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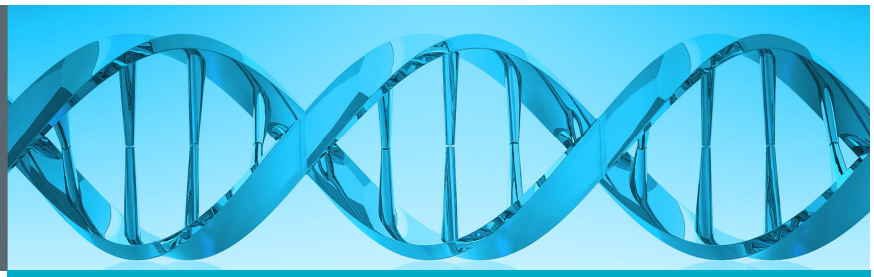
Health Care



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Is This the Perfect Storm for Union Organizing of Health Care Providers?

In this Issue:

For the past six years, the National Labor Relations Board has issued decisions and rules that substantially impact the rights of employers under the National Labor Relations Act. For example, recent Board decisions have limited employers' rights to discipline employees for vulgar, offensive, and threatening speech and conduct. The Board has limited the right of employers to control employee access and use of email. Employers cannot, under all circumstances, advise employees to maintain the confidentiality of internal investigations and witness statements are no longer shielded from being given to the union. These are just examples.

However, **the Board's actions regarding union representation elections may well present the greatest threat to the ability of health care employers to maintain union-free status**. The first action, the Board's decision in *Specialty Healthcare,* significantly changed how the Board determines what is an appropriate bargaining unit. The effect of this decision is that bargaining units will be much smaller than they have been in the past, which is likely to result in more elections won by unions. While this decision does not apply to bargaining units in acute care hospitals, it does apply to other health care settings such as long-term care facilities, urgent care centers, surgical centers, LTACs and rehabilitation facilities.

The second action is the Board's Final Rule, which dramatically changes the process for holding union elections. This rule, which becomes effective April 1, shortens the time between when a representation petition is filed and when the election is held. Here is a summary of the changes and the impact:

Changes for Filing of Petitions

Currently, when a union files a petition it has 48 hours to provide evidence the petition is supported by at least 30 percent of the employees. The petition must be filed in writing by mail and there is no obligation to send an employer a copy of the petition. Under the Final Rule, the union must include the proof of support by at least 30 percent of bargaining unit employees with the filing of the petition and it must serve a copy of the petition to the employer. In addition, the petition can be filed electronically.

IMPACT: These changes shorten the overall process by at least two days, if not more.

Posting of Pre-Election Employee Rights Poster

Before the rule, the long-standing practice has been that after the Board received the petition it would send documents to the employer, which included a Notice to Employees regarding their rights and the election process. The employer was encouraged to post the notice, but posting was not mandatory. The rule now requires an employer to post the notice within two business days after the employer receives it. If the employer uses its email system to communicate with employees, it must also send the notice via email.

IMPACT: If an employer does not post the notice or timely email the notice to employees, it could result in the Board setting aside the election. In addition, the notice will describe unlawful employer conduct during the election period, which could lead to unfair labor practices as employees and union representatives attempt to goad members of management into making unlawful statements.

Pre-hearing Statement of Position

If an employer chooses to go to a hearing to challenge the bargaining unit sought by the union, it must submit a position statement within seven days after receiving the Notice of Hearing, which usually accompanies the notice of the petition. The position statement must be served to the Board and the union and it must include the following: whether and why the petitioned-for unit is not appropriate; if the unit is found appropriate, which employee classifications, locations, and other employee groupings should and should not be included.

The Statement of Position must also include the employer's position on the following matters: individual employee eligibility and election details (date, time, location, and eligibility cutoff). It must also include information about the employer's workforce. The union does not have to respond to the Statement of Position until the hearing.

IMPACT: This new requirement forces the employer to stake out its position on numerous issues before the hearing and its failure to properly anticipate every issue or question the Board or the union may raise at the hearing could preclude the employer from raising or responding to those issues at the hearing. Also, it gives the union additional information about the employer's workforce and election position, which the union can use to its best advantage regarding the election.

The Pre-hearing Election — Held Sooner, Shortened and Diminished Scope, Greater Regional Director Discretion, No Right to Post-Hearing Briefs

The hearing must be held within eight days after the Board serves the Notice of Hearing on the employer, unless the regional director determines that the case raises complex issues. The only issue addressed at the hearing is whether there is a Question Concerning Representation; that is, does the union seek a bargaining unit that is appropriate for collective bargaining. Other issues that often are litigated at the hearing under current procedures can no longer be raised before the election. These issues include who is a supervisor, who is a confidential employee, and who is a casual employee, among other important matters. Only if these employees comprise more than 10 percent of the petitioned-for unit can they be raised.

