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NLRB Expands *Specialty Healthcare* Micro-Units into the Retail Sector

The National Labor Relations Board ("NLRB" or "Board") recently issued two important decisions regarding the expansion of its controversial 2011 ruling in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011)—the so-called "micro-units" case—into the retail sector. In *Specialty Healthcare*, the Board held that if a petitioned-for bargaining unit is "readily identifiable as a group" and the workers share a "community of interest," it will be deemed presumptively valid unless the employer can demonstrate that the workers in a larger unit share an "*overwhelming* community of interest" with the proposed unit and must be included.

Macy's Inc.

In the first of two recent cases, *Macy's Inc.*, 361 NLRB No. 4 (2014), the Board considered the appropriateness of a petitioned-for micro-unit at a Macy's store in Saugus, MA. Although the store employed 150 non-supervisory workers (120 of whom were engaged in sales), the union sought to represent only 41 cosmetics and fragrance sales employees. Macy's argued that the requested unit was improper under Board precedent and that an appropriate unit should include all non-supervisory employees at the store, or at least all of the store's sales employees.[1] The Board majority, however, found that the petitioned-for unit was a "readily identifiable group" based on job classifications and job functions and that the workers shared a "community of interest" with one another since they each worked in the same department, had common supervision, and were engaged in the common function of selling cosmetic and fragrance products.

The Board also found that Macy's failed to prove that other Macy's employees shared an "overwhelming community of interest" with the petitioned-for workers. In so finding, the Board considered similarities among all store employees (*e.g.*, same work shifts, employment policies, evaluation system, benefits, etc.) less significant than the differences between the petitioned-for unit and the other store employees (*e.g.*, separate departments, separate compensation schemes, separate mid-level supervisors, etc.). Finally, the Board rejected as "pure speculation" Macy's

[1] As Macy's argued, the Board had held for decades that where employees in the retail industry share a "community of interest," the appropriate bargaining unit is presumptively a "wall-to-wall" unit of all similarly-situated employees. To overcome this presumption and obtain approval of a "micro-unit," a party needed to show that the interests of the employees in the smaller unit were "sufficiently distinct" from those of all other employees in the business. *Specialty Healthcare*, not only abandons this long-standing principle, but reverses it, holding that the smaller unit requested by the union, rather than a wall-to-wall unit, is presumptively acceptable.

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argument that a decision approving the petitioned-for unit would harm the retail industry by causing "destructive factionalization" of retail operations and the proliferation of competitive "micro-unions" within retail stores.

The *Macy's* decision is significant for a couple of reasons. First, it shows that employers will face a substantial challenge in seeking to overcome a proposed "micro-unit" under the *Specialty Healthcare* test. *Specialty Healthcare* will likely assist unions in their organizing efforts, particularly where only a subset of employees in a specific department, division, or job classification favors unionization. Second, despite hopes that the Board might limit its holding in *Specialty Healthcare* to the healthcare industry (as suggested by the decision itself), *Macy's* makes clear that the Board intends to apply the ruling more broadly.

Bergdorf Goodman

Several days after its decision in *Macy's*, the Board issued a ruling in *Bergdorf Goodman*, 361 NLRB No. 11 (2014). In that case, a unanimous Board found that a petitioned-for unit at the Bergdorf Goodman store in New York City was inappropriate because it lacked a sufficient community of interest. The employees in the requested unit consisted of two sets of employees: (i) 35 women's "Salon shoes" sales associates and (ii) 11 women's "Contemporary shoes" sales associates. The Board explained that in determining the appropriateness of a requested unit, it weighs various community-of-interest factors, including whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work; 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; and are separately supervised.

The Board acknowledged that although some factors supported a community of interest among the Bergdorf employees in the petitioned-for unit, the other factors undermined such a finding. Distinguishing *Macy's*, the Board emphasized that Bergdorf's women's Salon and Contemporary shoe sales associates worked under different department managers, floor managers, and directors of sales, sharing supervision only at the highest level of store management (*i.e.*, the General Manager). The Board also found it significant that the women's Salon and Contemporary sales associates worked on non-adjacent floors at Bergdorf's and had no significant interchange; instead, contact among the petitioned-for employees was limited to attendance at storewide meetings and other incidental contact. The two departments could therefore not be appropriately combined into a single bargaining unit, because there was no relationship between the contours of the proposed unit and the employer's administrative or

operational structure (such as departments, job classifications, or supervision), and no other factors were demonstrated that could have mitigated or offset that deficit.

The *Bergdorf* decision offers a mixed bag for employers. Although it shows that the current Board will not rubber stamp all petitioned-for micro-units and that such units may be found inappropriate when they lack a sufficient community of interest, it is telling that the Board majority (without the approval of the two Republican Board members) seized the opportunity to identify facts that could have altered the outcome in the case in the union's favor, effectively providing a roadmap for unions to rely upon in the future. For instance, the Board majority opined, in *dicta*, that if the sales employees had shared supervision despite their different departments on non-adjacent floors, or had significant interchange and contact with one another, the proposed fragmented micro-unit might have been appropriate.

In light of the Board's decisions in *Macy's* and *Bergdorf*, employers should not be surprised to see a proliferation of micro-units being proposed by unions across the country as they seek to re-establish a substantial foothold in private-sector business, following decades of decline. Employers would be wise to remain alert to organizing efforts as unions seek to apply *Specialty Healthcare* in retail and other industries as a new quiver in their organizing arsenal.

If you have any questions regarding these issues, please contact Phil Repash at (212) 758-1078, or another attorney at the Firm.