NLRB's New Brew: "Micro-Units"

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Micro brews are all the rage among today's increasingly sophisticated beer consumers. With the large variety of tastes that micro-brews offer consumers are far more likely to find a beer that suits their tastes.

The NLRB appears to have adopted a similar approach to bargaining unit composition. The Board has the authority to determine which employees will be included and which employees will be excluded from collective bargaining and voting units. Historically the NLRB made these determinations based on its findings that a specific group of employees within an employer enjoyed a sufficient "community of interests" allowing them to adopt common bargaining objectives to effectively deal with their employers over their common issues relating to wages, hours and working conditions. The Board was prohibited from constructing bargaining units that were merely tailored to a union's extent of organizational success within the employer's workforce.

These bargaining unit principles appear to have been abandoned by the Obama Board, which in 2011 started to certify small groups of employees, commonly referred to as "micro units," forming sub-organizations of a larger community of employees.

"Micro Units – Tailored for Unions' Election Victories

"Micro-unit" is the term used to refer to a small portion of the total number of employees at a particular worksite that a labor union seeks to represent. Recent decisions by the National Labor Relations Board ("NLRB" or the "Board") have raised employers' concerns that unions will focus organizational efforts on such small groups, or "units" of employees. Smaller units often are easier for a union to organize; if the union is successful in convincing a small unit to choose union representation, the employer will face bargaining with one or more unions over small portions of its workforce, creating numerous operational inefficiencies at the very least.

In *Specialty Healthcare and Rehabilitation Center of Mobile,* 357 NLRB No. 83 (2011), the NLRB found that such a smaller unit was appropriate for a union certification election. The Board decided that a bargaining unit comprised of only a small portion of the employer's total number of employees in its facility was "appropriate" in the non-acute, extended care facility. The company had challenged the smaller proposed bargaining unit because it excluded the majority of its employees. The Board created a new test. It stated that to defeat the union's proposed micro-unit, the employer had to show that the excluded workers shared " . . . an overwhelming community of interest" with those in the smaller, proposed unit (the "micro-unit"). This was a

standard that it had not applied since passage of the Taft-Hartley Act amendments in 1947.

In a recent decision, the Sixth Circuit Court of Appeals affirmed the Board's new micro-unit approach to bargaining unit determinations.[1] Since its 2011 decision, the NLRB and several of its Regional Directors, have rejected employer objections and approved smaller micro-units. In cases that currently are pending before the Board, Regional Directors approved units comprised of single departments in large retail department stores.[2]

Section 9(b) of the National Labor Relations Act, 29 U.S.C. § 159(b) delegates to the Board responsibility for determining "the unit appropriate for the purposes of collective bargaining . . ." Other than specifically providing that certain units are not considered "appropriate," such as ones including guards with other employees, the law does not give much guidance on what will be considered an "appropriate" unit. There is no specific unit that may be found to be "appropriate." For many years, most unions sought representation of the broadest possible units, such as "wall-to-wall" units including all production and maintenance employees in a manufacturing facility, or comparable all-encompassing units in other settings.[3]

Faced with difficulties in organizing broader units in a number of industries, some unions have adopted a strategy of targeting smaller units in order to face a smaller number of employees to try to convince to vote for union representation. The NLRB in Specialty Healthcare endorsed that strategy, when the NLRB found that a bargaining unit consisting only of Certified Nursing Assistants constituted an appropriate unit. The Sixth Circuit's decision confirms the Board's adoption of such a "micro-unit" approach to collective bargaining.

Why should an employer care?

Smaller bargaining units often are easier to organize. They require a smaller number of "Yes" votes on union representation.

Smaller units create the possibility of inefficiency in operations; some employees in the same workplace may be subject to quite different work rules, or conflict resolution processes, or pay and benefit policies.

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[1] *Kindred Nursing Centers East, LLC v. NLRB*, 2013 U.S. App. LEXIS 16916 (6th Cir. August 15, 2013).

[2] See *e.g., Macy's Inc.* and *Local 1445*, *United Food & Commercial Workers*, 01-RC-091163 (Unit of cosmetic and fragrance sales employees). In a case involving Bergdorf Goodman, a unit of women's contemporary shoe sales people was found appropriate. In *Fraser Engineering Company*, 359 NLRB No. 80(2013), a smaller unit of plumbers and pipefitters was found appropriate where a larger unit had been approved two years earlier. A unit of only maintenance employees was found appropriate at a Nestle's manufacturing facility.

[3] In the healthcare industry, the Board utilized its rule-making authority several years ago to establish eight separate units based on skills, licensing, etc. that would be considered appropriate in acute care hospitals.

While many of the decisions of the NLRB which have issued over the past two years are presumably invalid due to the various Circuit Court decisions which held that President Obama's "recess" appointments to the Board were invalid, it nevertheless is very likely that the equally-partisan the newly constituted Board members will re-adopt their previously proposed "quickie election" rule. This would reduce the time a company has to explain the realities of collective bargaining (i.e., correcting many unions "over-promising").

Thus, employers may be faced with quickly scheduled union elections in smaller units, where the outcome will be all but a foregone conclusion.

Proactive Planning: Conduct a Labor Audit

Although the decline in union membership and number of union elections has resulted in many employers taking a more complacent view towards labor relations and union avoidance strategies, the time has come for companies to revisit their priorities in order to be ready when a petition for a certification election arrives in the mail. Non-union employers will be well served to either conduct their own labor relations audit, or employ outside professionals to help them assess their vulnerability to union organizing.

Many unions are seizing upon wage and hour violations, workforce reductions, elimination or reduction of fringe benefits and real, or perceived, unfair treatment of employees through smaller wage increases and longer working hours to attract support for an organization effort. Non-union employers in many industries, need to begin examining and analyzing their workforces from the vantage point of determining whether a labor organization would find it possible to carve out a small group of employees for organizational purposes, and what, if anything, the employer may be able to do to avoid that result before they are faced with an organizing attempt.

To minimize the potential of having unions pick off smaller groups of employees, or-- even worse-- having multiple labor organizations pick off different groups of employees within an enterprise- - employers should examine their workforces to determine whether it I possible to "flatten out" their management structures, such as, for example, having more employees report to a smaller number of managers, examining existing positions to determine whether the employer can reduce the number of different job classifications, and whether they can cross-train and actually utilize employees to perform different jobs on an interchangeable basis. They also need to ensure (when possible) that the employment terms and conditions are consistent across their entire non-technical, non-supervisory workforce.

"Quickie Elections" Still the Danger

Employers are likely to have a shortened time between a union's filing of a petition for representation and the election. Thus, the steps identified here may be unavailable or less effective. Employers are urged strongly to consider taking some or all of these steps now.

The NLRB's decisions for at least two years preceding August 2013, including Board decisions allowing for establishment of micro-units, are of doubtful legal precedent because of the appellate court decisions, which declared that the Board's membership was illegally constituted, and that it was operating without a quorum. With the recent Senate compromise, however, the President has nominated, and the Senate has confirmed a new majority of equally radical pro-union members. The newly constituted Labor Board is very likely to re-issue decisions that will affirm the approach taken by its illegally constituted predecessor Board. This will only delay—but it will not derail the changes that the old Board majority had made in representation election decisions. This means that the trend toward smaller voting (and bargaining) units and toward quickie elections is likely to continue under the new Obama Board.