CLIENT ALERTS & INSIGHTS

NLRB Makes Union Organization Easier, Loosens Test for Approval of Collective Bargaining "Micro-Units"

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Authors: W. Eric Baisden, Adam Primm

On Wednesday, the National Labor Relations Board issued a groundbreaking decision in American Steel Construction, Inc., 372 NLRB No. 23 (2022), reviving the concept of collective bargaining "micro-units." Micro-units are smaller, more insular collective bargaining units that represent a narrower faction of an employer's workforce. Representation elections for micro-units are traditionally more successful than for other bargaining units. Through its American Steel Construction decision, the Board has rendered unions' job of organizing new bargaining units markedly easier.

The Board's decision in *American Steel Construction* is the latest development in the now decade-long back-and-forth over the validity of micro-units. The establishment of micro-units was first explicitly affirmed by the Obama-era Board in *Specialty Healthcare*, 257 NLRB 934 (2011), in which the Board approved the exclusion of portions of the workforce from bargaining unit representation where the proposed bargaining unit shares a "community of interest," and where the excluded employee group is "sufficiently distinct" from the proposed bargaining unit.

In 2017, the *Specialty Healthcare* standard which paved the way for micro-units was reversed by the Trump-era Board in *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017). The Board during the conservative Trump administration reaffirmed its *PCC Structurals* decision a few years later in *The Boeing Co.*, 368 NLRB No. 67 (2019) (see our prior alerts here and here). Collectively, under *PCC-Boeing*, a narrow faction of the workforce could form a collective bargaining unit, to the exclusion of other employees, only where the excluded employees had "meaningfully distinct interests in the context of collective bargaining that outweigh similarities" with the included employees. This significantly heightened threshold, which was the last word until Wednesday's decision, rendered it difficult to earn the Board's approval of a bargaining micro-unit absent the existence of a clearly defined group of employees with significant differences from the rest of the workforce.

The Board's recent decision in *American Steel Construction* returns to the *Specialty Healthcare* test, paving the way for the increased organization of micro-units. Because micro-units represent a smaller faction of an employer's workforce, they require unions to exert significantly less effort to win over a sufficient number of employees to secure a vote in favor of their representation. It also may result in unions obtaining access to a worksite that otherwise is not unionized and establishing a foothold.

In a separate move this week, the Board added consequential damages to its cache of remedies.

In discouraging unfair labor practices by employers, the National Labor Relations Board has traditionally been limited to granting make-whole remedies like back pay and employee reinstatement. That changed this week. In *Thryv, Inc.*, 372 NLRB No. 22 (Dec. 13, 2022), the Democrat-majority Board ruled 3-2 to add another item - consequential damages - to the list of available remedies. There, the software company Thryv, Inc. was found to have violated federal labor law when it laid off workers without first bargaining with their union.

In deciding Thryv's case, the majority wrote that "'[m]ake-whole relief' is more fully realized when it consistently compensates affected employees for all direct or foreseeable pecuniary harms that result from a respondent's unfair labor practice." The ramification of the decision is a vast broadening of damages available to aggrieved employees, such as out-of-pocket medical expenses flowing from the loss of health insurance after an unlawful termination.

Damages may also include those that regional Board offices have negotiated into settlement agreements in the past, such as reimbursement for late car loan payments and late rent, payment of monthly interest on loans that an employee took out to cover living expenses, the cost of baby formula due to the loss of a workplace breast pumping station, and the cost of retrofitting an employee's vehicle to make it useful in a new job. These concessions have sometimes been accompanied by apologetic letters to reinstated employees, required training for management on employee rights under the National Labor Relations Act, mandatory inclusion of a statement of rights in job applications and recruitment advertisements, and coverage of a union's bargaining costs when employers have negotiated in bad faith.

In dissent, the Board's two Republican members decried what they believe to be an overextension of available remedies, writing that "[o]n its face, this standard would permit recovery for any losses indirectly caused by an unfair labor practice, regardless of how long the chain of causation may stretch from unfair labor practice loss, whenever the loss if found to be foreseeable."

Impact on Employers

The Board's decision in *American Steel Construction* will likely result in a sharp increase in unions' efforts to solicit the interest of non-organized workforces. Employers should be prepared to address organization efforts. Preemptive management training is paramount to ensuring an effective strategy and response.

In the wake of the Board's decision in *Thryv*, employers should be aware of the increasingly punishing cost that can result from engaging in an unfair labor practice. Employers should take proactive measures to ensure that their engagement with their organized workforce or its union representative does not interfere with the rights afforded to those employees under the National Labor Relations Act and should work efficiently to reach a resolution when they may have run afoul of the Act.

For more information, please contact a member of Benesch's Labor & Employment Practice Group.

Eric Baisden at ebaisden@beneschlaw.comor 216.363.4676.

Adam Primm at aprimm@beneschlaw.com or 216.363.4451.

Eric M. Flagg at eflagg@beneschlaw.com or 216.363.6196.