

Union Wars: SEIU vs. UHW and NUHW

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Over the past year, employers in California's health care industry have witnessed a relatively quiet intra-union dispute explode into an all-out battle for the hearts and minds of thousands of represented employees in California's hospitals and nursing facilities. There is no sign that the battle will end soon.

The ousted leaders of a large California SEIU local, the United Healthcare Workers-West (UHW), have regrouped to form a new union, the National Union of Healthcare Workers (NUHW). NUHW is now attempting to supplant SEIU as the collective bargaining representative in as many UHW-represented facilities as possible. As these two opponents pursue legal recourse against one another, employers are increasingly caught in the middle of an otherwise internal union dispute that has become increasingly public and difficult.

To help employers understand the nature of this dispute and to assist them moving forward, this Insight provides both an historical backdrop and an analysis as to many of the relevant legal considerations.

Historical Background on SEIU and SEIU-UHW

The Service Employees International Union (SEIU) is a nearly two-million-member union formed in the 1920's to represent building service employees, such as janitors. Over the years, SEIU grew to encompass workers in many fields, including both long term health care workers and acute health care workers in California and throughout the country.

In 2005, under the leadership of SEIU president Andy Stern, SEIU withdrew from its 50-year association with the AFL-CIO, creating a new coalition called "Change to Win." The new organization's mission was to reverse decades of declining union membership in the United States. SEIU sought to accomplish this goal by pouring substantial resources into organizing new members.

That same year, two large SEIU locals in California—Local 250 in Northern California and Local 399 in Southern California—merged to create a new, statewide local with 150,000 members, headed up by President Sal Rosselli. This new statewide local represented 65,000 long term health care workers and thousands more in acute care hospital settings. As president of this new SEIU local, Rosselli had a seat on SEIU's executive committee, holding the title of Vice President of SEIU International.

SEIU and Rosselli Part Ways – UHW Placed in Trusteeship

One component of SEIU's plan to expand the ranks of organized labor has been an effort to create industry-specific "super locals." These industry-specific locals purportedly have more leverage during collective bargaining, thus enabling the local union to better focus limited resources on organizing workers in a single industry.

Problems arose when SEIU decided that long term health care workers had different interests than acute health care workers and should therefore be placed into separate locals. For UHW and President Rosselli, this meant that 65,000 long term health care employees would no longer be dues-paying members of that local union. Needless to say, this approach proved unacceptable to UHW leadership.

In early 2008, this internal SEIU dispute became public. Rosselli abruptly resigned his leadership position with SEIU International, while retaining his title as President of UHW. Positioning himself as the champion of existing UHW members in opposition to SEIU's alleged focus on prospective future members, Rosselli explained his resignation as follows:

Over the past two years, a stark difference has evolved between SEIU's projected image and its real world practices. An overly zealous focus on growth—growth at any cost, apparently—has eclipsed SEIU's commitment to its members.¹

Rosselli's resignation proved to be a shot across the bow. Soon thereafter, SEIU accused UHW leadership of diverting millions of dollars in membership dues to a war chest set up to battle SEIU's attempt to carve out the 65,000 long term health care workers from UHW. SEIU alleged that this constituted serious breaches of its constitution.

In September 2008, SEIU scheduled a hearing to decide whether UHW's alleged breaches of the SEIU Constitution were sufficient to justify placing UHW in trusteeship. After hearing the evidence, the hearing officer issued his decision in January 2009, finding that UHW had engaged in serious financial wrongdoings. That provided a basis under which the local could be placed in trusteeship.

After UHW and SEIU failed to reach agreement on implementing the hearing officer's recommendations, SEIU officially placed the local in trusteeship on February 1, 2009. As a result, Rosselli and other top UHW officers were immediately removed from their positions in UHW, and other UHW officials were placed on administrative leave. Two co-trustees were appointed by SEIU to take over the leadership of UHW.

What is the Trusteeship?

As set forth in Article VIII, Section 7(b) of the SEIU Constitution, a trustee is "authorized and empowered to take full charge of the affairs of the local union." This section also provides that a trustee shall have the power to remove and replace any of the local union's employees and agents and can even replace the trustees of employee benefit funds. The trustees appointed by SEIU have already exercised this power, as indicated in a memorandum sent to employers of UHW-represented employees. They stated that all former UHW representatives had been placed on leave status and that their replacements would be named shortly. Although the paid leave status seemingly left the door open for some of the former representatives to remain with UHW, it is unclear whether any of them will actually do so.

Along with the sweeping powers of the trustees comes significant responsibility to safeguard UHW's finances. The SEIU Constitution provides that the trustees "shall take possession of all of the funds, books, papers and other property of the local union." It also states that the trustees shall pay all of the local union's outstanding claims if funds are adequate. Finally, the trustees are charged with returning all funds, books, papers and other property to the local union after self-government is restored. At present, however, the duration of the trusteeship remains an open question.

Rosselli Strikes Back – The Rapid Rise of NUHW

The former leaders of UHW did not go quietly into the night after the imposition of the trusteeship. Within days of the trusteeship announcement, they announced the formation of a new union: the National Union of Healthcare Workers.

NUHW moved aggressively in its first days to supplant SEIU-UHW as the representative of thousands of California health care workers. According to its own press releases, NUHW filed 62 election petitions to represent 9,000 employees at 11 hospitals and 51 nursing facilities within five days of the NUHW's formation. Many of the facilities where NUHW filed election petitions had been actively engaged in negotiating new collective bargaining agreements.

NUHW might have attempted to file election petitions at *every* facility with UHW-represented employees if not for the existence of several legal rules that prevented it from doing so. A thorough analysis of these rules and the exceptions to them is crucial to understanding how this complicated situation may play out in the months ahead.

The Contract Bar Rule

Where a collective bargaining agreement lasting three years or fewer is in place between an incumbent union and an employer, no rival union may file a petition with the NLRB to hold an election, except in narrow circumstances discussed below. *Hexton Furniture Co.*, 111 NLRB 342 (1955).

This "contract bar" rule was created by the National Labor Relations Board (NLRB) to stabilize labor relations and create a presumption that the incumbent union maintains continued majority support of represented employees. However, there are critical time periods during which the contract bar rule does not apply. During these time periods, NUHW could potentially file a petition even where a contract is in place.

The first is called the "open period." In the health care industry, a rival union may file a representation petition during the period of time that runs from 120 to 90 days prior to the expiration of any collective bargaining agreement lasting three years or fewer.² For contracts with terms longer than three years, however, the "open period" always runs from 120 to 90 days prior to the *end of the third year*, not prior to the expiration date of the contract.

The contract bar is also lifted at the end of the third year of any collective bargaining agreement lasting more than three years. NUHW will be free to file a petition at any facility where the third year of a contract has passed.

Efforts to circumvent the open period by, for example, entering into a new contract halfway through the old contract, have been consistently rejected by the NLRB. The Board's view is that employees' ability to freely choose their representative must be protected by providing for regular and predictable intervals during which employees can choose a different union if they wish. *See H.L. Klion, Inc.*, 148 NLRB 656 (1964).

For the final 90 days prior to expiration of the contract (or prior to the end of the third year of the contract), the "insulated period" commences. During this time, the NLRB precludes rival unions from filing a petition. The purpose of the insulated period is to give employers and the incumbent union the opportunity to work out a new collective bargaining agreement free from the distraction of a pending election sought by a rival union. Therefore, any petitions filed by NUHW during the insulated period of any labor contract would not be timely.

The Certification Bar Rule

The certification bar rule precludes a rival union from filing an election petition within one year from the certification of a prior election result. Therefore, potential NUHW election petitions are likely to be blocked in any units that were certified by the NLRB within the previous twelve months. For example, if SEIU-UHW won an election to represent business office clerical employees at a facility, and the election results were *certified* on February 1, 2009, the certification bar would typically prevent NUHW from filing a petition in that unit until February 1, 2010.

At least one of the NLRB's Regional Offices evaluating NUHW's petitions is currently weighing one way in which the certification bar can be lifted prior to the expiration of one full year—when a schism exists within a union. A schism is a "basic intraunion conflict" that has a "substantial disruptive effect on ... industrial stability." See *B&B Beer Distributing Co.*, 124 NLRB 1420 (1959). A "basic intraunion conflict" is defined by the Board as "any conflict over policy at the highest levels of an international union ... which results in the disruption of existing intraunion relationships." *Hershey Chocolate Corp.*, 121 NLRB 901 (1958).

In light of the SEIU vs. UHW battle prior to the institution of the trusteeship, the Regional Office is attempting to determine whether this dispute rises to the level of a dispute at the "highest levels" of SEIU. The Region's decision as to whether a schism exists will likely be issued in the coming weeks.

If the Region finds that a schism exists, the certification bar could be lifted for any unit where UHW was certified as the employees' representative in the last year.

The Election Bar

Similar to the certification bar discussed above, the "election bar" in section 9(c)(3) of the National Labor Relations Act (NLRA) precludes holding an *election* in any unit where there has been an NLRB-run election during the previous twelve months. Unlike the certification bar, however, petitions filed within the last 60 days prior to the expiration of the election bar will be entertained by the Board, as long as the election is set to occur after the expiration of the election bar. Petitions filed more than 60 days prior to expiration of the election bar will be dismissed. The date of the bar runs from the date of the election itself, not from the date the results are certified.

SEIU Responds

Where a new election can be held, the existence of unfair labor practice charges will prevent an election petition from being processed, and thus will prevent an election until the charges are resolved. These are known as "blocking charges." In the current situation, SEIU has taken the unusual action of filing charges against its own local union, UHW, alleging that, under the previous leadership, it failed to bargain in good faith with the hospitals. NLRB Regional Offices have temporarily suspended hearings on NUHW's election petitions pending a decision on whether SEIU's charges against UHW should be allowed to block the processing of those petitions.

In addition, the SEIU apparently called an emergency meeting of its trustees on February 27, 2009, to address allegations that former UHW leaders destroyed or absconded with documents that are necessary to the trustees' ability to administer existing collective bargaining agreements. SEIU's attorneys also may be considering other legal theories relating to the creation of NUHW, including the evaluation of allegations that UHW's ousted leadership used UHW membership dues to set up its new union.

Other Legal Considerations

UHW's Blocking Charges

In addition to the new charges filed by SEIU, the NLRB's Regional Offices are continuing to process unfair labor practice charges filed by UHW prior to the imposition of the trusteeship. These blocking charges, filed while the former leaders of UHW were still in place, are now preventing several NUHW petitions from being processed. Thus, in another remarkable twist, the leaders of NUHW are partly responsible for blocking their own petitions.

Union Access to Hospital Facilities

UHW's collective bargaining agreements with hospitals typically include provisions granting access to the facility by union representatives to ensure compliance with the contract. The representatives designated by the UHW trustees have the same access rights under these contractual provisions as existed under the previous leadership of the local union. In this regard, the trustees have stated in a memorandum to the hospitals that no one should be recognized as a representative of UHW unless they have express written authority from the trustees. The representatives of NUHW do not have this contractual right. Furthermore, the United States Supreme Court has held that employers have a right to bar non-employee union organizers from their private property as long as other outside organizations are not allowed to solicit on that property. *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). In addition, the National Labor Relations Board has held that this right extends to California hospitals. *Southern Monterey County Hospital dba George L. Mee Memorial Hospital*, 348 NLRB No. 15 (2006). Hospitals should consult with their legal counsel concerning the enforcement of these legal rights if NUHW representatives attempt to solicit on hospital property.

Dues Checkoff After Expiration of Contract

At many of the facilities where UHW-represented workers are employed, the collective bargaining agreements have expired and have not been renewed, raising the issue of what are the employer's obligations with respect to dues checkoff.

The NLRB has held for many years that an employer can suspend dues checkoff after a collective bargaining agreement expires. *Bethlehem Steel Co.*, 136 NLRB 1500 (1962). In 2002, the NLRB reaffirmed this longstanding principle in a 3-2 decision, *Hacienda Hotel, Inc.*, 331 NLRB 665 (2000). However, the U.S. Court of Appeals for the Ninth Circuit disagreed with the Board's rationale and reversed that decision. *Local Joint Executive Board v. NLRB*, 309 F.3d 578 (2002). In 2007, the NLRB reaffirmed its earlier ruling in another 3-2 decision, *Hacienda Hotel, Inc.*, 351 NLRB 504 (2007). That decision was based on contract language providing that dues would be deducted during the term of the agreement. However, the NLRB's decision was again reversed by the Ninth Circuit in *Local Joint Executive Board v. NLRB*, 540 F.3d 1072 (9th Cir. 2008). Furthermore, one of the dissenting Board members in both of the NLRB's *Hacienda Hotel* decisions, Wilma Liebman, has recently been appointed to serve as Chairman of the NLRB, and it is possible that new Board members to be appointed by President Obama will share her view of this issue. Accordingly, hospitals should consult with their legal counsel concerning the possible suspension of dues checkoff after an agreement expires.

