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LEGAL ALERT

Legal Alert: New NLRB Standard Favors Smaller Bargaining Units

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***Executive Summary*:** Overruling 20 years of precedence, the National Labor Relations Board (NLRB) has established a new standard for determining an appropriate bargaining unit in non-acute healthcare facilities (such as nursing homes). The impact of this decision likely will reach beyond the healthcare industry, however, because the Board also held that an employer who challenges a union's proposed bargaining unit as improperly excluding employees must show that the excluded employees share an "overwhelming" community of interest with the petitioned-for employees. The Board's decision may make it easier for unions to organize smaller units of employees, such as one department or even one job classification. According to dissenting Member Hayes, the decision "fundamentally changes the standard for determining whether a petitioned-for unit is appropriate in any industry subject to the Board's jurisdiction." See Specialty Healthcare & Rehabilitation Center of Mobile, 357 NLRB No. 83 (August 26, 2011).

Background

In this case, an NLRB Regional Director found that a bargaining unit of full-time and part-time Certified Nursing Assistants (CNAs) in a nursing home was appropriate. The employer filed a request for review, arguing that the only appropriate bargaining unit that included CNAs should also include all other nonprofessional service and maintenance employees at its facility in accordance with the standard set forth in the Board's 1991 decision in *Park Manor Care Center*. In *Park Manor*, the Board adopted a "pragmatic or empirical community of interest" test to determine appropriate bargaining units in non-acute healthcare facilities. Under this test, the Board considered both the traditional community of interest factor used in unit determinations in non-healthcare cases as well as other factors such as the type of unit sought or the type of health care facility in dispute.

Although neither party questioned the appropriateness of the *Park Manor* test, in a 3-1 decision the Board overruled it, holding that it is "obsolete" and fails "to provide clear guidance to interested parties or the Board." Thus, in non-acute healthcare bargaining unit determinations, the Board will now apply the traditional community of interest considerations.

Challenges to a Proposed Bargaining Unit

The Board also held that when employees or a union petition for an election in a unit of employees "who are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar

factors), and the Board finds that the employees in the group share a community of interest" the Board will find the petitioned-for unit to be an appropriate unit, despite a contention that employees in the unit could be placed in a larger unit which would also be appropriate or even more appropriate, unless the party challenging the unit demonstrates that employees in the larger unit "share an overwhelming community of interest with those in the petitioned-for unit."

According to the Board, an example of an overwhelming community of interest occurs when the proposed unit is a "fractured unit" – that is an arbitrary segment of what would be an appropriate unit. A fractured unit is a combination of employees that is too narrow in scope or has no rational basis. The Board noted that, in this case, if the proposed unit consisted of only selected CNAs, it would likely be a fractured unit: "the selected employees would share a community of interest but there would be 'no rational basis' for including them but excluding other CNAs." However, the Board also held that the proposed unit of CNAs in this case was not a fractured unit simply because a larger unit containing the CNAs and other employee classifications might also be an appropriate unit or even a more appropriate unit.

Member Hayes' Dissent

Member Hayes dissented from the decision, arguing that the majority overruled *Park Manor* "for the purely ideological purpose of reversing the decades-old decline in union density in the private American work force." Member Hayes also warned that the bargaining unit test adopted by the majority "obviously encourages unions to engage in incremental organizing in the smallest units possible."

Employers' Bottom Line:

This decision, especially when considered in conjunction with the Board's proposed rule to shorten the time between filing a petition and holding an election, will likely make employers more susceptible to union organizing efforts. Accordingly, employers should continue to maintain open channels of communication with employees so that any potentially disruptive workplace issues can be quickly and effectively addressed.

If you have any questions regarding this decision or other labor or employment related issues, please contact the Ford & Harrison attorney with whom you usually work.