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Unions Poised to Exploit Changes in NLRB Rules

By A. Kevin Troutman (Houston)

After winning 73% of elections in healthcare units in 2011, unions seeking to organize more healthcare workers are preparing to exploit opportunities arising from significant new rule changes and recent decisions by the National Labor Relations Board (NLRB). Hospitals, nursing homes, home health agencies, clinics and other healthcare employers who want to preserve their union-free status must therefore be prepared for a significant uptick in activity.

Healthcare in Organizers' Crosshairs

Although the Board's proposed new "posting requirement" attracted considerable attention, the U.S. Court of Appeals for the District of Columbia moved that issue into the background, at least temporarily, by enjoining its implementation. (See our April 17, 2012 Legal Alert explaining this development in more detail.)

But, rule changes allowing "quickie" elections and the establishment of small "micro" units may prove far more troublesome for employers. The shortened election periods arise from rule changes effective on April 30, 2012. The opportunity to gerrymander elections within small pockets of discontent emerged from the Board's decision last summer in *Specialty Healthcare*. That decision was one of several parting shots by former Board chairman Wilma Liebman.

These developments fit into the larger picture of a labor movement trying desperately to reverse a long trend of declining union membership. Stocked with good-paying jobs that cannot be outsourced, the healthcare industry remains an inviting target for unions hungry to increase membership and revenues.

Trends In Membership And Elections

In 2011, overall union membership was 11.8 % in the U.S., down a tenth of a percent from 2010. Membership in the private sector held steady at 6.9 %. For the first time in several years, union win rate in *all* elections was greater outside the healthcare industry than inside it. In certification elections, however, unions won 73 % of the time, compared with a 69 % success rate in non-healthcare elections. Unions' win rates increased both inside and outside the industry. At least in healthcare, this appears to be due in part to unions' willingness to withdraw petitions before an election when their leaders believe the vote may not turn out in their favor.

The Service Employees International Union (SEIU) again accounted for most of the activity in healthcare, filing 41 percent of the petitions and winning 78 % of the time. The National Nurses United (NNU, led by the NNOC aka California Nurses Association) filed 4 percent of petitions, but won 94 % of its elections. Both groups continue to hone the substance and style of their marketing, making extensive use of the internet and social media. Armed with the new advantages discussed below, they will likely be even more aggressive this year.

Administrative Changes Provide Golden Opportunities to Organizers

After the so-called Employee Free Choice Act (EFCA or the "card check" bill) stalled in 2009, union leaders and supporters found a friend and

effective ally in the decidedly pro-union majority of the NLRB. Their decisions and rule changes present union organizers with newfound golden opportunities. Some of these developments may turn out to be more effective than the card check bill would have been. It is therefore even more important for healthcare employers to be prepared for increases in organizing activity.

Apart from the Board's ill-fated mandate to post its 11" x 17" pro-union notice, new rules will significantly reduce the period of time between filing a petition and an election. In other words, employers now have far less time to respond when a union files a representation petition seeking to represent its workers. Under the old rules, the period between filing a petition and the election (the campaign period) was normally about six weeks, sometimes longer. Under the new rules, the campaign period will be reduced to 21 days or even as few as 10 days. This would allow employers precious little time in which to tell their side of the story.

Muddying The Waters

Additionally, the rules now severely restrict pre-election hearings. Thus, even a dispute over whether certain employees are ineligible to vote (because they may be supervisors) will not be resolved until after an election. This will generate confusion and make it more difficult for employers to identify which employees are permitted to speak on its behalf during a campaign. More after-the-fact unfair labor practice charges and litigation are therefore likely.

An expedited election process will also make it more difficult to deal with fallout from the *Specialty Healthcare* decision, which opened the door for organizing small, isolated pockets of employees. Such small units have been fairly uncommon because even employees in smaller departments usually share a significant "community of interest" (similar job functions, supervision, hours, physical proximity, etc.) with others in the organization. The community of interest consideration is critical in determining what constitutes an appropriate bargaining unit. This decision clearly reflected the Board's pro-union stance: statistically, as the size of a bargain unit decreases, the union's chance of winning an election increases.

When it decided *Specialty Healthcare*, the Board majority indicated that its application would be narrow. But, the decision has already been

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Independent Contractor Or Employee?

By Anthony B. Golden (Las Vegas)

A perennial issue for businesses both in and out of the healthcare industry is the classification of individuals as independent contractors or employees. In an effort to save money in a tight economy and limit liability, many businesses attempt to use independent contractors to serve functions typically served by employees. Classifying someone as an independent contractor can save money on federal and state taxes, and it often means the business does not have to pay minimum wage or overtime to the individual.

