

Micro-Units: Divided They May Rise Before the NLRB

Labor & Employment Law Update

By Beverly Alfon on July 31, 2014

The labor world is abuzz about “micro-units” as a result of two recent National Labor Relations Board decisions regarding Union petitions to represent such “micro-units” of employees: *Bergdorf Goodman*, 361 NLRB No. 11 (July 28, 2014) and *Macy’s, Inc.*, 361 NLRB No. 4 (July 22, 2014).

What is a micro-unit and why does it matter?

A “micro-unit” is a small and discrete subset of employees at a particular worksite, which a union seeks to represent. It is the opposite of a “wall-to-wall unit” that would encompass the majority of an employer’s non-supervisory employees.

The two recent micro-unit cases specifically relied upon the NLRB’s controversial decision in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011). The decision was affirmed by the federal Sixth Circuit in 2013, which effectively encourages unions to petition for micro-units. That decision changed the established test for determining whether or not a Union’s petitioned-for unit is too discrete, by creating a high burden for an employer challenging the appropriateness of a unit to show that any excluded employees “share an overwhelming community of interest with the included employees.” This matters because a union only needs the votes of 50% + 1 of the group that it seeks to represent (“petitioned-for unit”) in order to become the unit’s certified bargaining representative. **The more limited that a union defines the petitioned-for unit, the less number of employees belong to the unit and the easier it is for the Union to get the necessary votes to win an election.**

In *Bergdorf Goodman*, the board unanimously held that the petitioned-for unit of Salon Shoes department employees and Contemporary Shoes department employees (located on different floors) was not appropriate because they lacked a community of interest and “the boundaries of the petitioned-for unit do not resemble any administrative or operational lines drawn by the Employer.” The board had specific trouble with the fact that the petitioned-for unit carved out Contemporary Shoes from the larger Contemporary Sportswear department and then grouped them with the Salon Shoes employees, suggesting that it would have approved an even more discrete bargaining unit.

In *Macy's Inc.*, the board affirmed the appropriateness of a proposed unit that only included the store's cosmetic and fragrance department salespersons. The board held that the store's cosmetic and fragrance employees constituted an appropriate unit because they are a "readily identifiable group" and "share a community of interest." The board dismissed the fact that the cosmetic and fragrance employees worked on different floors, the store's cosmetic beauty advisors only sold a single vendor's products in contrast to the fragrance beauty advisors who sold all vendors' products, and the cosmetic beauty advisors wore distinct uniforms.

Bottom line: The NLRB's current position encourages unions to petition for micro-units. If a union petitions for a micro-unit that is based upon the employer's departmental structure, the NLRB will likely find the unit to be appropriate and reject any attempt to expand the unit to employees in different departments. An employer must meet a heavy burden to overcome the presumption that the petitioned-for unit is appropriate. Union petitions for micro-units will also become more problematic if the NLRB finalizes proposed changes to election procedures, including severe limitation on an employer's ability to challenge the appropriateness of the petitioned-for unit before the election.

Be cognizant of potential union organizing of particular departments.

Consider integrating departments and functions between employees.

Identify operational or administrative adjustments that may give you a fighting chance of proving an overwhelming community of interest if a union files a petition for a micro-unit of your employees.

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