Inside The Beltway

Keeping You Informed

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Critical developments in labor and employment law

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Organized labor scores major victories… micro-units "in," card-check recognition "back in," and successor employers "restricted again"

Executive Branch/Administration
National Labor Relations Board—rRecent decisions impacting employees and employers

Micro-units and *Specialty Healthcare & Rehabilitation Center of Mobile, 357 NLRB No. 83*

Former Chairman Liebman's statutory term of service concluded at midnight, August 27, 2011. As is typical with member departures, cases involving strategic matters finally issued as she left the agency. Dated August 26, 2011, although released publicly on August 30, the National Labor Relations Board (NLRB) issued three long-awaited decisions effectively giving organized labor significant opportunity and leverage in union organizing, increasing union density, and in retaining control in corporate asset sale transactions.

Certainly the result most feared by employers—"micro-units"—is now endorsed by the current NLRB. At issue is whether a union's petitioned-for unit or group of employees to be represented for purposes of collective bargaining is "appropriate" under the National Labor Relations Act (Act). Except for the NLRB's 1989 rule defining eight specific units appropriate for the acute-health care industry and declaring any other unit design inappropriate, a union's petition to represent employees has needed only to constitute "an" appropriate unit, and the employer then could challenge the proposed unit considering the NLRB's community-of-interest standards.

In assessing whether a proposed group of employees constitutes an appropriate unit for union representation, the NLRB assesses the degree of functional integration of the employees in the petitioned-for group, whether the employee group has common supervision, the nature of the employees' skills and functions, the degree of interchangeability and contact among employees, the

work situs for employees in the proposed unit, the employees' general working conditions, the fringe benefits applicable to the proposed unit of employees, and the history of bargaining and extent of organization.

As previously reported, Member Becker signaled the possibility of micro units in his dissent in *Wheeling Island Gaming, Inc.*, 355 NLRB No. 127, decided one year ago. In that case, Becker would have approved a petitioned-for unit of poker dealers as distinct and separate from fellow craps, roulette, and blackjack dealers. Interestingly, former Chairman Liebman rejected Becker's micro/mini unit justification.

Trying to defend against petitioned-for micro units will be nearly impossible given the majority's newly announced test. Going forward, an employer contending that a micro unit is inappropriate for failing to include additional employees will bear the new burden of demonstrating that the excluded employees share an "overwhelming community of interest" with the included/petitioned-for employees. As Member Hayes noted in his dissent, this new standard will "make it virtually impossible for a party opposing [a micro unit] to prove that any excluded employees should be included." And, with this decision and the NLRB's proposed rule for "quickie elections," "the [NLRB] majority seeks to make it virtually impossible for an employer to oppose the organizing effort either by campaign persuasion or through NLRB litigation."

Comment:
The NLRB's approval of micro-units is a serious concern for every employer. Clearly, with private sector union membership of 6.9 percent, micro units will allow unions to "cherry-pick" smaller groups of sympathetic employees to establish a presence and, over time, facilitate expansion through additional organizing in the same workplace. Employers now face not only the threat of fractional organizing but the possibility of multiple, separate bargaining units requiring multiple, separate collective bargaining resulting in multiple contracts posing conflicting obligations, limitations on operating flexibility, and multiple risks of strikes and labor unrest.

To defend against being picked-off and subjected to the future risk of multiple, separate mini-units with conflicting contract demands/provisions and strike risks, conduct a unit analysis. You cannot change job structures or other unit criteria once an election petition is filed with the NLRB. As a result of *Specialty Healthcare*, it is now both a strategic defense and offense to create, justify, and defend any logical, larger unit necessary to ensure operating flexibility. Contact your Nixon Peabody counsel to discuss our Unit Analysis Program.

Card-check recognition and *Lamons Gasket Co., 357 NLRB No. 72*

The NLRB has become well-known for "flip-flopping" case precedent. On August 26, 2011, in *Lamons Gasket Co.*, the NLRB majority overruled the 2007 decision in *Dana Corp.,* 351 NLRB 434, which gave employees a 45-day window to challenge an employer's voluntary recognition of a union's request for recognition based on a majority of signed cards in an appropriate unit. As a result, following voluntary recognition, a union is protected from rival union or decertification petitions for a "reasonable period of time" to permit the union to negotiate a contract.

The now overturned *Dana* decision gave employees an opportunity to petition for a secret ballot election recognizing that card-check organizing is often achieved by union pressure and covertly to prevent pro-company employees as well as the employer from speaking out in opposition. Under *Dana,* once the employer voluntarily recognized the union based on card-check, the employer was

required to post an official NLRB notice for 45 days informing employees of their right to seek a secret ballot election to affirm or reject union representation.

Comment:
The *Lamons Gasket* overturning of *Dana* combined with *Specialty Healthcare's* micro-units decision, should put employers on guard. Some employers may consider challenging a request for voluntary recognition of a small unit not worth the cost and effort. *Lamons Gasket* makes employee free and informed choice difficult if not impossible and the realization of a micro-unit infestation quick and easy.

Successor employers and *UGL-Unicco Service Co., 357 NLRB No. 76*

In another flip-flop, the NLRB overturned a 2002 decision, *MV Transportation,* 337 NLRB 770, which itself overturned *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999). At issue is the "successor bar" doctrine, which requires a successor employer by way of corporate merger or acquisition to recognize the predecessor employer's union, if any, for a reasonable period of time without challenge to its representative status. The NLRB majority underscored that during a transition between employers, "a union is in a peculiarly vulnerable position" recognizing that the employees may be concerned about their job security with the successor. The majority acknowledged the policy tension in the National Labor Relations Act between preserving employee freedom of choice and promoting stable collective-bargaining relationships. The majority reasoned that preserving industrial peace was the Act's paramount policy and would increase the incentive for a successor employer to bargain an agreement. As a result, a "successor bar" will apply where a successor employer recognizes an incumbent union but does not adopt the predecessor's contract. In such cases, the union will be entitled to a reasonable period to bargain—around 6 months—during which time no rival union petition, decertification petition, or employer withdrawal of recognition may proceed.

Comment:
With the return of the "successor bar" it will be prudent for entities acquiring businesses with represented employees through asset transactions to evaluate the legal impact of hiring from the predecessor's workforce and the value of setting initial terms and conditions of work regardless of whether the a majority of the new workforce is comprised of the predecessor's union represented workforce.

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