Additionally, an independent contractor typically cannot claim rights under the various discrimination laws, such as Title VII, the ADA, the Age Discrimination in Employment Act, and others. It is critical, however, that if you are going to make use of independent contractors, you do so legitimately: the consequences of misclassification can be severe. In the healthcare industry, the legitimate use of independent contractors can be more difficult to determine than in other industries because of the many and varied functions in a single healthcare business.

Interested Agencies

Who cares whether a business classifies someone as an independent contractor or an employee? At the federal level, the U.S. Labor Department and the IRS are the primary agencies that care. The DOL regulates and enforces, among other things, the federal minimum wage and overtime laws. Of course, the IRS regulates and enforces the federal tax laws.

At the state level, the interested agencies vary from state to state, but typically include some form of unemployment division, state labor board, and workers' compensation insurance division. The consensus seems to be that, no matter which agency is performing an investigation, their investigators are specially trained to make the experience as enjoyable as a root canal, without the painkiller.

To further complicate matters, each agency has its own test to determine whether someone is truly an independent contractor. The tests of the state agencies are beyond the scope of this article, but they generally track one or more of the tests used by the federal agencies.

The DOL

In the DOL's 2011 budget it dedicated approximately $25 million to its initiative of investigating and correcting what it perceives as a problem of "employee misclassification," which means individuals classified as independent contractors who should have been classified as employees. In its 2012 budget, the DOL has nearly doubled the amount of money dedicated to this initiative, earmarking $46 million for it.

The DOL, in determining whether someone is an independent contractor or an employee for purposes of minimum wage and overtime, uses what is known as the "Economic Realities Test." The courts have distilled this test into the following factors:

- the degree to which the person's work is controlled by the organization;
- the individual's investment in facilities and equipment, if any;
- the individual's opportunities for profit or loss, if any;
- the amount of any initiative, judgment, or foresight the person uses in open-market competition;
- the permanency of the relationship; and
- whether and to what extent the individual's work is an integral part of the organization's business or activities.

No one factor is determinative, but the DOL typically finds an employment relationship, rather than a true independent contractor relationship.

The IRS

In September 2011, the IRS and the DOL entered into a Memorandum of Understanding, which states as its purpose, "The sharing of information and collaboration between the parties will help reduce the incidence of misclassification of employees as independent contractors, help reduce the tax gap, and improve compliance with federal labor laws." Businesses should be conscious that an investigation by one of these agencies will almost certainly result in an inquiry by the other.

Until recently, the IRS used a 20-factor test to determine whether someone is an independent contractor or employee. The test has been streamlined a bit into 11 factors that are grouped into specific categories:

Behavioral Control

1. Instructions that the business gives the worker
2. Training that the business gives the worker

Financial Control

3. The extent to which the worker has unreimbursed business expenses
4. The extent of the worker's investment
5. The extent to which the worker makes his or her services available to the relevant market
6. How the business pays the worker
7. The extent to which the worker can realize a profit or loss

Type of Relationship

8. Written contracts describing the relationship the parties intend to create
9. Whether or not the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation pay, or sick pay
10. The permanency of the relationship
11. The extent to which services performed by the worker are a key aspect of the regular business of the company

Several of the factors the IRS uses overlap with the DOL's test, but it's important to understand that the IRS and DOL come at the problem from different perspectives. The DOL is attempting to ensure that individuals misclassified as independent contractors are paid what they are entitled to under the federal minimum wage and overtime laws. The IRS, on the other hand, is concerned with whether a business is paying its "fair share" of taxes, such as FICA (social security), FUTA (federal unemployment), and Medicare. Not surprisingly, the IRS typically finds an employment relationship.

Unlike the DOL, however, the IRS provides businesses some assistance in a misclassification situation. The IRS utilizes a Voluntary Classification Settlement Program, which can reduce a business's liability in the event of misclassification.

A Thumbnail Approach

Most situations are unique, and it is difficult to say that a particular position, in all circumstances, is appropriately classified as an independent contractor or an employee. In a hospital setting, for example, courts have held physicians to be appropriately classified as independent contractors in some cases and hospital employees in others. The same is true of nurses.

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Top 10 OSHA Citations In The Healthcare Industry, Part 2

By Tiffani Casey (Atlanta)

Following up on the discussion in our last issue of the Healthcare Update, this month we are examining one of the most rigorous and demanding areas of OSHA compliance – failure to meet the information and training requirements of the Bloodborne Pathogens Standard (BBP).

The standard states that the employer "shall train each employee with occupational exposure in accordance with the requirements of this section… [and] institute a training program and ensure employee participation in the program." The training required under the standard is to be performed both at the time of initial assignment to tasks where occupational exposure may take place, and annually thereafter. Employers are also required to provide additional training when changes such as a modification of tasks or procedures, or the implementation of new tasks or procedures, will affect the employee's occupational exposure.

Detailed Training Required

The elements of the BBP training standard are relatively burdensome and include explanations of all the following:

- the epidemiology and symptoms of bloodborne diseases;
- the modes of transmission of bloodborne pathogens;
- the appropriate methods for recognizing tasks and other activities that may involve exposure to blood and other potentially infectious materials;
- the use and limitations of methods that will prevent or reduce exposure including appropriate engineering controls, work practices, and personal protective equipment;
- the types, proper use, location, removal, handling, decontamination and disposal of personal protective equipment;
- the basis for selection of personal protective equipment;
- the hepatitis B vaccine, including information on its efficacy, safety, method of administration, the benefits of being vaccinated, and that the vaccine and vaccination will be offered free of charge;
- the appropriate actions to take and persons to contact in an emergency involving blood or other potentially infectious materials;
- the procedure to follow if an exposure incident occurs, including the method of reporting the incident and the medical follow-up that will be made available;
- the post-exposure evaluation and follow-up that the employer is required to provide for the employee following an exposure incident; and
- the signs, labels and color coding required by OSHA.

The Legal Pitfalls

Keeping current with BBP information and training requirements can be one of the most difficult tasks you face as an employer in the healthcare industry, where advances in technology and medical procedures requires constant re-evaluation of BBP procedures and related training. The level of detail required in the training and staff turnover add to the challenge of staying in compliance. And this year, OSHA has a keen eye focused on the healthcare industry as well.

To make things more difficult, you can be cited under the standard for failure to train even if you miss just one employee in training or retraining. OSHA may also cite employers individually for each instance of a failure to train, although this is rare unless the employer's conduct has been particularly egregious.

These special challenges require appropriate resources to ensure that a systematic program is in place for training and retraining on the BBP standard. In a larger facility, this usually means identifying someone with full-time responsibility for the program. In smaller settings, such as a doctor's office, you should create a team system of audits and checks. Compliance can quickly fall behind if the person in charge of the program is out sick, on vacation or otherwise preoccupied with a project. Assigning the responsibility to detail-oriented, trusted staff is critical. And don't hesitate to call in reinforcements from the outside! If you need an expert or consultant to get your program started, get back on track, or just monitor it from time to time, it's usually an investment worth making.

The cost to organize a program focused on BBP training compliance is relatively small compared to the cost of significant OSHA citations that have the potential to become repeat citations in the future (which can be for another five years up to a cost of $70,000.00 each).

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It can be overwhelming for businesses to go through each person who does work for the business and apply each of the various tests from the multiple agencies. To expedite the process a bit, a business could ask the following questions:

- is the individual economically dependent on your business for his or her livelihood?
- is the service being provided integral to your business?

If either is true, you likely have an employee and not an independent contractor. Of course, this thumbnail approach is no substitute for a thorough analysis, but it can assist in making a rapid decision when there is insufficient time to go through each test in detail. It is also important not to forget about the interested agencies in your state, which will have their own tests and, in some circumstances, may have specific obligations for businesses even when someone is appropriately classified as an independent contractor.

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2011 Index Of Healthcare Update Articles

For those of you interested in articles that appeared in the Healthcare Updates throughout the year, here is a list of their titles, authors, and dates. All are available on our website at www.laborlawyers.com.

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cited in several other cases. Under the Board's new analysis of this issue, employers will have an extremely difficult time successfully challenging the appropriateness of "micro" units. The proliferation of such units will give unions more opportunities to get their foot in the door of previously union-free workplaces and make the administration of union contracts even more cumbersome.

What Can Healthcare Employers Do?

Although shortened campaign periods and smaller bargaining units will make union-organizers' jobs easier, employers can still take effective steps to protect their union-free environment. Sound employee relations practices, good supervisor training and responsive management will still make it less likely that employees will want to be represented by a third party. Nevertheless, employers whose supervisors have not been adequately trained or who are blindsided by an organizing effort may find themselves in a position from which they do not have enough time to recover.

The past year was busy, largely with the Board and Big Labor moving toward these various changes. This year the results of those changes will be increasingly apparent as unions ramp up their efforts to attract new members. Healthcare employers who are unprepared will be most vulnerable.

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