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Employer Alert

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Union Organizing in Health Care Made Easier

The National Labor Relations Board (NLRB) has overturned its longstanding rule that avoided the proliferation of bargaining units in health care facilities by applying to non-acute care facilities the same rules that apply to acute care facilities. Now the test of whether a bargaining unit is appropriate will be whether there is a community of interest among the employees who seek to have a union represent them. No longer will there be a presumption that certified nursing assistants (CNAs) must be in a bargaining unit with other service and maintenance employees. Instead, they can seek to have their own representative. A request for a smaller bargaining unit will only be defeated by the employer establishing that the petitioned-for group shares an "overwhelming community of interest" with a larger group of employees. This will make organizing in nursing homes, rehabilitation facilities, and long term care facilities easier for unions.

In January of 2009, the United Steelworkers Union filed a petition with the NLRB seeking an election in a unit of 52 CNAs in a nursing home. While recognizing that the CNAs shared a community of interest, the employer opposed the requested bargaining unit, arguing that the only appropriate bargaining unit was one that included all service and maintenance employees: resident activity assistants, social services assistants, staffing coordinators, maintenance assistants, central supply clerks, cooks, dietary aides, medical records clerk, data entry clerk, business office clericals, and a receptionist. The employer contended that the same limited number of bargaining units should continue to be appropriate in nursing homes, rehabilitation facilities, and long term care facilities as applies to acute care hospitals.

The NLRB rejected the employer's arguments, and reversed its earlier decisions in which non-acute care facilities had been allowed only a few bargaining units. Instead, the NLRB applied the community of interest standard, which analyzes whether the employees work in a separate department, have distinct skills and training, have distinct job functions and perform distinct work, are functionally integrated with other employees, have frequent contact with other employees, have job interchanges with other employees, have distinct terms and conditions of employment (hours of work, shifts, uniforms, pay rates, etc.), and are separately supervised.

The NLRB rejected the notion that there could only be a larger and more inclusive service and maintenance employee unit, which would be harder for the union to organize and would require

Questions?

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a greater number of employees to petition and to win an election. As a result, in non-acute care facilities, each group of employees who share a community of interest may seek their own bargaining representative. It will be the employer's burden to prove, with "overwhelming" evidence, that the requested unit is not appropriate because it excludes employees who overlap almost completely in the community of interest factors discussed above, or that the requested unit inappropriately fractures similarly situated groups of employees.

Like other recent controversial NLRB decisions, this ruling was issued by a NLRB majority over the vigorous dissent of the only Republican Board member, who accused the majority of having a pro-union agenda designed to reverse the continuing downward trajectory of union penetration in the private section workforce. He argued that the majority's approach runs afoul of the statutory prohibition against bargaining unit determinations based on which group of employees favor unionization. What it does, in effect, is provide unions with the opportunity to organize smaller groups of employees, thus creating the potential for a proliferation of bargaining units. The concern is that this can lead to an unstable labor relations environment. The likelihood that a petitioning union will get the unit it wants, combined with the NLRB's newly streamlined election processing rules, will make it more difficult for employers to successfully oppose unionization.

The end result of this decision is that it will be easier for unions to organize employees in all industries in smaller units, not just Health Care. Employers will need to be more vigilant about the risks of organizing. Coupled with the NLRB's new rule requiring the posting of employee rights under the National Labor Relations Act, supervisors will need to be trained to respect those rights while understanding what can and cannot be done if there is an organizing effort and why it is critical to alert senior management when they become aware that union activity is starting.

Questions or Assistance?

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