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# Employers Should Plan For Micro-Union Fight After NLRB Win

By **Abigail Rubenstein**

*Law360, New York (August 15, 2013, 8:10 PM ET)* -- With the Sixth Circuit handing the National Labor Relations Board a major victory on Thursday by affirming the agency's controversial Specialty Healthcare standard for determining an appropriate bargaining unit, attorneys say employers must now take steps to protect themselves from the proliferation of so-called micro-unions.

The appeals court's decision to uphold the board's August 2011 decision in Specialty Healthcare and Rehabilitation Center of Mobile — which held that an employer challenging a proposed bargaining unit on the basis that it improperly excludes certain employees is required to prove that the excluded workers share "an overwhelming community of interest" with those in the proposed unit — is likely to give the board added confidence in applying the heightened standard across industries, lawyers say.

Critics of the Specialty Healthcare decision, from employer groups to Republican lawmakers, contend that this heightened standard for an employer to dispute a small unit will lead to a proliferation of micro-unions that fragment an employer's workforce.

"An employer could potentially be faced not just with multiple units but with multiple unions ... so the potential exists for a chaotic bargaining relationship to be established in what would otherwise have been considered a single unit," said Ronald Meisburg of Proskauer Rose LLP. "That is the concern that has caused so many employers to oppose this test."

"You can balkanize the employer's business and create a bargaining unit for each identifiable group, and that greatly undermines the ability to manage a business or conduct effective collective bargaining," he said.

Since the Specialty Healthcare decision was handed down, the NLRB and its regional directors have already cited the decision in approving units that the employer has maintained are too small. In cases currently before the board, for example, regional directors approved units comprised of single departments at large department stores.

"We've been operating under this [standard] for two years already, and there has been some indication that the board is deciding cases with smaller units," Brennan Bolt of McKenna Long & Aldridge LLP told Law360. "I don't think much will change given the Sixth Circuit ruling, but there is some indication that the board might be looking to expand Specialty Healthcare."

As such, the Sixth Circuit's decision, which gives the NLRB increased ammunition in support of the new standard, should spur employers to take measures to protect themselves from having to face the potential flowering of micro-unions, lawyers say.

"Employers, especially those who may be in industries being targeted by labor or in areas where unions have been more active, would be wise to do vulnerability assessment and take a look at their operations from a bargaining unit perspective," Michael Lotito of Littler Mendelson PC said.

Once an employer has examined its position, there are steps that can be taken to help them make a convincing case before the labor board that a broader unit would be more appropriate than a smaller one because their workers do indeed share an overwhelming community of interest, lawyers say.

Assuming that it also makes sense from a business perspective, attorneys recommend trying to consolidate operations through steps like cutting down on the number of job titles, making sure employees are cross-trained and able to do different jobs interchangeably, having different types of employees report to similar supervisors, and generally keeping the conditions of employment consistent across different groups of workers.

"Employers should strive for commonality among all classifications, which structurally from an organizational standpoint means flattening out management structures and making more employees report to fewer managers," Jeffrey Pagano of Crowell & Moring LLP said. "The traditional concepts of common supervision, common hours and common terms and conditions of employment have to be carefully focused upon to broaden the unit."

And attorneys say that employers should not wait until a union election is looming to begin considering what they will need to do to show that their employees have an overwhelming community of interest and to start taking steps to bolster their argument.

"If an employer does that while a petition is about to be filed or has been filed, I can guarantee you it's too late," Lotito said.

Taking preventative steps sooner rather than later will become even more important for employers looking to steer clear of micro-unions if the newly seated five-member NLRB decides to readopt the previous board's rules aimed at streamlining union election, which have been stalled by court rulings over whether they were enacted by a proper quorum.

"If the quickie election rules are readopted by the new board the impact of Specialty Healthcare could be more significant because the time frame from when a petition is filed and the election would be shortened," Bolt said. "If a union is seeking to organize a small group of employees, the shortened election time would make it harder for the employer to campaign and convince that group to vote against the union."

Indeed, attorneys say that the Specialty Healthcare decision and the tougher standard it established must not be viewed in isolation but in concert with the possibility of the rules speeding up elections and the U.S. Department of Labor's proposed persuader activity rule, which lawyers say could make it harder for employers to get legal counsel on union issues.

This combination could give unions a significant boost in their organizing efforts going forward, lawyers told Law360.

"In light of all the rhetoric and some tools being made available to unions and the likely flow of decisions we are going to have [from the NLRB] over the next several years, it would be wise to put basic labor relations back on your priority list of things to do and to consider from a prevention standpoint, because if unions begin to utilize the tools that are in place and are about to become in place, employers cannot take their union-free status for granted," Lotito said.

Kindred Nursing Centers East LLC, formerly known as Specialty Healthcare and Rehabilitation Center, is represented by Clifford H. Nelson Jr. and Charles P. Roberts III of Constangy Brooks & Smith LLP.

The case is Kindred Nursing Centers East v. NLRB, case numbers 12-1027 and 12-1174, in the U.S. Court of Appeals for the Sixth Circuit.

--Editing by John Quinn and Katherine Rautenberg.

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