At some facilities where the contracts with UHW have expired, the bargaining unit members have submitted written revocations of their authorizations for dues checkoff. The U.S. Court of Appeals for the Fourth Circuit has held that union members have a right "at will" to revoke dues checkoff during the time period following the expiration of a contract. See *Anheuser Busch, Inc. v. International Brotherhood of Teamsters*, 584 F.2d 41, 44 (4th Cir. 1978). As such (although the Ninth Circuit might see the issue differently), an employer who does not honor a revocation of dues checkoff in this situation could be at risk of violating Section 8(a)(1) and 8(a)(2), and perhaps other statutes.

Ratification by UHW Membership of Contracts Negotiated by SEIU Trustees

UHW's local constitution included a provision requiring that all contracts be ratified by a vote of the bargaining unit members. Upon the institution of the trusteeship, SEIU suspended UHW's local constitution and announced that the SEIU International Constitution would control. The SEIU International Constitution is silent on the issue of contract ratification. Nonetheless, the trustees have since gone on record as stating that new contracts negotiated with the trustees will be subject to a ratification vote by the members of the bargaining unit.

Non-Union Facilities in the Line of Fire

The SEIU vs. NUHW battle has thus far focused on facilities where employees are already represented by SEIU-UHW. However, it is likely that new competition between the two unions will result in increased organizing activity throughout California, including at *non*-union facilities. One important reason increased organizing activity is likely is because NUHW currently lacks an essential component of any successful union—members. Yet many of NUHW's initial efforts to establish its membership have run into legal delays and hurdles preventing NUHW's petitions from being processed. Depending on the length of delay resulting from these legal obstacles, NUHW may soon begin seeking members outside of currently organized facilities.

However, non-unionized facilities have more to worry about than just the NUHW vs. SEIU dispute. The Employee Free Choice Act (EFCA)—a bill that would make it easier for unions to organize non-unionized facilities—could be enacted by Congress this year. When the EFCA is added to the NUHW vs. SEIU mix, non-unionized facilities' exposure to potential organizing will substantially increase. Now is the time for these facilities to explore their risk for potential organizing efforts, and, with the assistance of legal counsel, put the necessary mechanisms into place to respond to future organizing, whether by NUHW or other unions.

Surveying the Landscape Ahead

While the SEIU vs. UHW conflict at first appeared to have been settled in favor of SEIU when the trusteeship was imposed, it now appears that the battle with NUHW has only just begun. Working with legal counsel, employers are well advised to review their existing labor contracts to determine when election petitions by NUHW would be timely.

Likewise, employers should pay close attention to the identity of individuals claiming to represent SEIU-UHW. Absent notification from UHW's trustee that a specific person is the appropriate union representative, employers should not assume that the person is so empowered. Employers should carefully review, and be prepared to enforce consistently, existing rules and policies regarding solicitation and distribution of literature, as well as policies containing restrictions on access to facilities by visitors.

As the NLRB's Regional Offices attempt to resolve the charges SEIU filed against its own local, and as they address questions such as whether a schism has occurred within SEIU, health care employers in California and elsewhere should be prepared for a long fight between the two unions, SEIU-UHW and NUHW, for the right to represent health care employees. Employers who are well prepared and who have put effective mechanisms in place to respond to union conflicts arising in their facilities will be best positioned to weather this potential war of attrition.

¹ Rosselli's February 2008 resignation letter may be viewed at <http://harpers.org/archive/2008/02/hbc-90002386>.

² Outside of the health care industry, the open period is slightly different, running from 90 days to 60 days prior to expiration of the CBA.

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