PUBLICATION

NLRB Opens Door for Multiple Unions at one Employer

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In what seemed to be a blatant attempt to make it easier for unions to organize in the long-term health care and other industries, the National Labor Relations Board (NLRB) decided in an August 26, 2011 case named *Specialty Healthcare and Rehabilitation Center of Mobile*, that a bargaining unit consisting of only Certified Nursing Assistants (CNAs) in a non-acute health care facility was an appropriate unit for bargaining.

The United Steelworkers of America was seeking to represent a group of only CNAs over the employer's objection that all non-professional service and maintenance employees should be included in the unit for the purposes of an NLRB secret ballot election. The NLRB rejected the employer's argument, overruling a two-decades-old precedent holding that broader units of employees, including service and maintenance employees, cooks and dietary aids in non-acute health care facilities was the appropriate group of employees for an election. The NLRB ordered the election to be held only with CNAs.

In issuing its ruling, the NLRB determined that it was only required to decide whether the group that sought to be represented by the union was an appropriate unit, not the most appropriate unit, and that it need only determine if the unit petitioned for by the union was a clearly identifiable group.

Although the decision dealt only with non-acute health care facilities or nursing homes, the principle will apply across the board to many industries, including the hospitality industry. Thus, it is conceivable that a union could seek an election in a unit of only housekeepers in a hotel or only food servers in a restaurant, and the NLRB would allow the union to proceed.

The NLRB gave short shrift to the potential problem of a proliferation of bargaining units, leaving open the possibility that an employer in the same facility or establishment may have to bargain with different unions or have several contracts with the same union.

Although it may be difficult, employers need to be aware of the criteria the NLRB will now use to determine whether a stand-alone group of employees is appropriate. Factors such as whether the employees are organized into a separate department, have distinct skills and training, have distinct job functions and perform distinct work, including the amount and type of job overlap between classifications, whether the jobs are functionally integrated with the employer's other employees, have frequent contact with other employees, interchange with other employees, have distinct terms and conditions of employment (such as pay rates, shifts and work areas) and are separately supervised, now become critical. Thus, it is incumbent upon employers, regardless of the industry, to integrate its workforce with the above criteria as much as practical.

Going forward the NLRB message, especially for the health care and hospitality industries, is quite clear. The unit petitioned for by the union, if it is readily identifiable as a distinct group, will be deemed appropriate unless the employer can show an overwhelming “community of interest” with other employees in the facility. This is a heavy burden and one not easily overcome, especially once a petition for an election has been filed.

This is only the beginning of other decisions and regulatory rules we expect to be issued by the National Labor Relations Board between now and the end of the year, when the Democratic pro-union majority of the NLRB's

terms expire. The departure of Wilma Liebman in August and the eminent departure of Craig Becker in December means the NLRB will once again be a 2 member board.

If you have any questions on this or any other NLRB decision, please feel free to reach out to your Baker Donelson attorney or any of our nearly 70 Labor & Employment attorneys located in Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville and New Orleans, Louisiana; Jackson, Mississippi; and Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee.