



Unions Poised to Exploit Changes in NLRB Rules

Insights

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After winning 73% of elections in healthcare units in 2011, unions seeking to organize more healthcare workers are preparing to exploit opportunities arising from significant new rule changes and recent decisions by the National Labor Relations Board (NLRB). Hospitals, nursing homes, home health agencies, clinics and other healthcare employers who want to preserve their union-free status must therefore be prepared for a significant uptick in activity.

Healthcare in Organizers' Crosshairs

Although the Board's proposed new "posting requirement" attracted considerable attention, the U.S. Court of Appeals for the District of Columbia moved that issue into the background, at least temporarily, by enjoining its implementation. (See our April 17, 2012 Legal Alert explaining this development in more detail.)

But, rule changes allowing "quickie" elections and the establishment of small "micro" units may prove far more troublesome for employers. The shortened election periods arise from rule changes effective on April 30, 2012. The opportunity to gerrymander elections within small pockets of discontent emerged from the Board's decision last summer in *Specialty Healthcare*. That decision was one of several parting shots by former Board chairman Wilma Liebman.

These developments fit into the larger picture of a labor movement trying desperately to reverse a long trend of declining union membership. Stocked with good-paying jobs that cannot be outsourced, the healthcare industry remains an inviting target for unions hungry to increase membership and revenues.

Trends In Membership And Elections

In 2011, overall union membership was 11.8 % in the U.S., down a tenth of a percent from 2010. Membership in the private sector held steady at 6.9 %. For the first time in several years, union win rate in *all* elections was greater outside the healthcare industry than inside it. In certification elections, however, unions won 73 % of the time, compared with a 69 % success rate in non-healthcare elections. Unions' win rates increased both inside and outside the industry. At least in healthcare, this appears to be due in part to unions' willingness to withdraw petitions before an election when their leaders believe the vote may not turn out in their favor.

The Service Employees International Union (SEIU) again accounted for most of the activity in healthcare, filing 41 percent of the petitions and winning 78 % of the time. The National Nurses United (NNU, led by the NNOC aka California Nurses Association) filed 4 percent of petitions, but won 94 % of its elections. Both groups continue to hone the substance and style of their marketing, making extensive use of the internet and social media. Armed with the new advantages discussed below, they will likely be even more aggressive this year.

Administrative Changes Provide Golden Opportunities to Organizers

After the so-called Employee Free Choice Act (EFCA or the "card check" bill) stalled in 2009, union leaders and supporters found a friend and effective ally in the decidedly pro-union majority of the NLRB. Their decisions and rule changes present union organizers with newfound golden opportunities. Some of these developments may turn out to be more effective than the card check bill would have been. It is therefore even more important for healthcare employers to be prepared for increases in organizing activity.

Apart from the Board's ill-fated mandate to post its 11" x 17" pro-union notice, new rules will significantly reduce the period of time between filing a petition and an election. In other words, employers now have far less time to respond when a union files a representation petition seeking to represent its workers. Under the old rules, the period between filing a petition and the election (the campaign period) was normally about six weeks, sometimes longer. Under the new rules, the campaign period will be reduced to 21 days or even as few as 10 days. This would allow employers precious little time in which to tell their side of the story.

Muddying The Waters

Additionally, the rules now severely restrict pre-election hearings. Thus, even a dispute over whether certain employees are ineligible to vote (because they may be supervisors) will not be resolved until after an election. This will generate confusion and make it more difficult for employers to identify which employees are permitted to speak on its behalf during a campaign. More after-the-fact unfair labor practice charges and litigation are therefore likely.

An expedited election process will also make it more difficult to deal with fallout from the *Specialty Healthcare* decision, which opened the door for organizing small, isolated pockets of employees. Such small units have been fairly uncommon because even employees in smaller departments usually share a significant "community of interest" (similar job functions, supervision, hours, physical proximity, etc.) with others in the organization. The community of interest consideration is critical in determining what constitutes an appropriate bargaining unit. This decision clearly reflected the Board's pro-union stance: statistically, as the size of a bargain unit decreases, the union's chance of winning an election increases.

When it decided *Specialty Healthcare*, the Board majority indicated that its application would be narrow. But, the decision has already been cited in several other cases. Under the Board's new analysis of this issue, employers will have an extremely difficult time successfully challenging the appropriateness of "micro" units. The proliferation of such units will give unions more opportunities

appropriateness of micro units. The proliferation of such units will give unions more opportunities to get their foot in the door of previously union-free workplaces and make the administration of union contracts even more cumbersome.

What Can Healthcare Employers Do?

Although shortened campaign periods and smaller bargaining units will make union-organizers' jobs easier, employers can still take effective steps to protect their union-free environment. Sound employee relations practices, good supervisor training and responsive management will still make it less likely that employees will want to be represented by a third party. Nevertheless, employers whose supervisors have not been adequately trained or who are blindsided by an organizing effort may find themselves in a position from which they do not have enough time to recover.

The past year was busy, largely with the Board and Big Labor moving toward these various changes. This year the results of those changes will be increasingly apparent as unions ramp up their efforts to attract new members. Healthcare employers who are unprepared will be most vulnerable.

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