Bloomberg BNA

BNA's
Health Law Reporter™

Health Care Institutions and Recent NLRB Activity: Preventative Action Is the Best Medicine

BY STANLEY J. BROWN AND MICHAEL E. DELARCO

In the past year-and-a-half, the National Labor Relations Board (the ''NLRB'' or ''board'') has engaged in arguably its most controversial activity since it was created by the National Labor Relations Act (the ''NLRA'' or ''Act'') in 1935. Many of these union-friendly changes either target or have a substantial impact on health care employers. As such, it is imperative that health care institutions begin taking preventive action now to avoid potential problems created by recent and future NLRB activity.

Stanley J. Brown and Michael E. DeLarco are partners in the New York, N.Y., law offices of Hogan Lovells. Brown represents management clients in collective bargaining negotiations, arbitrations, unfair labor practice, and representation cases before the National Labor Relations Board; single plaintiff and class action equal employment litigation before the courts and administrative agencies; and in wrongful discharge, whistleblower, Fair Labor Standards Act, and Employee Retirement Income Security Act litigation. DeLarco has extensive experience in labor and employment litigation representing management, large and small employers, and government agencies. His practice encompasses all areas of labor and employment disputes, including the defense of age, race, sex, disability, breach of contract, whistleblower, and wage and hour claims.

This article will explore and offer advice on the following areas of recent change:

1. *Specialty Healthcare and Rehabilitation Center*, 357 NLRB No. 83 (Aug. 26, 2011) and how health care employers can act to protect themselves against the proliferation of micro-bargaining units;
2. The status of the ''quickie elections'' rule, and steps health care employers should take to prepare for either a repromulgated quickie elections rule or a court finding the rule valid;
3. The status of the notice-posting rule;
4. The acting general counsel's recent pronouncements on social media, and how health care employers can protect themselves against disruptive employee social media activity;
5. The board's recent ruling requiring a hospital to bargain with a union prior to implementing a disease-prevention policy;
6. The board's recent ruling making it unlawful to ban certain union insignia in patient care areas; and
7. The board's recent arbitration decision in D.R. Horton Inc., 357 NLRB No. 184 (Jan. 3, 2012) and that decision's continued viability.

Before getting into the specifics of these areas, it bears warning that much of labor law is in flux due to the current makeup of the board. The recent recusal and resignation of Terence F. Flynn (a conservative appointee) has reduced the current board to four active members (three liberal appointees and one conservative appointee). Moreover, two board members are recess appointees whom the Senate never confirmed. Whether they are proper recess appointments is the subject of litigation.[1] If they are found to have been improper, then the board will not have the minimum three members required to act,[2] and will be unable to adjudicate cases or promulgate rules until at least one addi-

[1] *Noel Canning v. NLRB*, Case No. 12-1115 (D.C. Cir.).

[2] The board needs a quorum of three members to act. 29 U.S.C. § 153; *New Process Steel, LP v. NLRB*, 130 S. Ct. 2635, 2640 (2010) (''[T]he Board quorum requirement . . . requires

 ISSN 1064-2137

tional member is successfully appointed. It could also undermine board action that was taken while only two valid members were part of the board.

It is also important to note that the health care industry has become a primary target of unions. Health care is a huge industry with many stressful and lower-wage jobs, factors that make employees more likely to be open to unionization. Unions, and in particular the Service Employees International Union (SEIU), have accordingly engaged in aggressive organizing activity and ''corporate campaigns.'' These corporate campaigns feature, among other actions: (1) filing of lawsuits and agency charges against employers; (2) conducting demonstrations against employers, their executives (at their homes), their customers, and their suppliers; (3) enlisting the help of media, legislators, government agencies, academics, and special interest groups; and (4) attempting to portray the employer as a bad corporate citizen.

1. Specialty Healthcare: Avoiding Micro-Bargaining at Your Workplace

In the NLRB's recent decision in *Specialty Healthcare*, 357 NLRB No. 83 (Aug. 26, 2011), the board (1) created a heightened standard for employers who seek to challenge a bargaining unit on the basis that it was cherry-picked out of a larger, more appropriate unit; and, in the same decision, (2) overruled a 20-year-old case that had set forth clear categories of appropriate bargaining units for nonacute care facilities.

