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Changing the Rules: The Federal Government Makes Union Organizing Easier

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Non-unionized health care employers – especially clinics and other non-hospital employers – may feel like the government has made them a target. Reacting, some pundits think, to Congress's failure to pass the so-called "Employee Free Choice Act," in recent months the National Labor Relations Board has taken several steps to make it easier for unions to organize new workplaces. These new regulations, proposed regulations and new decisions will change decades-old legal principles.

Free Advertising: Posting Advice About Unions.

The first of the Board's new requirements is a regulation that obligates all employers covered by the National Labor Relations Act – essentially, all private sector employers except for very small businesses – to post a notice reciting employees' rights under the NLRA. The notice seems designed to increase employees' interest in unions: it is a large, multi-colored poster that discusses employees' rights without addressing any of the drawbacks of unionization. The poster is especially troubling for health care employers because it does not describe any of the rules specific to the health care industry.

The Board's new rule purports to make it an unfair labor practice for an employer to fail to post the notice – and a knowing refusal to post the notice could support a finding of unlawful motivation in other unfair labor practice proceedings. Worse, the Board claims that if the notice is not posted, the six-month statute of limitations mandated by the NLRA will never even start to run.

Changing the Rules: Who Gets to Vote?

As if it that were not bad enough, the Board is also altering its policies to make it easier for unions to win elections. One way of doing so arises from a recent decision by the Board. In union elections, the preliminary dispositive issue is determining who gets to vote – or, in NLRA terms, what is the appropriate "unit" of employees? In the *Specialty Healthcare* case, the Board faced a petition for a union election in a very narrowly defined unit, consisting of only the nursing home's CNAs. The nursing home, in contrast, claimed that the appropriate unit was all service and maintenance employees. Rejecting decades of precedent, the Board held that the narrow unit sought by the union would be allowed, despite the Congressional direction to avoid fragmentation of bargaining units in health care facilities. In an even more dramatic change, the Board concluded that if an employer believes the appropriate group of employees is broader than the proposed unit, the employer must demonstrate that those additional

employees share "an overwhelming community of interest" with the employees in the proposed unit.

Under *Specialty Healthcare*, unions will be able to target small groups of disgruntled employees, and the employer will have to prove that the "micro-unit" is inappropriate. The likely outcome is obvious: employers will face a proliferation of small units, with increased exposure to disruptive small strikes, not to mention increased expenses attributed to negotiating multiple contracts. All these considerations seem secondary to the Board's objective of increasing union representation.

Changing the Rules: How Long to Decide?

Worse still, the Board has proposed radical changes to the rules regarding union elections, dramatically shortening the time between the union's filing of a petition and the holding of the election. Even under current rules, union elections happen quickly. The Board's statistics demonstrate that currently an initial election is held within a median of 38 days from the filing of a petition, and more than 95% of elections occur in less than two months. Not content with these speedy results, the Board seeks to eliminate several steps in the current process, in order to have an election in perhaps as short as *10 days*.

The Board would accelerate elections by requiring employers to identify all issues with the proposed unit at the "pre-election conference," held within seven days of the filing of the petition. Even if the employer could hire legal counsel and identify all the possible issues within a week, the employer's concerns may not be addressed unless the positions at issue equal 20% of the proposed bargaining unit. If the employer's concerns involve less than 20% of the unit, those issues would simply be ignored, and an election would be directed as soon as possible. Moreover, the employer would be required to quickly produce contact information about all employees in the proposed unit, including the employees' home telephone numbers and personal email addresses.

The Board's proposal causes alarm on several levels. Within one week, an employer would be required to identify all of its concerns about the unit proposed by the union and be prepared to actively litigate any disputed issues. Moreover, because the Board would refuse to decide issues pertaining to less than 20% of the bargaining unit, an employer would face dramatic uncertainty about how to get its message out. For example, one routine issue that a health care employer may dispute in a union election is whether charge nurses are supervisors. It is unlikely that charge nurses would make up 20% of the bargaining unit. Thus the employer would go into the union election campaign not knowing who its supervisors are. The Board's new rules not only shorten the time the employer has to communicate its message, but also place roadblocks on how an employer could do so.

Where Can You Get Advice?

The final major effort to help unions organizing is not from the Board – it is a proposed regulation from the Department of Labor, which enforces the Labor-Management Reporting and Disclosure Act. The LMRDA requires detailed reports from individuals who communicate with employees about the disadvantages of unionization – so called "persuaders." For decades, rules interpreting the LMRDA made clear that the reporting requirements did not apply to professionals who merely advise the employer about strategy and the legality of dealing with an organizing campaign.

Earlier this year, however, the Department proposed new regulations that would virtually eliminate this "advice" exception. Under the proposed rules, professionals who give advice to an employer facing a union organizing drive would have to file reports with the government about that work – even attorneys giving legal advice to their clients.

The effect is obvious. By requiring reporting of activities that could invade the attorney-client privilege, the Department would limit the resources currently available to employers. Tellingly, the American Bar Association – by no means a right-wing organization – has condemned the Department's attempt to pry into attorney-client advice.

Conclusion: What Is an Employer to Do?

The labor law changes that have been implemented or proposed will dramatically change the landscape for union organizing. The watch word must be *preparation*. An employer that pays no attention to union avoidance until the union files a petition for an election will find the rules stacked against it, with little time to respond and fewer resources available. Any employer that hasn't consulted with counsel to review its vulnerability to union organizing efforts, and how it can

respond, should do so – and soon.

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