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NLRB Deals Another Blow to Obama-Era Micro-Units

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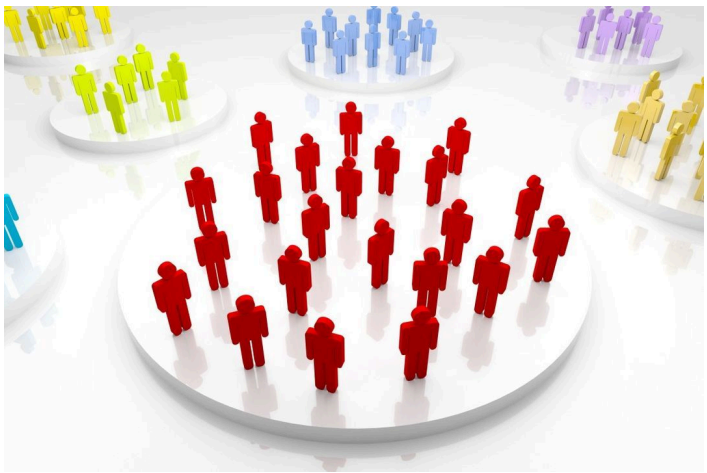
From an employer's perspective, one of the most challenging decisions to come out of the Obama-era National Labor Relations Board (NLRB) was the concept of "micro-units" within an employer's organizational structure. Under the concept, employers could have multiple, small bargaining units, sometimes involving different unions, notwithstanding the fact that a broader group of employees shared a significant (though not "overwhelming") community of interest. That decision was later overruled by the NLRB in *PCC Structurals, Inc.* 365 NLRB No. 160 (2017), which restored the Board's prior standard for determining the appropriateness of a petitioned-for bargaining unit. Now, in *The Boeing* Company, 368 NLRB No. 67 (2019), the NLRB has further clarified the required analysis for this determination.

Under the Obama-era ruling, the labor unit proposed in the union's representation petition was presumed appropriate, with the employer having to prove that a broader labor unit shared an "overwhelming community of interest." The *PCC Structurals* decision found this standard to be "fundamentally flawed" and restored the prior "community of interest' standard. This standard consists of the following: First, the proposed unit must share an internal community of interest. This means that employees within the proposed unit must have a strong measure of commonality with respect to terms and conditions of employment and share common concerns and interests with respect to workplace rules, supervision and wages. Second, the interests of those within the proposed unit must be distinct from those excluded from the unit, and the differences must be comparatively analyzed and weighed against factors supporting commonality. Finally, consideration must be given to the NLRB's decisions on appropriate units in the industry at issue.



In *Boeing*, the NLRB certified a bargaining unit comprised of Flight-Line Readiness Technicians (FRTs) and Flight-Line Readiness Technician Inspectors (FRTIs) who worked only in the final phase of assembly. Those workers performed work similar in nature to the work

performed in the first three assembly phases by other employees. Additional similarities between all production and maintenance employees—including the FRTs and FRTIs—include sharing the same timekeeping system; payroll and direct deposit system; performance management system determining pay and pay increases; attendance guidelines; overtime system; corrective discipline system; hiring process; similar benefits, such as retirement plans; and the same cash awards program.

Using the three factors of the community-of-interest analysis, the NLRB examined whether the FRTs and FRTIs shared common interests within the unit proposed by the union. The Board found that the employees performed dissimilar functions, worked throughout the entire production process, and did not share any common supervision. Importantly, in relation to the second factor, the Board found that the employees in the unit shared many similarities in their job duties and benefits with excluded employees. In making that determination, the Board found that the employees had a high degree of functional integration with the excluded employees on Boeing's 787 production process. Citing *Publix Supermarkets*, the NLRB said it was particularly inappropriate in this case to carve out a disproportionately small portion of a large functionally integrated group of workers as a separate unit. Finally, the Board found that there were no industry-specific guidelines applicable to this case. Taking all this into consideration, the NLRB reversed the determination of the Regional Director to certify the smaller (micro) unit of FRTs and FRTIs working in the last phase of the production process, and then dismissed the petition.

Boeing adds further clarity to the analysis the Regional Directors should employ in determining the appropriate bargaining unit. Boeing secured a significant victory by defeating a micro-unit of employees who share significant similarities in job duties, supervision, and other terms and conditions of employment with a broader group of production-level employees. Employers and their counsel will need to consider the lessons of *Boeing* when it receives a representation petition and makes the initial determination on whether to challenge the bargaining unit proposed by the union.

Topics

National Labor Relations Board (NLRB), Unions, Obama Administration, Micro-Units, Bargaining Unit

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