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Steven Swirsky Quoted in Article "Court Refuses to Enforce NLRB Order Because Striking Aides Put Patients at Risk"

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Steven Swirsky, a Member of the Firm in the Labor and Employment and Health Care and Life Sciences practices, in the New York office, was quoted in an article titled "Court Refuses to Enforce NLRB Order Because Striking Aides Put Patients at Risk."

Following is an excerpt:

The National Labor Relations Board erred in finding 48 striking home health care workers, who provided inaccurate responses to a pre-strike inquiry from their employer, were entitled to reinstatement and back pay, a federal appeals court ruled Feb. 27 (*NLRB v. Special Touch Home Care Services Inc.,* 2d Cir., No. 11-3147, 2/27/13).

The U.S. Court of Appeals for the Second Circuit refused to enforce an NLRB decision that a home health care company in New York committed unfair labor practices when it suspended the striking workers immediately. In so doing, the Second Circuit ruled that the home health aides' conduct was not protected because they failed to report to work after informing their employer, Special Touch Home Care Services Inc., that they planned to work during the scheduled strike for which 1199 SEIU had given notice.

Steven Swirsky agreed that the decision has important implications for providers who need to protect their patients in the face of a threatened strike. "The decision

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reined in the Board, rejecting its position that, if there was no actual harm, there was no 'foul,' '' he said. ''The court told union members 'either respond truthfully or not at all' and properly determined that the fact that nobody died or was injured did not mean that there was no imminent risk of harm to the aides' clients.''

''The court engaged in a reasoned examination of the applicable facts and law, finding that individual notice provided to patients by their aides did not significantly mitigate the risk of danger,'' Swirsky noted. ''The Court also emphasized the fact that home health aides remind their clients to take their medication and observe them for signs of immediate distress and that the nonperformance of even general or menial tasks—such as cleaning, shopping, and bathing patients—may create a risk of imminent danger.''

''While the NLRB had held that the workers' actions were protected activity under the NLRA, and that they had no obligation to the patients since the union had provided a statutory 10-day notice of the strike to their employer, the court disagreed,'' Swirsky continued. The court's decision ''was a significant repudiation of the NLRB's conclusion that the patients were not placed in imminent danger by the conduct of the striking aides,'' he said.

''This decision does not require employees to tell their employer whether they intend to participate in a strike. Nor does it require the employee to even respond to the employer's query. In fact, the employees would not have lost the protection of the Act if they had simply not answered the employer's inquiries about whether they planned to report on those days, because the 10-day notice from the union serves to put the employer on notice of their intent to strike,'' Swirsky observed.

''It is only when the employee controverts the intent of the 10-day notice provision that they lose the protection of the act,'' he said.

Not Just Home Health? Swirsky also said that the ruling extends beyond the home care context. ''The decision arguably applies to all health care settings, including hospitals and long-term care facilities where patient care and staffing needs intersect,'' he said.

''The very point of the 10-day notice is to help an employer make appropriate arrangements. The court recognized that permitting unions to use a tactic that allows members to strike after affirmatively stating that they would work would effectively negate the 8(g) notice requirement,'' Swirsky said.