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NLRB Gift: Staying Non-Union May Be A Little Easier

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The NLRB offered a holiday gift to employers this year, overturning an Obama-era decision that allowed unions to organize "micro-units" of employees, by restoring a more employer-friendly standard to determine an "appropriate bargaining unit." In *PCC Structurals, Inc.*, the NLRB overturned the 2011 decision in *Specialty Healthcare and Rehabilitation Center of Mobile* which had allowed the unionization of "micro-units." The new decision re-establishes the traditional "community of interest" standard for determining which employees should be included in an appropriate bargaining unit.

Composition of an appropriate bargaining unit usually has a significant effect on the result of the NLRB election to determine whether the employees will be represented by the union. The petition for an election filed by a union typically proposes a bargaining unit composed of employees who have already indicated their support for the union. An employer response may be to propose a larger bargaining unit including employees who may not have been organized by the union or who may not support the union. The NLRB must decide which bargaining unit is appropriate. Under the *Specialty Healthcare* standard, employers seeking to expand the bargaining unit were required to prove the existence of an "overwhelming community of interest" among the employees in the Petition and

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the employees that the employer seeks to add, which was a more stringent standard than had been in place for decades. If the union won the election, the result was that employers may have been required to bargain with multiple "micro-units", instead of the traditional "wall-to-wall" bargaining units. *PCC Structurals* restored the prior standard.

PCC Structurals is a metal casting company that employs approximately 2,500 employees. The International Association of Machinists filed a NLRB petition for an election to represent approximately 100 welding employees. Applying the *Specialty Healthcare* standard, the NLRB Regional Director determined that the welders alone constituted an appropriate bargaining unit. Not surprisingly, the union won the election based on the "micro-unit" that it had proposed. The full NLRB recently remanded the case for re-examination of whether any other PCC Structurals employees shared a community of interest (not an "overwhelming community of interest") with the welders, or whether the welders were "sufficiently distinct" from other employees. It will be interesting to watch whether the NLRB Regional Director will now determine that the welders should be included in a larger (possibly "wall-to-wall") bargaining unit with any other employees.

By returning to the prior "appropriate bargaining unit" standard, the NLRB may have made it more difficult for unions to organize. No longer will unions be able to unilaterally determine the size and composition of the bargaining unit. In addition to requiring unions to consider organizing and gaining the support of a greater number of employees in a larger bargaining unit, the *PCC Structural* decision may affect the union-organizing strategy of "getting a foot in the door" with a smaller bargaining unit as a prelude to organizing more employees at a later date.

Although the *PCC Structurals* decision is expected to have a positive effect on maintaining non-union status, non-union employers should not relax their

efforts to remain union-free. In fact, now is a good time for employers to review their organizational structure. Employers should consider requiring employees to perform multiple job functions for different supervisors and in different departments. By establishing the interchange of employees, the interconnection of their job functions, and possibly expanded departments an employer may be able to create a broader community of interest and thereby a larger appropriate bargaining unit. Finally, employers should always be vigilant for early warning signs of union organizing activity.

The newly constituted NLRB offered a few other year-end gifts for non-union employers. The first is a Memorandum to Regional Offices regarding *PCC Structurals*, which authorizes the delay in pre-election hearings to resolve "appropriate bargaining unit" issues. The second is the publication of a request for input regarding the 2014 election rules changes, also known as the "quickie election" rules. It will be interesting to see whether the election process will be restored to its prior rules of allowing the most important issues to be resolved before voting. Finally, the NLRB General Counsel issued GC Memorandum 18-02 indicating that the NLRB will no longer view as an illegal threat an employer's campaign statement that employees will not be able to discuss issues directly with management if the union were to win the election.