

NLRB Applies Specialty Healthcare "Micro-union" Standards To Retail Industry With Mixed Results

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The NLRB recently issued a pair of decisions applying its controversial test for appropriate bargaining units set out in *Specialty Healthcare*, 357 NLRB No. 83 (2011). *Specialty Healthcare*, which was affirmed by the Sixth Circuit last year, has been criticized by many as allowing the formation of "micro-units" within facilities instead of the traditional "wall-to-wall" units. The Board did little to assuage those critics with its decisions in *Macy's*, 361 NLRB No. 4 (July 22, 2014) and *Bergdorf Goodman*, 361 NLRB No. 11 (July 28, 2014) released last month. Instead, the Board signaled its willingness to apply *Specialty Healthcare* in the retail context, and underscored the intensely factual nature of the Board's test for appropriate units. In these cases, both involving retail sales employees, the Board came to different conclusions, holding in *Macy's* that a group of fragrance and cosmetic sales employees were an appropriate unit for bargaining, while finding in *Bergdorf Goodman* that a group of women's shoe sales employees were not an appropriate unit. The apparent difference between the two according to the Board was that the *Macy's* employees made up a single department within the store, while the petitioned-for shoe sales employees at *Bergdorf Goodman* were from two different departments with different supervision and little overlap between the two departments. This was enough for the Board to find *Macy's* employees to have a "community of interest" while the *Bergdorf Goodman* employees did not, despite the fact that both groups of sales employees were paid similarly, had the same benefits, were subject to the same employee handbook, and were evaluated the same way as other sales employees in the store at large. Although *Bergdorf Goodman* is nominally a victory for the employer, showing that in at least some contexts the Board will not approve "micro-units", ultimately these decisions merely highlight the difficulty that employers face when challenging these mini-bargaining units due to the purely fact-dependent nature of the Board's decisions. And with success like in *Macy's*, there is no doubt that unions will continue to target small groups of employees within a facility in a "divide and conquer" approach using *Specialty Healthcare* to their advantage. See our recent Barnes & Thornburg alert analyzing the *Macy's* decision in more detail [here](#).

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