3 Changes Healthcare Employers Should Watch For Under Biden's National Labor Relations Board

Insights
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A Biden presidency will surely bring changes to federal labor law under the National Labor Relations Act, the primary law that governs employee collective activity, labor-management relations, collective bargaining, and union elections. The NLRA is enforced by the National Labor Relations Board, a quasi-judicial body comprised of a General Counsel and a five-member board, each of whom are appointed by the president with the consent of the Senate.

The General Counsel is appointed to a four-year term, while Board members serve five-year terms, with one term expiring every year. Consequently, NLRB decisions typically reflect the ideology of the sitting presidential administration. For example, the Obama Board decisions were more union-friendly and worker-centered, while the Trump Board decisions have been more union-neutral and business-centered, often giving greater deference to employers and their business justifications for their workplace policies, decisions, and actions.

In light of this, healthcare employers should be aware of three key NLRB doctrines that are vulnerable to challenge by a Biden-appointed General Counsel and subject to reversal by a Biden-appointed Board: (1) Contract Coverage Doctrine; (2) the Joint Employer Rule; and (3) Union Access.

Contract Coverage Doctrine
Last year, the Board reversed its *clear and unmistakable* waiver standard and returned to its *contract coverage* standard in determining whether a union has waived its right to bargain over certain mandatory subjects of bargaining by the terms of its collective bargaining agreement via the Management's Rights provision of that agreement.

Under the former *clear and unmistakable* waiver standard, an employer would be liable for unilateral decisions made pursuant provisions in its collective bargaining agreement unless a provision of the agreement specifically referred to the type of employer decision in dispute. For example, a broad provision reserving to management the right to "make reasonable work rules" would not – alone – permit management to unilaterally institute a rule requiring mandatory drug testing or flu vaccination since that provision does not specifically speak to those types of rules.

In order to pass legal muster, the provision needed to specify that management has the right to make reasonably work rules regarding drug testing, flu vaccination, etc." As a result, employers were forced to discuss in bargaining and delineate in their CBAs every conceivable action that

management could take unilaterally (or every conceivable scenario requiring such action) under the CBA's language, a burdensome endeavor to undertake.

The *contract coverage* doctrine reestablished by the Trump Board grants greater flexibility and deference to employers in interpreting provisions of a collective bargaining agreement. Under this standard, the Board examines the plain language of the collective bargaining agreement to determine whether action taken by the employer was within scope of the CBA language at issue.

Healthcare employers should anticipate the chance that a Biden Board could return to the narrower, union-friendly *clear and unmistakable waiver* standard. This would be a significant blow to healthcare employers – especially in light of the COVID-19 pandemic response efforts and the need for managerial flexibility and the right to broadly interpret CBA language to meet safety and health, patient care, and community needs as they arise.

Joint Employer

Earlier this year, the NLRB issued its final rule on the standard for determining joint employer status under the NLRA, specifically whether a business is a joint employer of employees directly employed by another employer. In healthcare settings, this usually arises in the context of contractors who provide food services, revenue stream, environmental services, and even clinical services to healthcare institutions with use of the contractor's own employees.

Prior to the Board's final rule, joint employer status was determined pursuant to the former Board standard under *Browning-Ferris*. Under that standard, a company could be deemed a joint employer of a contractor's employees if the company exercised direct control, indirect control, or had the contractual right to exercise to control – even if never exercised – of the essential terms and conditions of employment for the contractor's employees. This standard exposed companies to significant labor law liability for the conduct and/or obligations of their contractors, with respect to their employees, under the NLRA.

The Board's final rule reversed *Browning-Ferris* and established that a company will not necessarily be deemed a joint employer of the contractor's employees where the company has no actual control over the essential terms and conditions of employment for those employees, merely has indirect influence over the contractor employer's employees, or only retains contractual rights with respect to the contractor's employees' essential terms and conditions of employment – even if never unexercised. For example, if a company requested, or had an unexercised contractual right to request, the removal of a contractor's employee for violating the company's policies (e.g. anti-harassment policies, HIPAA policies, etc.), that alone cannot be determinative on the question of whether the company is a joint employer of the contractor's employees. This is a significant advantage to employers who rely on the use of contractors to provide essential services to their organizations.

Union Access

The Board also recently reversed precedent concerning access to employers' public cafeterias by non-employee union organizers engaged in organizing activities. Under prior precedent, employers were required to permit non-employees to engage in promotional or organizational activity in public cafeterias or restaurants absent evidence of inaccessibility or activity-based discrimination. For example, if an employer permitted access to non-employee third parties engaged in non-work-related activity, that employer could not lawfully ban union-organizers access for the purposes of engaging in organizing activity.

However, in a 2019 decision, the Board reversed that precedent in a case involving a hospital where union organizers stationed themselves inside the hospital's public cafeteria and engaged in organizing activity. The Board held that "an employer does not have a duty to allow the use of its facility by nonemployees for promotional or organizational activity. The fact that a cafeteria located on the employer's private property is open to the public does not mean that an employer must allow any nonemployee access for any purpose."

Thus, no violation would be found if an employer prohibits non-employee union representatives from accessing its public cafeteria to engage in union organizing activity, absent disparate treatment – i.e. where by rule or practice, the employer prohibits access by non-employee union representatives seeking to engage in certain activity while permitting access by other non-employees engaged in similar activity under similar circumstances. But if this decision is overturned, healthcare employers can expect to see a resurgence of non-employee union organizing activity in their public restaurants and cafeterias.

Conclusion

In short, the years ahead are sure to bring about changes to the NLRB's policy agenda, priorities, and case law as a Biden-appointed General Counsel and Board members are established. Fisher Phillips will continue to monitor the developments and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips' Alert System to get the most up-to-date information.

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