CLIENT ALERTS & INSIGHTS

The National Labor Relations Board Caps a Busy Week by Throwing Out Micro-Unit Bargaining Units And Returns To Decades-Old Test for Implementing Changes During an Expired Contract

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On the heels of Thursday's groundbreaking decisions reversing *Browning-Ferris* and *Lutheran Heritage Village-Livonia* (see our 12/15 alert here), in another important decision on Friday, the National Labor Relations Board scrapped the Obama-era decision, *Specialty Healthcare*, 357 NLRB 934 (2011), which made it far easier for unions to organize subsets of a company's employees - in effect cherry-picking a group favoring organization as a way of getting foot in the door. The smaller units proposed by employees and unions protected by *Specialty Healthcare* are commonly referred to as "micro-units."

The Board (with the familiar 3-2 majority of Republicans Phillip Miscimarra, Marvin Kaplan, and William Emanuel) reviewed a 102-person proposed micro-unit and decided to reverse *Specialty Healthcare*. In *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017), rather than forcing employers to prove that excluded workers shared an "overwhelming community of interest" with the employees in the proposed unit - a requirement the majority was concerned forced the Board to "disregard the interests of the excluded employees" except for rare circumstances in which such an overwhelming community of interests is present - the Board instead reinstated its prior analysis that examined whether the petitioned-for unit shared a community of interest "sufficiently distinct" from excluded employees to warrant a separate unit. In other words, the petitioned-for unit must show that they are "sufficiently distinct" from excluded employees working at the same jobsite to be certified as a separate unit, rather than the employer or excluded employees having to prove that they share an "overwhelming community of interest" to be included in the petitioned-for unit under *Specialty Healthcare*.

The decision returns balance to the appropriate unit analysis among the interests of the employees in the proposed unit, the excluded employees, and the affected employer instead of forcing the employer and excluded employees to prove an "overwhelming" community of interest to overcome the presumed viability of a proposed unit.

Board Also Returned to 50-Year Precedent Regarding Changes to Employment Conditions

In another 3-2 decision on Friday, the Board restored a 50-year-old standard regarding an employer's ability to change employment terms of employees without bargaining with the union where the employer has a past practice of making similar changes. *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017). *Raytheon* reversed *E.I. du Pont de Nemours*, 364 NLRB No. 113 (2016) (*DuPont*

), a one-year-old Obama-era decision that redefined what constituted a "change" requiring notice to the union and the opportunity to bargain. *DuPont* held that if an employer continued to take the same actions it took previously under a since-expired collective bargaining agreement, following that consistent past practice constituted a "change" which required bargaining with and notice to the union. In reaching that conclusion, the *DuPont* decision rewrote five decades of Board precedent.

The precedent stemmed from the 1962 Supreme Court decision in *NLRB v. Katz*, 369 U.S. 736 (1962), which held that unionized employers must refrain from making unilateral changes in employment terms unless the union first receives notice and the opportunity to bargain. However, under *Katz*, the definition of "change" was typically read to mean "a substantial departure from past practice" with no analysis of whether a collective bargaining agreement existed when the prior actions created the past practice. Just two years after *Katz*, the Board rejected the precise position the it adopted in *DuPont* - that whether an employer's actions constitute a "change" does not depend on whether past actions were permitted by a since-expired collective bargaining agreement. *Shell Oil*, 149 NLRB 283 (1964).

Thus, the *Raytheon* decision returns the Board to the *Katz* and *Shell Oil* precedent by finding that the employer was not obligated to bargain with the union over changes where the changes were in line with unilateral changes made at the same time each year for more than a decade. The changes were consistent with past practice and did not constitute a "change" for purposes of bargaining.

For more information on this topic, please contact Benesch's Labor & Employment Practice Group.

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