

Union Organizing in the Healthcare Industry: Where Is the NLRB Going?

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Let there be no doubt — there has been a change in regime at the National Labor Relations Board (NLRB or the Board). The Obama-appointed NLRB, charged with the responsibility for interpreting and enforcing the National Labor Relations Act (the Act), already has made significant changes in law and procedure to favor unions and, if the Board has its way, there will be many more to come. In particular, the Board appears to be deciding cases and targeting issues in a manner designed to assist unions in mounting successful election campaigns. In cases involving healthcare enterprises, the NLRB is considering whether it will change decades-long precedent to permit the formation of so-called micro-bargaining units, and whether it will change the ground rules for determining who is, and is not, a supervisory employee. In addition, the Board is considering shortening the time between the filing of a certification petition and a union election, and has approved new and more favorable remedies for unions and their members in the event of employer misconduct. Whether considered collectively or individually, these decisions can be expected to have a significant impact on the organizing environment in the healthcare industry.

The NLRB's Plan of Action

Many predictions have been made regarding the current Board's possible course of action, and the expectation that it would pursue a union-friendly

agenda. The NLRB now has identified, at least in part, those issues impacting union organizing where significant change may be expected, including measures targeted specifically at the healthcare industry. First, the Board has requested *amicus* briefs (often requested when the Board may overturn long-standing precedent) in *Specialty Healthcare and Rehabilitation Center of Mobile*, regarding the issue of appropriate bargaining units in healthcare facilities.¹ Second, in a memorandum issued on April 12, 2011, the NLRB's Acting General Counsel (Acting GC) directed the NLRB's regional offices to submit to the Division of Advice the following cases, among others:²

- Cases in the healthcare industry involving whether charge nurses and rotating supervisors are classified properly as supervisory employees not entitled to union representation.
- Cases involving employers that prohibit employees from engaging in protected concerted activity by using social media, such as Facebook or Twitter, or discipline employees for such activity.
- Cases involving union organizing campaigns where the following remedies might be awarded:
 1. access to employer electronic communications systems,
 2. access to non-work areas,

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3. equal time to respond to captive audience speeches (in which employers present their views to employees during paid work time before a union election).

The identification of these issues signals a willingness on the part of the Board to make significant, union-friendly changes to the certification and election process.

— 1. Micro Bargaining Units?

Perhaps most significantly, the Board is contemplating a sweeping change to the standard for establishing bargaining units in non-acute healthcare facilities, such as nursing homes. Historically, the Board has employed case-specific adjudication to determine whether a proposed bargaining unit is appropriate in non-acute healthcare facilities.³ It now is considering establishing a presumption that units formed of all employees performing the same job are appropriate in non-acute healthcare facilities — and possibly in all industries.⁴

In *Specialty Healthcare*, the union proposed a unit at a nursing home composed solely of certified nursing assistants.⁵ The employer argued that the unit should include all nonprofessional service and maintenance employees.⁶ Rather than make a case-specific ruling, as has been its practice for over two decades, the Board issued a Notice and Invitation to File Briefs to the parties and interested *amici* on eight questions, including whether the Board should "hold that a unit of all employees performing the same job at a single facility is presumptively appropriate in non-acute health care facilities," and whether such a unit should "be presumptively appropriate as a general matter."⁷

Such a "same job, same facility" test would significantly alter the landscape of union-management relations, as demonstrated by the concerns quickly raised by members of Congress. On March 8, 2011, Senators Hatch, Enzi, and Isakson submitted a letter

brief to the Board, expressing disapproval regarding both the breadth of the change the Board is considering and the manner in which it is undertaking to make that change.⁸ The Senators argued that such change, especially if extended to all workplaces under the Board's jurisdiction, should be made by Congress.⁹ Further, the Senators suggested adjudication was not the appropriate way to resolve this question, stating that a request for briefing is not an adequate substitute for the deliberative, open rulemaking process.¹⁰

The Senators have reason for concern. Under the "same job, same facility" test proposed by the Board, unions could create small bargaining units targeted to those employees most amenable to joining a union, as long as they had the same job in the same facility.¹¹ Such micro-unions have the potential to create a workplace where a union of as few as two workers could effectively cripple operations, or where competing union demands could make effective negotiations difficult or impossible for the employer.¹²

— 2. Supervisory Status for Charge Nurses?

