COALITION FOR A
DEMOCRATIC WORKPLACE

Big Labor's Push for Micro-Unions

In December 2021, the NLRB invited amicus briefs in American Steel Construction to determine if the Board should readopt an Obama-era standard used to determine the appropriateness of a petitioned-for bargaining unit in a representation election. The Obama-era standard allowed for the formation of "micro-unions," effectively allowing union organizers to gerrymander workforces and disenfranchise employees that did not support unionization. Congress is also trying to expand the definition of an "appropriate" bargaining unit via the PRO Act, dangerous legislation that would radically rewrite the nation's labor laws. Congress should immediately enact legislation that would codify into law the traditional standard of what constitutes an appropriate unit.

THE NLRB AND CONGRESS ARE PUSHING FOR MICRO-UNIONS

In December 2021, the National Labor Relations Board (NLRB) invited interested stakeholders to file amicus briefs in *American Steel Construction* to determine if the Board should readopt the 2011 Obama-era *Specialty Healthcare* standard, which radically changed how the Board determines the appropriate composition of bargaining units, or the group of employees the union is attempting to organize. Additionally, Democrats in Congress and the president are pushing for passage of the Protecting the Right to Organize (PRO) Act (H.R. 842, S. 420), which would codify similar policy into law. The bill already passed the House on March 9, 2021.

Previously, if an employer believed a union's petitioned-for bargaining unit 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.

The *Specialty Healthcare* 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," or smaller-than-traditional bargaining units, effectively allowing union organizers to disenfranchise employees that did not support unionization. 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 focus on isolated sub-groups.

EFFORTS TO ROLL BACK *SPECIALTY HEALTHCARE*

The Trump-era NLRB and Republicans in Congress tried to eliminate the *Specialty Healthcare* decision. In 2017, the NLRB issued a decision in *PCC Structurals* that rescinded *Specialty Healthcare* and reinstated the traditional standard by abandoning the "overwhelming" community-of-interest burden. The *PCC Structurals* decision clarified 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 in December 2017, which instructed Regional Offices to use the standard established in *PCC Structurals* "at all stages of case processing in currently active cases," effectively prohibiting application of the *Specialty Healthcare* decision.

Finally, previous Congresses introduced legislation to roll back the *Specialty Healthcare* decision and codify the traditional standard into law – 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).

THE FIGHT CONTINUES

The Biden administration and Democrats in Congress and on the NLRB are working to reinstate the *Specialty Healthcare* standard. CDW filed an amicus brief with the Board in *American Steel Construction,* but the NLRB is likely to move forward with this misguided policy regardless.

Congress should move to permanently prevent implementation of the *Specialty Healthcare* standard by enacting legislation that codifies the traditional standard into law.

Additionally, CDW will continue to pursue the issue in court as opportunities arise.