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Micro Units: Recent NLRB Opinions Prove They Aren't Just For Health Care Anymore

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In August of 2011, the National Labor Relations Board issued its controversial decision in *Specialty Healthcare and Rehabilitation Center of Mobile*, 356 NLRB 56 (Aug. 26, 2011), overruling 20 years of Board precedent and imposing a new approach for determining what constitutes an appropriate bargaining unit in non-acute health care facilities. There, the Board announced that it would apply the "community of interest" test to non-acute care settings, such as nursing homes. As a result, the Board allowed certification of a bargaining unit comprised of 53 certified nursing assistants who had similar "training, certification, supervision, uniforms, pay rates, work assignments, shifts and work areas," and that excluded 33 other non-supervisory personnel. Under *Specialty Healthcare*, the Board gives extreme deference to a union's petitioned-for bargaining unit. As long as the petitioned-for unit may be considered an appropriate bargaining unit, the Board will deny any employer efforts to include similar employees in that unit unless the employer can demonstrate an "overwhelming" community of interest between the groups. This heightened standard is likely to mean that almost any bargaining unit the union suggests will be deemed appropriate, even if it is comprised of a very small number of workers—otherwise known as "micro units"—which create a fragmented workforce and competing employee demands.

Since its issuance, employers have feared that the newly-established rule in *Specialty Healthcare* would not be limited to the health care industry and, instead, would pave the way for successful union petitioning of micro units in *any* workplace—regardless of industry or size. Indeed, as cautioned by Board Member Brian Hayes in his dissent, *Specialty Healthcare* "fundamentally changes the standard for determining whether a petitioned-for unit is appropriate in any industry subject to the Board's jurisdiction." Unfortunately, recent Board decisions illustrate the prophetic nature of Member Hayes' projection.

***First Aviation Services, Inc.*, 2011 NLRB LEXIS 595 (Oct. 19, 2011).** On October 19, 2011, the Board ruled on its first case invoking *Specialty Healthcare's* new precedent. In *First Aviation Services*, the Board's Regional Director allowed a group of 34 "line service" employees to form their own bargaining unit despite sharing a community of interest with all but two of the other workers in the same facility. (All of the employer's 110 employees worked closely together and often shared responsibilities as circumstances required.) The Board denied the employer's attempt to appeal the Regional Director's ruling, which used *Specialty Healthcare* as the rationale for finding the petitioned-for unit of 34 line service employees appropriate.

***Northrop Grumman Shipbuilding, Inc.*, 357 NLRB No. 163 (December 30, 2011).** In *Northrop Grumman Shipbuilding*, the Board majority rejected the employer's contention that a unit of one type of technician approved by the Board's Regional Director should also include other technical employees. The Board majority reasoned that the employer failed to meet the newly-established standard in *Specialty Healthcare* that a party claiming a larger unit must demonstrate that the larger unit shares an "*overwhelming* community of interest" with those in the petitioned-for unit (italics added). As he did in *Specialty Healthcare*, Member Hayes dissented, projecting that the "new standard will encourage petitioning for small, single-classification and/or single department groups of employees . . . [leading] to balkanization of an employer's unionized workforce, creating an environment of constant negotiation and tension resulting from competing demands of the representatives of numerous micro-units."

***DTG Operations, Inc.*, 357 NLRB No. 175 (December 30, 2011).** In *DGT Operations*, the Board reversed a finding by the Board's Regional Director that the employer satisfied the "overwhelming community of interest" burden under *Specialty Healthcare* and that the only appropriate unit was a wall-to-wall unit of all 109 of the airport car rental facility's employees. Instead, the Board majority approved the 31-employee unit of rental service agents and lead rental service agents petitioned for by the union. Again, Member Hayes dissented, stating that "Board review of the scope of the unit has now been rendered largely irrelevant. It is the union's choice, and the likelihood is that most unions will choose to organize incrementally, petitioning for units of the smallest scale possible. The days of traditional all-inclusive production and maintenance units, technical units, or service and maintenance units—much less wall-to-wall plant units—are numbered."

What Does This Mean for Employers? Recent Board decisions relying on *Specialty Healthcare* leave no room for doubt: going forward, it will be extremely difficult for employers to refute *any* union-proposed bargaining unit. As Member Hayes projects, there can similarly be no doubt that unions will be encouraged to organize smaller micro units, where they often have a greater chance of gaining majority support. Employers, in turn, are more likely to face a workforce comprised of multiple bargaining units (with multiple collective bargaining agreements) and will also be presented with a greater risk of experiencing labor unrest. Employers are encouraged to consult with counsel to review their vulnerability to union organizing efforts and to determine how they may respond to any such efforts.