Also under consideration by the Board is whether charge nurses should be recognized as "supervisors" within the meaning of the Act. In 2006, the NLRB issued a landmark 3-2 decision setting new guidelines on who within the ranks of nursing staff is a "supervisor."¹³ Applying these revised guidelines, the Board found that full-time charge nurses (excluding emergency charge nurses) who used independent judgment, responsibly directed others, and were held accountable for their performance in directing other employees qualified as supervisors.¹⁴ Key to its decision was the training and skills of the nurses in question, and the acuity of the patients they cared for, which the Board found established the use of "independent judgment."¹⁵ This decision, considered a significant victory for management, now is at risk as the Acting GC reconsiders whether training and skills, and the acuity of patients—

without more—can demonstrate "independent judgment."¹⁶

— 3. Requirement to Post Rights?

Also of concern to employers is a proposed Board rule that would require employers subject to the Act to post a notice informing employees of their rights under the Act.¹⁷ The proposed rule would require employers to post a notice in a conspicuous place, where notices customarily are posted.¹⁸ If employers regularly communicate with their employees electronically, they also must provide copies of the notice electronically, including a copy in any language spoken by a significant portion of the workforce.¹⁹

If employers fail to comply with the notice requirement, the proposed rule provides for significant sanctions, including: (1) finding the failure to post the required notice to be an unfair labor practice; (2) tolling the statute of limitations for filing unfair labor practice charges until the time that the employee acquires actual or constructive notice that the employer's conduct may be unlawful; and (3) considering the knowing failure to post the notices as evidence of unlawful motive in an unfair labor practice case.²⁰ Notably, NLRB member Hayes dissented from the petition for rulemaking, noting the potential impact of the proposed sanctions and arguing that the Board did not have the authority to promulgate the type of rule contemplated.²¹

— 4. "Snap" Elections?

Currently, the median time for union elections is 38 days after a union files its representation petition.²² Board Chair Liebman, however, believes the election process is too long and favors management. Therefore, the NLRB also is considering rulemaking in this area to shorten the period.²³ Commentators anticipate that the Board will reduce the timeframe to just 14 to 21 days.²⁴

Many employers may not even be aware of a union campaign until a representation petition is filed, or at least imminent. From the employer's perspective, shortening the time between the filing of a certification petition and the election would significantly reduce its ability to communicate its position regarding the union to its employees in advance of an election.

— 5. Union Access to Employer Premises?

The Board also is poised to allow union access to employer premises during union campaigns in the event of employer misconduct. This may include access to electronic communications systems and equal time in response to captive audience speeches.²⁵ These potential remedies for an employer's unlawful conduct are in addition to those earlier identified by the Acting GC, which included requiring management to read the Board's remedial notice to assembled employees, requiring the employer to permit access to its bulletin boards to better facilitate employee/union communication, and requiring the employer to provide the union with an updated list of employee names and addresses.²⁶ If the NLRB not only allows unions to have equal time to respond to an employer's captive audience speeches as an "extraordinary remedy" for the employer's unfair labor practice(s), but also accepts the invitation of unions and others to place additional limits on employers' "captive audience" presentations, the advantage to the union is clear.²⁷

— 6. Already Here: Scrutiny of Employer Policies

The NLRB already is giving close scrutiny to employer handbooks and policies, and taking action when it does not like what it sees. In *Jurys Boston Hotel*, a 2-1 majority of the Board ruled that a decertification election would be set aside due to certain provisions in the employer's handbook.²⁸ The rules held to be unlawful included a rule prohibiting employee solicitation and distribution on hotel property, another that prohibited employees from being in

unauthorized areas or loitering on hotel premises, and one that restricted employees from wearing unauthorized "emblems, badges, or buttons with messages of any kind" on their uniforms.²⁹

Notably, the Board acknowledged that the hotel did not enforce the rules during the election period, and the union presented no evidence that any employee had been intimidated by or had refrained from organizing activity because of the rules. In fact, the union had never objected to the rules prior to the time the decertification petition was filed, and the employer advised employees during the campaign that the rules were not meant to preclude union activity.³⁰ Nonetheless, the Board found that the rules had a close "relationship to election-related activity" and therefore had a "reasonable tendency to chill or otherwise interfere with the pronoun campaign," and invalidated the election (which the employer had won).³¹

In addition to solicitation and distribution policies and the like, the Acting GC has indicated a particular interest in reviewing employers' social media policies. Several cases recently have been filed or threatened by the NLRB concerning the employers' response after an employee posted critical comments regarding company matters on Facebook or Twitter.³² The Board also is poised to review its 2007 decision in *Register Guard*,³³ in which it held that an employer "may lawfully bar employees' nonwork use of its e-mail system, unless [the employer] acts in a manner that discriminates against [activities protected under the Act]."³⁴ Ultimately, unions may have more opportunities to share an employer's electronic "space," and may dominate in the social media world,

