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NLRB's *Macy's* Decision Raises Questions About Best Strategies for Combating Union Efforts to Organize Micro-Bargaining Units

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In a decision released this past week, a majority of the National Labor Relations Board ("NLRB" or "Board") recommitted the federal agency to the principles set forth in *Specialty Healthcare*, further expanding the way for unions to organize "micro" bargaining units, which consist of only a fraction of an employer's workforce. Buoyed by a decision of the U.S. Court of Appeals for the Sixth Circuit blessing this micro-unit approach, the NLRB's latest decision on the issue raises difficult questions about operations and labor relations that employers must address before it is too late to prevent the certification of a micro-unit.

Employees Performing the Same Function in a Discrete Department Constitute an Appropriate Bargaining Unit

In its latest micro-unit case, *Macy's Inc.*, 361 NLRB No. 4 (2014), the NLRB affirmed a direction of election by the Board's Boston Regional Office for a proposed bargaining unit that *only* includes the store's cosmetic and fragrance department selling employees. This unit excludes all other selling employees in this department store, i.e., those working in other departments on the sales floor, the staffing employees, as well as those in the receiving and merchandising teams.

Relying upon *Specialty Healthcare*, 357 NLRB No. 83 (2011), the Board in *Macy's* held that the store's 41 cosmetic and fragrance employees constitute an appropriate bargaining unit because they are a "readily identifiable group" and "share a community of interest." The employer had argued that this was not an appropriate unit and that the smallest appropriate unit was one that included sales employees in other departments of the store as well as stock and other support employees.

In concluding that the fragrance and cosmetic department employees are a readily identifiable group that shared a distinct community of interest, the NLRB focused on their classification, function, and department. The NLRB specifically noted that these employees comprise the entirety of the non-supervisory workforce within a "primary selling department" as opposed to a "sub-department." As the totality of the non-supervisory employees in this department, these selling employees are responsible for "perform[ing] the function of selling cosmetics and fragrances" at the store.

The NLRB determined that these employees share a community of interest, allowing for the establishment of their own bargaining unit because: (1) they all work in the same department, (2) they are all directly supervised by the same manager, (3) they all sell cosmetics and/or fragrances (which implies a level of functional integration), (4) they have limited contact with other selling employees, (5) they all have the same commission-based pay structure and benefits, and (6) there is "limited" transfer of employees between the fragrance and cosmetic department and other store departments.

In sweeping aside the arguments of the employer and its amici that these employees do not constitute a readily identifiable group or share a distinct community of interest, the NLRB made clear that it would not find the proposed unit inappropriate simply because the cosmetic and fragrance employees worked on different floors, on-call employees earn commissions at lower rates than beauty advisors, the store's cosmetics beauty advisors sell only a single vendor's products while the fragrance beauty advisors sell all vendors' products, the cosmetic beauty advisors wear distinct uniforms, and the two selling areas are adjacent to different departments.

Specialty Healthcare's **"Overwhelming Community of Interest" Test Applied to the Retail Industry (and Presumably Any Industry)**

The NLRB majority in *Macy's* also took great pains to explain why a unit of all selling employees in the store, which the employer argued was the smallest appropriate unit, was *not* appropriate here. These efforts appeared to be clearly intended to demonstrate the NLRB's position that the analysis and conclusions in *Specialty Healthcare*, a case involving a micro-unit in a non-acute care health care facility, are applicable to the retail industry (and presumably to any industry other than acute-care health care facilities).

Although the NLRB spent nearly five pages of the *Macy's* decision explaining why the Board was not prepared to require the inclusion of other selling employees in the proposed bargaining unit, its position was succinctly stated up front:

> [T]he fact that the petitioned-for employees work in a separate department, report to a different supervisor, and work in separate physical spaces supports our finding that the petitioned-for employees do not share an overwhelming community of interest with the other selling employees.

