NLRB Continues Approval of "Micro-Bargaining Units"

The National Labor Relations Board (NLRB) recently strengthened the ability of unions to gain a foothold in a workplace by organizing sub-groups of employees when they are unable to get more broad-based support among co-workers. On July 22, the Board decided to hold an election limited to the Cosmetics and Fragrance employees at a Macy's store. Other sales employees were not included in the vote. Employers, particularly those in the retail industry, should pay close attention to the way that they structure their workforce. Differences may open them to such focused union organizing efforts.

Under the National Labor Relations Act, employees can petition the NLRB to conduct a secret ballot election to determine whether a majority of the employees in a particular "bargaining unit" wish to be represented by a union for purposes of collective bargaining. If a majority of the employees in the bargaining unit vote in favor of representation, then the union becomes the representative of **all** the employees in that bargaining unit. The question in the Macy's case was how narrowly the petitioning union could draw the lines for a "bargaining unit."

In 2011, the NLRB held an election among all the employees at the Macy's store in Saugus, Massachusetts to determine whether they would be represented by the United Food and Commercial Workers union. The union lost the election. In 2012, the union filed a petition to represent a subset of the store's employees - only the employees who worked selling cosmetics and fragrances. Macy's argued that segregating the cosmetics and fragrance employees from its other retail sales employees was improper, and that the smallest bargaining unit should be all employees who sold goods at the store.

The NLRB held that a unit consisting of only the cosmetics and fragrance employees was an appropriate unit, and ordered that an election be held just among that group. It analyzed the evidence presented at the representation hearing and decided that Macy's had not proven that other employees shared an "overwhelming" community of interest with the cosmetic and fragrance salespeople. Thus, the union now has the opportunity to convince a much smaller group of employees to vote in favor of representation and perhaps create a beachhead in the store for further organizing efforts.

If you have any questions about the issues addressed here, or any other matters involving Labor and Employment issues, please feel free to contact:

Susan J. Baronoff

Michael Colgan Harrington

Lauren M. Hopwood

William J. Keenan, Jr.

Hugh F. Murray, III

Lissa J. Paris

Rachel Faye Smith

Barry J. Waters

Jennifer A. Corvo

Stella Szantova Giordano

Colleen O'Neill

Monica P. Snyder

Kristen L. Zaehringer

Copyright © 2014 Murtha Cullina LLP. This alert is one of a series of publications by Murtha Cullina LLP and should not be construed as legal advice or legal opinion on any specific facts or circumstances.
The contents are intended for general information purposes only, and you are urged to consult your own lawyer concerning your own situation and any specific legal questions you may have.

While couched in language indicating that this was a straightforward application of long-standing law, this decision would almost certainly have gone the other way under previous administrations. It indicates the current NLRB's greater willingness to facilitate union organizing. The potential proliferation of "micro-units," such as the sub-group of sales employees, will combine with the imminent regulations shortening the time period for pre-election hearings and campaigns to put employers facing unexpected union organizing petitions at a significant disadvantage. The consequence of losing an election for a sub-group like this are likely worse for an employer than having a larger unit organized because both the employer and the union will be focused on the impact of bargaining on unrepresented employees working side by side with the represented employees, making negotiations more difficult and divisive.

Significantly, a week after the Macy's decision, the Board issued a decision that seemed to go the other way. In that case, a union petitioned for an election among all the women's shoe salespeople at a Bergdorf Goodman store. The requested unit included all the salespeople in the store's "salon unit" and all those members of the "Contemporary Sportswear" department that sold shoes. The Board held that the proposed unit was not appropriate because it did not coincide at all with the way the employer organized its workforce. While not a determinative factor in all cases, the fact that the Union sought to organize a department and a half, as opposed to 1 department or even 2 combined departments, made the unit inappropriate.

In light of these cases, and the imminent regulations, employers should review their organizational structure and decide whether to make changes that might avoid such "micro-units." Now more than ever employers need to understand how the NLRA works, because they will not have the luxury of time once a petition is filed.

Please contact Hugh F. Murray, III at 860.240.6077, hmurray@murthalaw.com or Michael C. Harrington at 860.240.6049, mharrington@murthalaw.com if you have any questions concerning the issues discussed in this article.