— 7. Already Here: New Financial Remedies

Already approved are sweeping changes to the financial remedies available to employees who claim discrimination due to their union activities. First, interest on back pay and other monetary awards now is to be compounded daily, in contrast to past

awards of simple interest.³⁵ In addition, employees found to have been wrongfully discharged now are entitled to the following:

- reimbursement of any expenses incurred when searching for work;
- work-related expenses that would not have been incurred had the employee continued to work for the respondent employer, such as increased transportation costs; and
- compensation for any increased tax obligation resulting from a lump sum payment of back pay.³⁶

Further, compensatory damages no longer are limited to the amount of gross back pay to which an employee is entitled, and no longer will be offset against any interim earnings of the employee.³⁷

Finally, the Acting GC has requested the NLRB to overturn two recent decisions dealing with an employee's mitigation of damages.³⁸ In the first, the Board had established a rule requiring discharged employees to make "reasonable efforts to secure interim work" to be entitled to full back pay, generally beginning within the two-week period immediately following the discharge.³⁹ In the second, the Board had determined that, once the employer produced evidence that suitable jobs were available in the relevant geographical area, the burden of proof properly would shift to the General Counsel to produce evidence regarding the reasonableness of the employee's job search.⁴⁰ In each case, reversing the decision will make it much more likely that the employee will be entitled to full back pay.

Why It Matters Now

Pragmatically, the NLRB's focus on these matters will have the effect of inviting unions to file unfair labor practice charges and to seek extraordinary remedies for an employer's violations of the Act. It also necessarily will impact the litigation strategy of both unions and employers. Although an employer

may not always be held retroactively liable in the event of a change in the law,⁴¹ the risk of liability, or of additional litigation to avoid enforcement, always remains. Either way, employers must be prepared to incur the expense and inconvenience of defending charges before the Board, or be prepared to settle the claims.

While many of the issues identified above are not unique to the healthcare industry, the fact that employment in the healthcare industry has remained strong even in a weak economy makes healthcare a prime, continuing target for union organizing activities. Healthcare institutions, therefore, may well bear the brunt of being a party in the test cases considered by the NLRB.

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1 356 N.L.R.B. 56 (2010) (notice and invitation to file briefs) (hereinafter "*Specialty Healthcare*"). In the NLRB's invitation to file *amicus* briefs, it indicated it might extend any decision reached in the case to other industries. *See id.*

2 *See* N.L.R.B. Office of General Counsel, Memorandum, 11-11 (April 12, 2011), <http://myNlrb.nlr.gov/link/document.aspx/09031d458047021e> (hereinafter "11-11 GC Memo").

3 *See, e.g., Park Manor Care Center*, 305 N.L.R.B. 872 (1991). In acute healthcare facilities, the Board re-

cognizes eight specific units as appropriate bargaining units. *American Hosp. Ass'n v. N.L.R.B.*, 499 U.S. 606 (1991) (approving rule adopted by the Board).

4 *Specialty Healthcare*, 356 N.L.R.B. 56.

5 *Id.*

6 *Id.*

7 *Id.*

8 *Specialty Healthcare*, Letter to Mr. Lester A. Heltzer from Michael B. Enzi, Orrin Hatch, and Johnny Isakson (Mar. 8, 2011), <http://myNlrb.nlr.gov/link/document.aspx/09031d458045ac96>.

9 *Id.*

10 *Id.* The Senators noted that, since 2010, the Board has invited briefing in at least six other cases in which the Board contemplated significant policy changes. They expressed their concern that the Board "may be forcing policy through adjudication that should be properly considered through rulemaking." The Senators warned that "[t]his emerging trend at the Board and its outcome may well warrant future Congressional oversight and limitations."

11 *Id.*

12 *Id.*

13 *See Oakwood Healthcare Inc.*, 348 N.L.R.B. 686 (2006).

14 Nurses who rotated into the charge nurse position were held not to be supervisors because they did not spend a "regular and substantial" portion of their work time performing supervisory duties. *Id.* at 694.

15 Noting a distinction between healthcare and other industries, the Board noted that the assignment of a nurse with particular skills may have life or death consequences for a particular patient. Accordingly, the charge nurses were determined to exercise sufficient independent judgment in their assignment of nursing staff to patients. *Id.* at 698.

16 *See* 11-11 GC Memo, *supra* note 2.

