



Labor & Employment @lert

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NLRB Paves the Way for Micro Units

On December 14 the National Labor Relations Board (NLRB or Board) issued another precedent-shifting decision, this time easing the standard for unions to organize “micro units” made up of subsets of the workforce. The 3-2 decision issued by the Board’s democratic majority in *American Steel Construction, Inc.* returned to an Obama-era standard and overturned the historical standard that was readopted under the Trump Board in 2017. Under the new decision, unions can exclude employees within the workforce from the voting unit unless the employer can show the excluded employees share an “overwhelming community of interest” with the employees included in the voting unit.

Section 9(b) of the National Labor Relations Act allows a party petitioning for unit recognition to seek representation of a subdivision of employees. Historically, the NLRB has considered multiple factors to determine the appropriateness of these micro units, including:

- Are the employees under separate supervision?
- Are the employees functionally integrated with other employees?
- Do the employees have distinct terms and conditions of employment?
- Do the employees have distinct skills and training?
- Are the employees organized into separate departments?

However, in 2011 the Obama Board changed the standard for showing the union-selected unit is improper by requiring employers to show employees in the voting unit shared an overwhelming community of interest with the employees the union left out.

In 2017 the Trump Board returned to the traditional test but created a new three-step process for analyzing the

unit’s appropriateness. The new standard required the petitioning unit to be:

- Homogenous, meaning the group shares a community of interest
- Identifiable, meaning there is some rational basis for the group
- Separate or sufficiently distinct, meaning the group cannot exclude employees who cannot rationally be excluded from the petitioning group

Now, the Biden Board has returned to the Obama-era standard that, as a practical matter, was almost impossible for employers to meet. Under the new standard, unions will have an easier time choosing voting units that are more likely to vote in favor of the union, while employers will be faced with the near impossible task of showing an overwhelming community of interest with other employees to prevent the cherry-picked unit.

Notably, this decision will apply to all pending cases, requiring employers to shift their strategic efforts.

FOR MORE INFORMATION

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