Specialty Healthcare creates a two-step process for determining whether a bargaining unit is appropriate. First, when a union attempts to organize a group of employees, the burden is initially on the union to show that the employees it seeks to organize share a ''community of interest,'' irrespective of whether they are part of a larger unit.[3] Second, if the employer seeks to challenge such a unit on the basis that it is underinclusive, it can do so only by showing that there is an ''overwhelming community of interest'' between the union's proposed unit and the excluded employees. To meet this standard, the factors in the community of interest test must ''overlap almost completely,'' such that there is ''no legitimate basis upon which to exclude certain employees from'' the unit. For example, it is inappropriate to organize only some employees out of a group with identical job responsibilities. The board also suggested it *might* be inappropriate to organize only night-shift employees but not day-shift employees with otherwise-identical job responsibilities.

Significantly, *Specialty Healthcare* does *not* apply to employers that constitute ''acute care hospitals,'' a term defined in 29 C.F.R. § 103.30(f).[4] Rather, appropriate bargaining units at acute care hospitals are defined in 29 C.F.R. § 103.30(a).[5] The board made clear in *Specialty Healthcare*, however, that the § 103.30(a) categories do not apply to health care employers that are not acute care hospitals. Thus, the board overruled the 20-year-old decision of *Park Manor Care Ctr.*, 305 NLRB 871 (1991), which had previously allowed those employers to take advantage of § 103.30.

Thus, health care employers that do not constitute ''acute care hospitals'' are likely to face efforts by unions to organize small groups of employees. This can be particularly troublesome, because health care employers often have many classes of employees. As such, these employers should take steps to structure their workforces to prevent micro-organizing activity, such as:

1. Clearly define employee groups pursuant to the ''community of interest'' factors.
2. Consider replacing ''night shift'' versus ''day shift'' employees, or ''first floor'' versus ''second floor'' employees, with interchange and rotating shifts.
3. Accumulate substantial documentary evidence on the differences and similarities between employee groups.
4. Train supervisors regarding the differences and similarities between employee groups.
5. Establish policies, pay structures, benefits, and supervisory chains that are consistent among employees within the same groups.
6. Carefully monitor employee sentiment and establish clear lines of communication between employees and management.

2. Quickie Elections: Advance Preparation Is Key

In December 2011, two board members voted to make a number of changes to the representation elec-

---

three participating members 'at all times' for the Board to act.'').

[3] This involves a consideration of, among other factors: ''whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the [e]mployer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.'' *United Operations, Inc.*, 338 NLRB 123, 123 (2002).

[4] An ''acute care hospital'' is ''either a short term care hospital in which the average length of patient stay is less than thirty days, or a short term care hospital in which over 50% of all patients are admitted to units where the average length of patient stay is less than thirty days. Average length of stay shall be determined by reference to the most recent twelve month period preceding receipt of a representation petition for which data is readily available. The term 'acute care hospital' shall include those hospitals operating as acute care facilities even if those hospitals provide such services as, for example, long term care, outpatient care, psychiatric care, or rehabilitative care, but shall exclude facilities that are primarily nursing homes, primarily psychiatric hospitals, or primarily rehabilitation hospitals. Where, after issuance of a subpoena, an employer does not produce records sufficient for the Board to determine the facts, the Board may presume the employer is an acute care hospital.'' 29 C.F.R. § 103.30(f).

[5] The eight appropriate bargaining units are:

(1) All registered nurses.

(2) All physicians.

(3) All professionals except for registered nurses and physicians.

(4) All technical employees.

(5) All skilled maintenance employees.

(6) All business office clerical employees.

(7) All guards.

(8) All nonprofessional employees except for technical employees, skilled maintenance employees, business office clerical employees, and guards, provided that a unit of five or fewer employees shall constitute an extraordinary circumstance.

29 C.F.R. § 103.30(a).

  HLR ISSN 1064-2137

tion process in what has come to be known as the ''quickie'' or ''ambush'' elections rule. This rule would, among other changes, reduce the matters that could be disputed at a pre-election hearing, narrow the ability of parties to appeal regional director decisions to the board, and shorten the amount of time between the regional director's decision to hold an election and voting. This rule was predicted to reduce the average time between the filing of an election petition and voting from 38 days to 25 days.

On May 14, the U.S. District Court for the District of Columbia in *Chamber of Commerce of the United States of Am. v. NLRB*, No. 1:11-cv-02262 (D.D.C., 5/14/12) held that the quickie elections rule was invalid because ''no quorum ever existed for the pivotal vote in question.'' Specifically, the court concluded that because one of the board's three members, Brian Hayes, never actually participated in the online vote on whether to promulgate the rule, there was no quorum for the vote, and the vote was thus invalid.

Although for the time being these so-called ''quickie'' or ''ambush'' election rules have been overturned, this battle is far from over. The board has appealed to the D.C. Circuit the court's decision overturning the election rules, and has also indicated that it plans to adopt new election rules that it hopes will pass legal muster. And indeed, those rules could require even quicker elections than the rules that the court threw out. In fact, the December 2011 rules the board adopted were actually a less-ambitious version of election rules it had attempted to pass during the summer of 2011. Further, even within the current rules, the board will attempt to schedule elections as quickly as possible. What that means for health care employers is that once a union has petitioned for a representation election, the employer will have very little time to react and put together a campaign so that its employees will understand the downsides of unionization before they vote.

Health care employers should consider creating a ''campaign-in-a-box'' in advance of any union organizing efforts. This should include defining potential vulnerabilities and planning a response to address these vulnerabilities.

In addition, health care employers should consider taking the following actions to make the workplace less conducive to organizing efforts, which will assist in preparing for elections:

1. Improve employee-relations programs to ensure that employees have a clear line of communication to management, including creating or updating grievance systems.
2. Update employee handbooks and policies to ensure fair treatment and eliminate unneeded controversial policies, while restricting employees from taking disruptive actions.
3. Proactively monitor employee satisfaction and train supervisors to do the same.
4. Ensure fair treatment of employees by supervisors.

3. Notice-Posting Rule: Don't Hang Those Posters Yet

The quickie elections rule is not the only rule that the board promulgated in 2011. The other rule is the notice-posting rule, which required all private sector employers—even those that are not unionized—to post a document notifying employees of their NLRA rights. 76 Fed. Reg. 54,006 (Aug. 30, 2011). After two federal district courts reached conflicting decisions about the validity of the rule, however, the U.S. Court of Appeals for the D.C. Circuit granted an emergency motion for injunction pending appeal. *National Association of Manufacturers v. NLRB*, Case No. 12-5068 (D.C. Cir.). The D.C. Circuit also ordered an expedited briefing schedule for appeal and set oral argument for September 2012. Then, on April 26, 2012, the NLRB issued a rule delaying the effective date of the notice-posting rule indefinitely. Health care employers should pay careful attention to this litigation to determine whether they will have an obligation to post. Moreover, regardless of the outcome of the litigation, health care employers should recognize that the notice-posting rule is merely one example of the board's extensive efforts to make unions a more prominent fixture in the workplace today.

4. Social Media: Reacting to and Preventing Disruptive Online Activity

Recent NLRB activity suggests that Facebook and other social networking websites may be the new ''water cooler.'' The NLRB's acting general counsel (the ''acting GC'') recently issued three reports (see first report, second report, and third report) regarding employee use of social networking websites, in which he stated that employees who post negative information about their employers on Facebook are often engaged in activity protected by the NLRA. These reports raise two issues: first, the ability of employers to terminate or discipline employees who engage in inappropriate social media activity; and second, the ability of employers to promulgate social media policies. These issues are particularly significant for health care employers, who often employ a large number of employees, and thus face the potential of extensive social media use by employees.

A. Don't Fire Until You Investigate!

Regarding termination or discipline, the basic rule is that it is an unfair labor practice for employers to terminate or discipline employees for engaging in protected and concerted activity. Activity is concerted if an employee acts ''with or on the authority of other employees, and not solely by and on behalf of the employee himself.'' *Meyers Indus.*, 268 NLRB 493, 497 (1984). Activity is protected if it is ''for the purpose of collective bargaining or other mutual aid or protection,'' meaning it is an effort by employees ''to improve their terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship.'' *Eastex Inc. v. NLRB*, 437 U.S. 556, 563, 565 (1978).

The acting GC has taken a broad view of protected and concerted social media activity. Thus, health care employers should carefully consider whether a post is protected and concerted prior to making a decision to discipline or terminate. Consider the following:

1. If employees discuss an employee's social media post, or if an employee makes a social media post about topics that employees have been discussing,

the post is more likely to constitute concerted activity.

2. If other employees ''like'' the post or respond to it via social media, it is more likely to constitute concerted activity.

3. If the post seeks the support or input of other co-workers, it is more likely to constitute concerted activity.

4. If the employee is not Facebook friends with co-workers, the employee's posts are less likely to be concerted activity.

5. If the post relates to wages, benefits, work hours, discipline, or similar topics, it is likely to be protected activity.

6. If the post relates to treatment by supervisors or even fellow co-workers, it is likely to be protected activity.

7. If the post is merely about treatment of patients, without connection to terms and conditions of employment, it is less likely to be protected activity.

Significantly, the NLRB has recently created a website to ensure that employees are aware of the board's recent pronouncements on protected and concerted activity. The website features cases (including social media cases) in which employees have prevailed against employers in litigation before the NLRB after engaging in protected and concerted activity.

B. Create a Social Media Policy—but Only After Careful Consideration

Health care employers should consider preventing inappropriate social media use by establishing or updating social media policies. However, the acting GC has stated that such policies are unlawful in certain circumstances. First, social media policies are unlawful if they (a) explicitly restrict protected activity, (b) are promulgated in response to union activity, or (c) are applied to restrict the exercise of protected activity. Second, social media policies are unlawful if ''employees would reasonably construe the language to prohibit protected activity.''

Unfortunately, the only thing clear about the ''reasonably construe'' standard is that it is a broad standard that is not favorable to employers. The acting GC has set forth several guidelines that employers should keep in mind in crafting social media policies:

1. Most importantly, policies should provide examples and limiting language to clarify any ambiguity. For example, it is generally unlawful to prohibit ''statements which are slanderous or detrimental to the company,'' but not unlawful when such a statement appears on a list of prohibited conduct that includes terms such as ''sexual or racial harassment'' or ''sabotage.''

2. Employers may not flatly prohibit employees from speaking to the public or the media (or require advance authorization before doing so). However, employers may so prohibit or require approval, however, if employees are attempting to speak on the employer's behalf, or if their speaking could be construed as speaking on the employer's behalf.

3. Employers may not prohibit employees from using the employer's logo in social media posts. However, employers may, however, prohibit misleading use of the logo.

4. Although employers should include a ''savings clause'' stating that the policy will not be construed to prohibit employees from engaging in Section 7 activity, employers should not rely on such a clause, as the acting GC has yet to identify a case in which a savings clause saved an otherwise unlawful policy.

5. Because concerted activity protection under the NLRA does not apply to managers or supervisors, social media policies for these individuals do not need to satisfy the above requirements for social media policies. *However*, employers should be aware that supervisors' social media activities can constitute unfair labor practices. *See, e.g.*, *Miklin Enters. Inc.*, 18-CA-19707 (NLRB Div. of Judges, May 20, 2012) (finding unlawful an assistant manager's attempt to use social media to encourage employees to harass a pro-union employee).

In addition to following the above advice, employers should consult the acting GC's third social media report, which includes a sample social media policy that the acting GC has stated is lawful.

Importantly, the state of the law in this area is in flux, and the board has not yet issued a decision on a social media case. Thus, employers should keep a close eye on developments in this area.

