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We Knew It Was Coming: Union-Friendly NLRB Rules that NY State 'Neutrality' Law Did Not Infringe on Health Facility's Federal Right to Oppose Unionization

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October 2010

The National Labor Relations Board ("NLRB" or "Board"), with its new political appointments now in place, recently issued its first decisions as the "Obama Board," and not surprisingly, these rulings are uniformly pro-union. In one of the most notable of these initial cases, *Independence Residences, Inc.*, 335 NLRB No. 153 (2010), a split NLRB refused to overturn a union election win, even though the employer, a private nonprofit that relies overwhelmingly on government funding to provide services to individuals with developmental disabilities, was largely barred by a New York statute from using any of those funds to "encourage or discourage union organization."

Even for this union-friendly NLRB, the ruling may be a legal stretch considering that, just two years ago, the U.S. Supreme Court, in *Chamber of Commerce v. Brown*, struck down a very similar California "neutrality" statute on the ground that it interfered with, and thus was preempted by, federal labor law.

The lengths to which the new Democratic majority on the Board was willing to go to uphold the union victory in the face of this precedent strongly suggest that, to paraphrase a famous movie line, employers should fasten their seatbelts; it's going to be a bumpy ride.

The Board's "Reasoning" in this Case: A Window into the NLRB's New, Pro-Union Mindset

In 2003, employees at Independence Residences, Inc., voted 68 to 32 to join the Union of Needletrades, Industrial and Textile Employees (now UNITE-HERE!). The employer filed

objections to the election, arguing that a newly enacted amendment to the New York Labor Law, Section 211-a, prevented the facility from campaigning to the full extent permitted by federal labor law. In short, the New York statute prohibits employers from using state funds for almost any cost incurred in connection with encouraging or discouraging unionization.

Currently, a federal district court is considering the legality of the statute in light of the *Brown* decision. Nevertheless, the Board majority decided that, even if the statute was deemed unlawful, the employer's rights under federal law were not violated. To reach this conclusion, the majority treated the statute as if it were a "third party" who arguably had interfered with the representation election. The majority then declared that, "[i]n objections cases based on third-party conduct, we will not overturn election results unless the third party's conduct was 'so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible.'"

In applying this standard here, the Board found that, notwithstanding the statute's restrictions, the employer had engaged in a "vigorous" campaign, and had in fact committed various unfair labor practices. Thus, the majority concluded that the employer failed to show that Section 211-a had "had a sufficient impact on eligible employees to warrant setting aside the election results."

In a sharply worded dissent, Republican Board Members Peter Schaumber and Brian Hayes accused the majority of "turning federalism on its head" by not acknowledging that Section 211-a is "patently" preempted under the Supreme Court's decision in *Brown*. The dissent vehemently criticized the majority for engaging in a "radical and unprecedented analysis" in order to deem the statute a "third party," thereby enabling the Board to uphold the election results.

The Bottom Line for Health Care Employers

As Members Hayes and Schaumber (whose term expired on the same date as this decision) emphasized, "neutrality" statutes such as Section 211-a undermine the rights "of employers to express, and employees to hear, noncoercive information opposing unionization." Moreover, the majority's decision will encourage state and local legislative "interference with the balance that Congress has struck in favor of free and uninhibited debate on unionization," because a majority of the NLRB now is willing to enforce such statutes until each individual one is struck down by a court.

Until the court case involving Section 211-a is resolved, health care employers in New York (and other localities that have such "neutrality" laws) should:

- Carefully review their policies and practices, including their accounting systems, to ensure that no state funds are used for prohibited activities related to opposing unionization;
- Reassess their entire strategy for maintaining nonunion status to determine how best to prevent employee interest in unionization (once underway, a union organizing campaign is difficult to counter successfully when an employer has the proverbial "one arm tied behind its back"); and
- Continue to closely monitor the Board's decisions, since the new majority is just getting warmed up (in the coming months, health care employers should expect this union-friendly majority to issue many more decisions restricting their rights to oppose unionization).

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