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NLRB Decision Potentially Impacts Hospitality and Other Service Businesses

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In a blatant attempt to make it easier for unions to organize in the longterm health care and other service industries, on August 26, 2011 the National Labor Relations Board (NLRB) decided in *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.

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

In *Specialty Healthcare*, the United Steelworkers of America was seeking to represent a group of 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. In rejecting the employer's argument, the NLRB overruled a two-decades-old precedent that had mandated 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 to vote in an organizing election. The NLRB ignored the employer's contention and ordered the election to be held only with CNAs.

The NLRB determined that it was only required to decide whether the group which 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 for a clearly identifiable group of employees.

The NLRB gave short shrift to the potential problem of a proliferation of bargaining units in a relatively small employer, demonstrating no regard or sympathy for an employer, which in the same facility or establishment, would be forced to bargain with different unions, or forced to administer several contracts with the same union covering different groups of employees.

Employers need to be aware of the criteria the NLRB will now use to determine whether a stand-alone group of employees is appropriate for an organizing election. Among the critical factors are whether the employees:

- Are organized into separate departments;
- 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.

Thus, it is incumbent upon employers, regardless of the industry, to integrate their workforces to the extent practical, keeping in mind the above criteria.

Notwithstanding recent pronouncements about easing regulatory burdens on small business, the NLRB message, especially for the health care and hospitality industries, is quite clear. The bargaining unit of employees 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 by an employer, especially once a petition for an election has been filed with the NLRB.

This ruling portends to be only the beginning of other decisions and regulatory rules we expect to be issued by the NLRB between now and the end of the year when the terms of the pro-union majority on the NLRB expire.