5. Consider Negotiating for Unilateral Right to Implement Disease-Prevention Policies

In *Virginia Mason Hosp.*, 357 NLRB No. 53 (2011), the NLRB held that an acute care hospital was required to bargain with its employees' union before adopting a flu-prevention policy at work. Specifically, the hospital unilaterally implemented a flu-prevention policy that required nurses who were not immunized from the flu to wear face masks, or to take antiviral medication. The hospital contended that it had no duty to bargain because, among other reasons, the policy went to the hospital's ''core purpose,'' and therefore, pursuant to the case of *Peerless Publ'ns*, 283 NLRB 334 (1987), was exempt from mandatory bargaining.

The board rejected the hospital's argument, suggesting that *Peerless* applied only to the newspaper industry, and stating that the NLRA ''does not establish a narrower duty to bargain for health care employers.'' The board left open, however, the possibility that the hospital need not bargain (1) under the balancing test set forth by the U.S. Supreme Court in *Virginia Mason Hosp.*, 452 U.S. 666 (1981); (2) due to the fact that federal and state law required the hospital to implement policies to control the flu; or (3) because the union waived bargaining rights when it agreed to management-rights and zipper clauses in the Collective Bargaining Agreement (CBA).

The lesson here is that unionized health care employers should consider, among other things, negotiating in a CBA the right to impose unilateral changes for disease-prevention purposes. Moreover, if making unilateral changes, employers should tie the need for the change, if possible, to federal, state, or local law requirements.

  HLR ISSN 1064-2137

6. Union Insignia: If You Want to Ban Buttons, Ban Them All

In *St. John's Health Center* , 357 NLRB No. 170 (Dec. 30, 2011), the board set forth a rule for whether a health care employer could ban union insignia in patient care areas. The board explained that although employees generally have a right to wear union insignia at work in the absence of special circumstances, *health care* employers have a presumptive right to ban such insignia in patient care areas. If there is a *selective* ban on union insignia, however, the burden is on the hospital to show that the selective ban is ''necessary to avoid disruption of health-care operations or disturbance of patients.'' In the *St. John's Health Ctr.* case, the board determined that a hospital's decision to allow employees to wear one ribbon that read ''Saint John's mission is safe patient care'' prohibited the hospital from banning a union ribbon that read ''Saint John's RNs for Safe Patient Care.''

This raises several important practical points for health care employers:

1. Health care employers generally may ban insignia *only* in patient care areas.
2. If concerned about disruptive union insignia in patient care areas, the safest choice is not to allow the wearing of *any* insignia in those areas.
3. If allowing certain insignia, avoid using wording that can be modified slightly to be critical of the health care employer.
4. Always be able to articulate the purpose of any ban (*i.e.* why it is disruptive).

7. D.R. Horton: See You (All) in Court?

Many health care employers require employees to sign arbitration clauses that waive the right to bring class or collective actions against the employer. However, in January 2012, the NLRB declared in *D.R. Horton Inc.*, 357 NLRB No. 184 (Jan. 3, 2012), that employers cannot require employees, as a condition of employment, to sign an arbitration clause that waives the right to bring class or collective actions against the employer regarding the terms and conditions of employment.

Although health care employers should not simply ignore *D.R. Horton*, it is important to note that numerous courts have rejected or distinguished it, and many experts predict that the Fifth Circuit will reverse the decision on appeal. Health care employers seeking to comply with the decision, however, should note the following qualifications that the board gave the decision:

1. Although individual employees may be unable to waive their right to bring class or collective actions, a properly certified or recognized union can do so.
2. The *D.R. Horton* decision applies only to employees covered by Section 7, meaning that, for example, it does not apply to managers or supervisors.
3. Arbitration clauses providing for class or collective actions in arbitral *or* judicial forums would be permissible.

Conclusion

The NLRB does not appear to be slowing down in its efforts to shift the labor law landscape in favor of unions. The current board will likely attempt to reverse several employer-friendly decisions of the Bush board and will continue to find unfair labor practices related to conduct once thought to be lawful. At the same time, unions are ramping up their organizing efforts and engaging in sophisticated corporate campaigns that are designed to place enormous financial and reputational pressure on employers whose workforces the unions seek to organize. Hospitals, nursing homes, long-term care facilities, and other health care institutions are particular targets for the union movement, and so it is essential that such facilities be proactive and sophisticated in addressing labor relations issues.