In rejecting the employer's argument that the petitioned-for unit was inappropriate because it was a "fractured" unit, the NLRB noted that the proposed unit tracked the employer's own departmental line and included all of the cosmetic and fragrance selling employees who work in that department, as opposed to just one classification, such as the beauty advisors.

NLRB Dismantles Longstanding Presumption of Wall-to-Wall Units in the Retail Industry

In an act that conflicts with its assertion in *Specialty Healthcare* that the approval of micro-units "is not intended to disturb any rules applicable only in specific industries," the majority in *Macy's* rejected the employer's argument that under longstanding precedent, a wall-to-wall unit is presumptively appropriate in a department store. Despite the NLRB having approved of the use of this presumption in a case involving grocery store employees as recently as 2006, the Board's rejection of the presumption that a wall-to-wall unit is appropriate suggests that presumptions regarding appropriate units in other industries are also likely to be at risk.

NLRB Member Philip Miscimarra's Blistering Dissent

Not every Member of the NLRB who participated in the decision agreed with the majority's opinion. Member Miscimarra wrote a lengthy dissent arguing that the majority's approval of the proposed unit disregards similarities that exist amongst all selling employees at the store, downplays important distinctions that exist amongst employees in the proposed units—distinctions that exist in all of the store's departments and threatens to produce an unstable bargaining relationship by creating divisions in the workforce that are irreconcilable with the structure of the setting and operation of the work.

In addition to challenging the majority's reasoning on the facts of this specific case, Member Miscimarra took aim at *Specialty Healthcare* generally, arguing that the Board's deference to the petitioned-for unit is in derogation of Congress' mandate that the NLRB must engage in a meaningful evaluation of the proposed bargaining unit whenever the parties disagree with regard to the appropriate scope of the unit.

Practical Impact of the *Macy's* Decision

At this point, the writing is on the wall: *Specialty Healthcare's* "overwhelming community of interest" test will likely be applied to all industries (with the exception of acute-care facilities), and every employer subject to the NLRB's jurisdiction must prepare, in advance, to combat union efforts to organize micro-units. Put another way, if a union petitions for a micro-unit that relies upon the employer's departmental delineations, it is unlikely that the current NLRB will find the petitioned-for unit to be inappropriate and include additional employees from other departments. Even in the face of substantial and well-documented evidence that other employees perform the same functions and their work is to some extent integrated with the work of those in the proposed unit, having found a micro-unit to be appropriate, the NLRB will defer to the petitioner-union because, under longstanding NLRB principles, it does not matter if there is a *more* appropriate unit as long as the unit petitioned for by the union is *an* appropriate unit.

As Member Miscimarra points out, micro-units may have a destabilizing effect on the operations and labor relations in a wide range of businesses. Indeed, the work rules that the union may seek to establish and the grievances that the union could file on behalf of the cosmetic and fragrance employees may reasonably have a negative impact on

customer service and employee cooperation across departmental lines in stores like Macy's. For all of its efforts to show that the work performed by the selling employees across departments was not functionally integrated, the Board's decision demonstrates that it has little or no regard for the practical, destabilizing realities that a micro-unit can have on the operations and workflow of the business.

What Employers Should Do Now

Employers must recognize that the current NLRB is serious when it says the union decides the proposed bargaining unit. Further, being able to pinpoint union organizing will become even more important for employers as soon as the NLRB finalizes pending changes to its election procedures that will shorten the time between the filing of a petition and the date of the election.

As a consequence, employers are encouraged to do the following:

- Take stock of employee opinion and susceptibility to union organizing across, as well as within, all departments.

- If it makes business sense, further integrate the functions of, and break down departmental barriers between, employees so that if a petition for a proposed micro-unit is filed, the chance of proving an overwhelming community of interest is improved.

- If a union files a petition for a micro-unit, determine whether it makes sense strategically to challenge the proposed unit, or if there are alternative measures that may more effectively combat the effort to unionize.

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