New York Law Journal

SERVING THE BENCH AND BAR SINCE 1888

WWW.NYLJ.COM

An ALM Publication

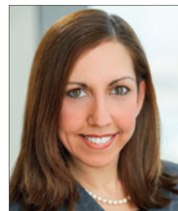
VOLUME 262—NO. 68

FRIDAY, OCTOBER 4, 2019

LABOR RELATIONS

Expert Analysis

NLRB Developments: Micro Units, Independent Contractors and More



By **David E. Schwartz**

And **Risa M. Salins**

Over the last several months, the National Labor Relations Board (Board) issued a slew of employer-friendly decisions. Many of these decisions overturned longstanding precedent. This column is the first of two addressing a number of these recent Board rulings that have significant implications for employers with and, in several cases, without a unionized workforce.

Bargaining Units

In *The Boeing Company*, 368 NLRB 67 (Sept. 9, 2019), the Board clarified its standard for reviewing whether a small bargaining unit within a larger workforce, often referred to as a "micro unit," is an appropriate unit under the National Labor Relations Act (NLRA).

"Micro units" flourished following the controversial Obama-era ruling in *Specialty Healthcare*, 357 NLRB 83 (Aug. 26, 2011), in which the Board stated a proposed unit was considered appropriate unless the excluded workers shared an "overwhelming community of interest" with the micro unit. The Board later rejected this precedent in *PCC Structurals*, 365 NLRB 160 (Dec. 15, 2017), by returning to a more traditional "community of interest" test, pursuant to which a union could represent a small subset of the larger workforce only if the petitioned-for unit shares an internal community of interest sufficiently distinct from excluded employees. This standard shifted the *Specialty Healthcare* burden to show an overwhelming community of interest off of employers.

> Following 'Boeing', micro units likely will face increased scrutiny and be easier for employers to challenge.

In *Boeing*, the Board clarified its *PCC Structurals* precedent and set forth the following three factors to consider when evaluating a petitioned-for unit: (1) whether the members of the petitioned-for unit share a community of interest with each other; (2) whether the employees excluded from the petitioned-for unit have meaningfully distinct interests in collective bargaining that outweigh their similarities; and (3) whether there are any industry-specific rules for appropriate unit configurations. Considering these factors, the Board found in *Boeing* that the mechanics in the petitioned-for unit shared neither an internal community of interest nor sufficiently distinct interests from the larger unit (there were no industry-specific guidelines applicable to the case).

Following *Boeing*, micro units likely will face increased scrutiny

DAVID E. SCHWARTZ *is a partner at the firm of Skadden, Arps, Slate, Meagher & Flom.* RISA M. SALINS *is a counsel at the firm.* JANE JEONG, *an associate at the firm, assisted in the preparation of this article.*

and be easier for employers to challenge. Notably, on Sept. 17, 2019, just about one week after *Boeing*, the acting director of the Board's Region 13 office in Chicago dismissed a unit clarification petition by a union that sought to carve out National Football League (NFL) running backs as a separate bargaining unit, finding no basis for that position to be excised from the broader bargaining unit of all NFL players. See *National Football League*, Case Number 13-UC-246227.

Worker Misclassification

Independent contractor status poses significant consequences under the NLRA because such workers are not covered by the NLRA and therefore cannot form unions. In *Velox Express*, 368 NLRB 61 (Aug. 29, 2019), the Board held 3-1 that an employer's misclassification of employees as independent contractors does not in and of itself constitute a violation of the NLRA.

The Board found that an employer's classification of employees is merely an expression of a legal opinion which, regardless of whether correct, is protected under §8(c) of the NLRA. Section 8(c), the so-called "free speech" section, states: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice …, if such expression contains no threat of reprisal or force or promise of benefit." The Board reasoned it would be a "bridge too far" to find a standalone misclassification of an employee as an independent contractor inherently interfered with employees' protections under the NLRA.

Velox offers some measure of certainty that an employer will not be found liable for an unfair labor practice violation for a mistaken classification decision. Nevertheless, classification of workers as independent contractors remains fraught with risk for employers due to increased regulatory attention given to misclassification and the numerous, often-changing legal standards used by federal, state and local agencies and courts.

> As the Board continues with its flurry of decisions, employers are advised to keep apprised of further Board developments.