17 Rules Governing Notification of Employee Rights; Obligations of Employers, 75 Fed. Reg. 245 (proposed Dec. 22, 2010) (to be codified at 29 C.F.R. pt. 104).

18 *Id.*

19 *Id.* The Board did not define or provide guidance regarding the term "significant."

20 *Id.*

21 *Id.*

22 Remarks of Chairman Liebman before the Subcommittee on Labor, Health and Human Services, Education and Related Agencies, House Committee on Appropriations (hearing held April 6, 2011), *see* Seth Borden,

No Joke: NLRB Chairman Giving "Active Consideration" to Rulemaking for Quicker Elections, Labor Relations Today (April 11, 2011),

<http://www.laborrelationstoday.com/2011/04/articles/nlr-administration/no-joke-nlr-chairman-giving-active-consideration-to-rulemaking-for-quicker-elections/>.

23 *Id.*

24 *See, e.g., NLRB: Employee Free Choice Act Ace in the Hole?*, Labor Relations Inst., Inc. (July 9, 2009), <http://lrionline.com/nlr-employee-free-choice-act>.

25 11-11 GC Memo, *supra* note 2.

26 N.L.R.B. Office of General Counsel, Memorandum, 11-01 (Dec. 20, 2010), <http://mynlrb.nlr.gov/link/document.aspx/09031d458042ba39>.

27 *See, e.g.,* Paul M. Secunda, *The Future of NLRB Doctrine on Captive Audience Speeches* (Nov. 10, 2010), Ind. L.J., Vol. 87, No. 1, 2012; Marquette Law School Legal Studies Paper No. 10-37. For a discussion of the impact of employer captive audience communications upon employees, *see Livingston Shirt Corp.*, 107 N.L.R.B. 400, 409 (1953).

28 *Jurys Boston Hotel*, 356 N.L.R.B. 114 (2011).

29 *Id.*

30 *Id.*

31 *Id.*

32 *See American Med. Response of Conn., Inc.*, No. 34-CA-12576 (complaint) (Oct. 27, 2010); *News Release: Settlement Reached in case involving discharge for Facebook Comments*, N.L.R.B. Office of the General Counsel (Feb. 7, 2011),

<http://mynlrb.nlr.gov/link/document.aspx/09031d4580445872> (describing a complaint alleging employer violated the Act by disciplining a worker who posted criticisms of her supervisor on her Facebook page; settled by agreement); *Regional News: Build.com settles charge of unlawful discharge for comments posted on Facebook with NLRB agreement in San Francisco*, N.L.R.B. Office of Public Affairs (Apr. 27, 2011), <http://nlrb.gov/news/regional-news-buildcom-settles-charge-unlawful-discharge-comments-posted-facebook-nlr-agreemen> (same, involving non-unionized workplace); Stephen Greenhouse, *Labor Panel to Press Reuters Over Reaction to Twitter Post*, N.Y. Times, April 7, 2011, at B3, available at <http://www.nytimes.com/2011/04/07/business/media/07twitter.html> (involving employer's alleged intimidation of employee in response to Twitter post).

33 *See* 11-11 GC Memo, *supra* note 2.

34 *Register Guard*, 351 N.L.R.B. 1110, 1116 (2007), *enf. denied in part*, 571 F.3d 53 (D.C. Cir. 2009).

35 *Jackson Hosp. Corp.*, 356 N.L.R.B. 8 (2010).

36 N.L.R.B. Office of General Counsel, Memorandum, 11-08 (Mar. 11, 2011), <http://mynlrb.nlr.gov/link/document.aspx/09031d458045cc81> (hereinafter "11-08 GC Memo"). Employers are required to compensate the employee for the tax payment and to complete the necessary paperwork to notify the Social Security Administration to allocate the back pay to the appropriate periods. *Id.*

37 *Id.*; *cf. English Mica Co.*, 101 N.L.R.B. 1061, (1952).

38 N.L.R.B. Office of General Counsel, Memorandum, 11-07 (Mar. 11, 2011), <http://mynlrb.nlr.gov/link/document.aspx/09031d458045d136>.

39 *Grosvenor Resort*, 350 N.L.R.B. 1197, 1198-99 (2007).

40 *St. George Warehouse*, 351 N.L.R.B. 961, 964 (2007).

41 *See, e.g., Epilepsy Found. of Northeast Ohio v. N.L.R.B.*, 268 F.3d 1095, 1102-03 (D.C. Cir. 2001) (affirming NLRB decision, but denying retroactive enforcement against employer).