision, and other terms and conditions of employment.

Notwithstanding the Board's purported new reliance on the "traditional" community-of-interest test, the Board's application, as noted by Member Hayes in his dissent, is a much different standard. In concluding that a unit comprised only of CNAs was an appropriate unit, the Board majority accepted the petitioned-for unit (CNAs only); applied the traditional community-of-interest test to show that those employees (CNAs only) did, in fact, share a community of interests; and then put the burden on the employer to show that other employees shared an "overwhelming" community-of-interest with the CNAs to justify inclusion of the other employees in the unit.

A legitimate concern is that this Board will use whatever community-of-interest standard it has articulated to create a proliferation of bargaining units in non-acute care settings. That is, given this Board's application of the community-of-interest test here, it seems clear that a non-acute care employer (indeed, any employer other than an acute care facility) could be subject to multiple smaller, fractured bargaining units resulting in increased bargaining obligations, and corresponding increased inefficiencies. And, as the Board's theme seems to be finding ways to make it easier for unions to organize workers, it should be no surprise that it is easier for unions to organize smaller units than larger units.

The Board's aggressiveness in removing perceived barriers to union organization of employees is unparalleled. Now, more than ever, it is essential for union-free employers to proactively insulate their workplace against the threat of unionization. Non-union employers must be very aware of the potential for unionization of their workforce and take steps to minimize the likelihood that this will occur, including putting in place policies prohibiting organizing efforts during working time, preventing access to your workplace by outside parties, and training supervisors to recognize incipient unionism.