Successorship

In *Ridgewood Health Center*, 367 NLRB 110 (April 2, 2019), the Board, in a 3-1 decision, narrowed the circumstances under which the purchaser of assets of a business is considered a "perfectly clear" successor required to consult with the incumbent union before setting initial terms and conditions of employment.

By way of background, the Supreme Court's decision in *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), established the "perfectly clear" successor doctrine. Generally, absent a contractual successors-and-assigns clause, a successor employer may decline to adopt existing collective bargaining agreements following an asset purchase and instead set initial terms of employment. However, if the purchaser plans to retain all or substantially all of its predecessor's unionized employees, it may be considered a "perfectly clear" successor, in which case it would not be free to establish initial terms without first consulting the union. In *Spruce Up*, 209 NLRB 194 (1974), the Board read the "perfectly clear" successor exception narrowly, limiting its application to cases in which a new employer misled the predecessor's employees into believing they would all be hired without changes in terms and conditions of employment or failed to clearly announce its intent to establish new terms and conditions prior to inviting the predecessor's employees to accept employment. However, over time, the "perfectly clear" successor exception was expanded, and even used as a means of remedying a new employer's unlawful discriminatory hiring practices purposefully aimed at denying a union majority status and avoiding a successor's bargaining obligations. See *Galloway School Lines*, 321 NLRB 1422 (1996).

In *Ridgewood Health Center*, an employer taking over the

operations of a unionized nursing home did not hire four of the predecessor's union-represented employees and made several conflicting statements concerning the incumbent employees' prospects for continued employment. Before beginning operations, the new operator rejected the incumbent union's demands to bargain and implemented new wages and working conditions that differed from those set forth in the predecessor's collective bargaining agreement. The union filed unfair labor practice charges regarding the new operator's (1) discriminatory refusal to hire, allegedly to deny the union majority status, (2) refusal to recognize and bargain with the union, and (3) unilateral changes in terms and conditions of employment made without prior consultation with the union.

The Board found for the union on the first two claims. With respect to the third charge, however, the Board held the new operator, as a *Burns* successor, was free to set initial wages and working conditions without prior union consultation, notwithstanding its discriminatory failure to hire the four union-represented employees. In so holding, the Board overturned *Galloway*, reasoning it would be contrary to fundamental economic policy to use the "perfectly clear" successor exception to remedy any hiring discrimination and strip an employer's customary right to set initial employment terms. The Board concluded, since it was apparent the new operator would not have hired all or substantially all of the predecessor's employees regardless of any discriminatory intent, the new operator was not a "perfectly clear" successor.

The *Ridgewood Health Center* Board's narrow view of the "perfectly clear" successor doctrine likely will provide successor employers with more flexibility following an acquisition. That said, if a new employer does not intend to hire all or substantially all of the predecessor's employees or intends to change terms and conditions of employment from those set forth in a predecessor's collective bargaining agreement, those messages should be clearly conveyed to the employees as early as practicable.

Mandatory Arbitration

Last year, the U.S. Supreme Court held in *Epic Systems v. Lewis*, 138 S. Ct. 1612 (2018), that individual arbitration agreements containing class and collective action waivers are lawful under the NLRA and should be enforced pursuant to the Federal Arbitration Act. In another 3-1 decision, the Board in *Cordúa Restaurants*, 368 NLRB 43 (Aug. 14, 2019), decided two issues of first impression that arose in light of *Epic*.

First, the Board held an employer may promulgate or revise a mandatory arbitration policy even in response to employees who have joined a collective or class action. It noted that any finding that promulgation of an arbitration agreement in response to opt-in action violates the NLRA would be inconsistent with the *Epic* holding that individual arbitration agreements do not violate the NLRA.

Second, the Board held it is not a violation of the NLRA for an employer to advise employees they will be subject to adverse employment action, including termination, if they refuse to sign such an arbitration agreement. It reasoned that inasmuch as *Epic* allows an employer to condition employment on an individual entering into an arbitration agreement containing a class or collective action waiver, conditioning continued employment on signing such an agreement also is lawful.

* * *

As the Board continues with its flurry of decisions, employers are advised to keep apprised of further Board developments.

Reprinted with permission from the October 4, 2019 edition of the NEW YORK LAW JOURNAL © 2019 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382 or reprints@alm.com. # 10032019-418777