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Big Labor's Push for Micro-Unions

In December 2017, the NLRB issued its decision in PCC Structurals, rescinding the 2011 Obama-era Specialty Healthcare decision and reinstating the traditional standard for determining appropriate bargaining units. In the Specialty Healthcare decision, the Board allowed for the formation of "micro-unions," or smaller-than-traditional bargaining units, effectively allowing union organizers to gerrymander workforces and disenfranchise employees that did not support unionization. In order to permanently roll back this damaging Board action, Congress should immediately reintroduce and pass the Representation Fairness Restoration Act and Workforce Democracy and Fairness Act; all of which would codify into law the traditional standard of what constitutes an "appropriate" bargaining unit.

THE PROBLEM

Under the Board's 2011 *Specialty Healthcare* decision, the NLRB radically changed the standard for determining the appropriate composition of bargaining units. Previously, if an employer believed a union's petitioned-for bargaining unit (the group of employees the union is attempting to organize) should include additional employees, the employer needed to show the employees shared a community-of-interest (i.e. similar working conditions, hours, benefits, supervision). Under *Specialty Healthcare*, however, an employer was required to show an "overwhelming" community-of-interest between the petitioned-for unit and the other employees.

This standard made it difficult for employers to prove the petitioned-for unit was inappropriate and, therefore, easier for unions to gerrymander the workforce into "micro-unions." For example, a union could attempt to organize a small group of employees working on one machine or one product rather than all machinists in a manufacturing facility if the majority of machinists do not want union representation. These micro-unions greatly limit an employer's ability to cross train and meet customer and client demands via flexible staffing as employees could not perform work assigned to another unit. Employees in these micro-unions also suffer from reduced job opportunities, such as promotions and transfers.

The *Specialty Healthcare* decision negatively impacted employers and employees alike. In *Macy's,* for example, one of the Board's Regional Directors ruled that full- and part-time employees in the fragrance and cosmetics department of a single Macy's store constituted an appropriate bargaining unit. This ruling came approximately a year and a half after the petitioning union lost an election involving a proposed unit that included all store sales employees. On July 22, 2014, the Board ruled against Macy's, determining the bargaining unit was in fact an appropriate unit, because the employees made up a single department within the store. *Macy's* thus makes clear the insidious effect of *Specialty Healthcare*, allowing unions to pick apart groups of employees, who for decades would have been considered a single bargaining unit, and focusing on isolated sub-groups.

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EFFORTS TO ROLL BACK *SPECIALTY HEALTHCARE*

The NLRB and Congress have both worked to eliminate the *Specialty Healthcare* decision. With its 2017 *PCC Structurals* decision, the NLRB abandoned the "overwhelming" community-of-interest standard, clarifying that the traditional standard allows the Board to evaluate the interests of all employees, not just those inside the petitioned-for unit. Along with this decision, the NLRB's General Counsel issued Memorandum OM 18-05 on December 22, 2017, instructing Regional Offices to use the standard established in *PCC Structurals* "at all stages of case processing in currently active cases," effectively prohibiting the application of the *Specialty Healthcare* decision to any currently pending cases.

Finally, previous Congresses have introduced legislation to roll back the *Specialty Healthcare* decision – the Representation Fairness Restoration Act (H.R. 2629 and S. 1217, 115th Congress) and the Workforce Democracy and Fairness Act (H.R. 2776, 115th Congress). These bills would roll back *Specialty Healthcare* and codify into law the traditional standard for determining an appropriate bargaining unit.

While CDW applauds the progress made on this issue, confusion remains around the application of the *PCC Structurals* standard. CDW submitted an amicus brief to the NLRB in *Boeing* requesting additional guidance for employers, unions, and the judicial system on how to determine appropriate bargaining units in future cases and circumstances. Additionally, there is nothing stopping a future pro-Labor NLRB or administration from attempting to reinstate the *Specialty Healthcare* decision or similar policies. Congress should therefore move to permanently prevent implementation of the *Specialty Healthcare* standard by enacting legislation that codifies the traditional standard into law. CDW will continue to pursue the issue in court as opportunities arise.