

Trump Board Kills Micro-Units, Weakens Unilateral Change Claims, Questions Quickie Election Rules

December 20, 2017

In *PCC Structurals, Inc.*, in a 3-2 decision, the National Labor Relations Board (NLRB or Board) overturned the 2011 *Specialty Healthcare* decision which allowed “micro-units” of small groups of employees to organize within a company. The Board found that the *Specialty Healthcare* decision had changed long-standing Board precedent by allowing bargaining units consisting of small groups of employees and only requiring larger units if the employees shared an “overwhelming” community of interest with the proposed smaller unit. The *Specialty Healthcare* decision had been helpful to unions by allowing them to organize a small department and then use that as a base for further organizing in a location or company.

The Board reverted to the traditional test, allowing employers to argue that a larger unit is the minimum appropriate bargaining unit by showing the union’s proposed unit excludes employees who share a “community of interest.” By increasing the size of the unit, an employer can often defeat a petition for election before the election is even held.

In *Raytheon Network Centric Systems*, another 3-2 decision, the Board overruled *E.I. Du Pont de Nemours, Louisville Works*. The *E.I. Du Pont* decision held that employer actions could constitute a unilateral change requiring bargaining even if the employer’s action was consistent with established past practice. Prior to *E.I. Du Pont*, Board precedent had held that where an employer implements a unilateral change in terms and conditions consistent with established past practice, the change was not a unilateral change requiring bargaining. The Board reinstated the pre- *E.I. Du Pont* standard. *Raytheon* will significantly reduce the ability of union efforts to delay changes in work rules and procedures desired by employers.

Finally, on Dec. 12, 2017, in a 3-2 vote, the NLRB issued a “Request for Information Regarding Representation Election Regulations.” This request is in direct response to the NLRB’s “quickie” election rules established in 2014, which reduced the amount of time between the filing of a union election petition and the election, providing the employer with less time to present their position concerning the representation election to its employees. The Rule also modified the timing of challenges to a representation petition and made other changes expediting the election process.

The Board’s request for information asks the following questions:

1. Should the 2014 Election Rule be retained without change?
2. Should the 2014 Election Rule be retained with modifications? If so, what should be modified?
3. Should the 2014 Election Rule be rescinded? If so, should the Board revert to the Representation Election Regulations that were in effect prior to the 2014 Election Rule’s adoption, or should the Board make changes to the prior Representation Election Regulations? If the Board should make changes to the prior Representation Election Regulations, what should be changed?

The newly constituted Board finished the year with a flurry of activity. At this point, former Board Chairman Phillip Miscimarra’s term expired on Dec. 16, 2017, leaving the Board with four members: two Democratic appointees and two Republican appointees.

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What Does This Mean for Employers?

These cases, along with other recent Board activity, signal an intent from the Board to overturn Obama Board era decisions that reversed or modified long-standing NLRB precedent. As cases come before the Board, employers need to stay alert on how the pendulum changes will affect their labor and employment practices.