The employer will no longer have the right to file a post-hearing brief and it cannot challenge the regional director's decisions regarding the unit and other matters before the hearing. Post-election challenge will likely be the only recourse and review by the Board is discretionary and of speculative benefit to employers.

IMPACT: These changes are material. If an employer does not have legal certainty on the supervisory, confidential, or managerial status of employees before the election it acts at its legal peril. For example, if it treats an employee as a supervisor and includes him/her in management meetings regarding the election or has the employee lawfully persuade voting unit employees regarding the election, and it is subsequently determined the employee did not meet the criteria for supervisory status, the election could be set aside and an unfair labor practice could also be alleged.

Conversely, if an employer chooses not to have a supervisor involved in communicating the employer's position during an election campaign out of an abundance of caution, it could lose a critical voice at a time when it is most needed.

The hearing officer will also require the parties to state their positions on election logistics including the date, time, location, and whether on-site and/or mail balloting should occur. This will enable the regional director to set these matters in the Decision and Direction of Election (DDE), in contrast to the current practice of these matters being negotiated between the regional director, the union, and the employer after the DDE issues.

All of these changes will meaningfully shorten the time from petition filing to election.

The 25-day Waiting Period for the Election Disappears

Another long-standing Board practice has been to hold elections no sooner than 25 days after the DDE issues. In addition, it has been the Board's practice to impound ballots if an employer has a Request for Review of the regional director's decision pending with the NLRB in Washington, D.C., when the election is held.

IMPACT: Most elections will be held much sooner than the 42+ days after the petition filing, which has been a common timeline up until now. The sooner the election is held, the less time the employer has to effectively communicate to employees about the election, the potential impact and risks of collective bargaining and union representation, and other critical matters. Less time for employers to communicate this essential information could result in more union election wins.

Employers Must Give the Union Personal Employee Information

The Board's current rules require an employer to provide the union and the region with the name and home addresses of eligible voters within seven days after the DDE or Stipulated Election Agreement. The new rule requires an employer to provide more information to the union and region much sooner. Effective April 1, within two days after the DDE or a Stipulated Election Agreement, an employer must provide electronically to the union and the NLRB a list of eligible voters that includes: name, home address, available personal cell and home telephone numbers, and personal email addresses, work location, shift, and job classification.

The rule continues the requirement that the union must have this information for at least 10 days before the election. The union can waive this right.

IMPACT: The changes will make it easier for the union to contact eligible voters on the phone, via email, and at their homes. Employees may become angry that the employer has shared this information with the union and/or that the union uses their personal information to communicate with them. Employees have no right to opt out of having their information given to the union and the region.

Limited Right to NLRB Review of Regional Director Rulings

Employers often enter into Stipulated Election Agreements instead of going to a hearing. At this time, employers have the right to obtain review by the NLRB of post-election issues. The Final Rule gives the regional director the authority to decide those matters, and review of the regional director's ruling(s) is within the NLRB's discretion and is no longer a matter of right.

IMPACT: Regardless of one's view of decisions by regional directors versus decisions by the Board, this part of the rule will limit an employer's appeal rights regarding adverse regional directors' decisions.

Post-Election Objection Timeline Is Reduced

After an election, an employer now has 14 days to investigate and file with the NLRB objections regarding conduct that affected the election. It is common for post-election hearings to occur two to three months after the election. The new rule shrinks these timelines significantly. Objections must be filed within seven days after the election and evidence in support of the objections must be filed at the same time. A post-election hearing must be held within 21 days after the election.

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IMPACT: Reduced time to investigate and file objections, along with the new obligation to also submit evidence at the same time, may prevent the employer from discovering evidence to support its position.

What Employers Should Do — Now

- Assess whether front-line supervisors meet the current NLRB standard for supervisory status;
- Provide preventive labor relations education and training to all supervisors, managers and executives and Board members;
- Assess employee engagement and union organizing vulnerability and develop strategic plan to increase engagement and reduce vulnerability;
- Analyze potential bargaining units at all non-acute care sites of care/operations;
- Comprehensive review of key HR policies including:
  - Off-duty access by employees;
  - Solicitation/distribution;
  - Dress code/button/insignia;
  - Social media;
  - Code of Conduct/Behavior; and
- Audit actual enforcement practices regarding key HR policies.

For More Information

For more information regarding this Update Series, please contact the author, a member of the Polsinelli's Health Care practice, or your Polisnelli attorney.

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**AHLA Connections* and *Modern Healthcare* (June 2014).

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* *Law360*, March 2014
** *The American Lawyer* 2013 and 2014 reports

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