



The July 2014 issue of *Take 5*, “Five Labor and Employment Issues Faced by Health Care Employers,” was written by **Michael F. McGahan**, a Member of the Firm, and Associates **D. Martin Stanberry** and **Daniel J. Green**.



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As the Affordable Care Act and the challenges of reimbursement and funding for health care services drive changes in the health care delivery system and employment in the industry, new issues in labor and employment law are arising. This month’s *Take 5* addresses five of these new and important issues as they impact employers in the health care industry.

1. NLRB’s Proposed Changes to Its Union Election Rules and Approval of Micro-Bargaining Units Increase Health Care Facilities’ Risk of Union Organizing

Pending changes to the National Labor Relations Board (“NLRB”) union election procedures and a number of union-friendly decisions issued by the NLRB have health care providers at a greater risk of union organizing today than in years past.

In February 2014, the [NLRB proposed](#) a number of significant revisions to its current union election procedures. The bottom line is that these proposals, if adopted, would expedite union representation elections to the detriment of employers. Under the current procedures, safeguards guarantee employers an opportunity to dispute important issues about a proposed bargaining unit before the election. The revised procedures would substantially inhibit that opportunity by: (1) shortening the length of time between the

filing of the petition and the hearing, (2) requiring employers to file a detailed statement of position on all applicable issues before the hearing begins (failure to raise an issue will result in waiver), and (3) granting hearing officers the authority to limit the issues presented at the hearing, thereby depriving employers of the opportunity to litigate valid questions prior to the election. Further, the NLRB has proposed amendments that would, after rushing the employer through the pre-election hearing, require the employer to provide the union with the phone numbers, email addresses, work location, shift, and job classification of all eligible voters two days after close of the hearing.

The proposed shortened time frames for elections would also give employers less time to communicate with their employees and to educate their employees about the disadvantages of union representation.

While there is no guarantee that the NLRB will adopt all of these proposals in its final rulemaking, employers should have no expectation that this union-friendly NLRB will heed their concerns. Several of these proposals were previously finalized by the NLRB and subsequently invalidated by the U.S. Court of Appeals for the D.C. Circuit because of a lack of quorum at the NLRB. Now that the NLRB is fully and properly appointed, the procedural barriers have been lifted, and the NLRB will likely finalize some or all of the proposals in short order.

These changes, in conjunction with the NLRB's 2011 ruling in *Specialty Healthcare*, 357 NLRB No. 83, which opens the door to "micro-bargaining" units in non-acute health care facilities, will make it easier for unions to organize by permitting unions to target small groups of employees and then move quickly to an election.

Under *Specialty Healthcare*, the NLRB will certify *any* proposed unit of employees that it deems a "discrete group," even one covering a single job classification. Only if an employer is able to convince the NLRB that other employees who have been left out of the proposed bargaining unit share an "overwhelming community of interest" with the targeted group will the NLRB include them—this is a high burden that is rarely established. For example, in *Specialty Healthcare*, the NLRB found a unit limited to certified nursing assistants to be appropriate, leaving out other non-professional service and maintenance employees at the employer's facility who would have been included in the bargaining unit under previous rulings by the NLRB. *Specialty Healthcare* allows unions to focus organizing efforts on relatively small groups of employees.

Because these changes both expedite the election process and open the door to the organization of micro-bargaining units that are easier for unions to target, employers must be prepared, in advance, to counter a union campaign. Employers should maintain their efforts to avoid unionization by:

- performing ongoing self-audits to ensure compliance with all laws governing the workplace, especially the Fair Labor Standards Act ("FLSA") and Occupational Safety and Health Act ("OSH Act"), so as not to give unions an easy target;

- making sure wages and benefits are competitive;
- ensuring that workplace policies are fair and enforced in an even-handed manner; and
- establishing an internal grievance procedure for employees.

2. Concerns Arise as Physicians Become Employees

As health care systems acquire medical practices and physician groups continue to consolidate, more and more physicians will become “employees,” as that term is used for purposes of federal and state law—a development that may cause new human resources challenges for health care industry employers. As employees, physicians are subject to the same workplace policies and protected by many of the same workplace laws as other employees. For instance, physician employees are permitted to take leave in accordance with the Family and Medical Leave Act (“FMLA”) and are protected from termination or discipline because of their age pursuant to the Age Discrimination in Employment Act (“ADEA”) and from discrimination based on such factors as race, religion, disability, sex, national origin, and all the categories protected by status. Employee physicians have the right to participate in employer-benefit plans under the Employee Retirement Income Security Act. Practicing physicians are, however, exempt employees under the FLSA and, thus, not entitled to overtime compensation.

As a result, employers must use the same care and scrutiny in making employment decisions involving employed physicians as they do for all their employees. Workplace rules and policies need to be carefully drafted to ensure productivity and workplace discipline, while affording physicians the discretion that they require to perform their jobs. Employers expecting an influx of physician employees should review their workplace policies and procedures to ensure that they adequately address their needs in managing a physician workforce.

3. Physicians in Unions? Not as Implausible as You May Think

As physicians become employees of health care systems and large medical practices, they secure rights under Section 7 of the National Labor Relations Act (“NLRA”). Among these protected rights is the right to form or join labor unions and to act collectively, even in the absence of a union. Significantly, the NLRB has long found that interns and residents are employees with the protected right to be represented by a union. See *Boston Medical Center*, 330 NLRB 152 (1999).

In many areas, unions already represent physicians in government-run hospitals. These unions may seek to expand by organizing bargaining units in private hospitals. Different unions are powerful in different regions. In California, the Union of American Physicians and Dentists AFSCME Local 206 is dominant. In Florida, the major player is the Federation of Physicians and Dentists. In New York, the largest physicians union is Doctors Council SEIU. Doctors Council SEIU is poised to expand in health care

workplaces, many of which already have bargaining units represented by 1199 SEIU and the Committee of Interns and Residents SEIU.

The Committee of Interns and Residents SEIU may serve as a particularly effective organizing tool. As many young physicians who were represented by the Committee of Interns and Residents SEIU in their internships and residencies become employed as staff physicians, they may seek continued union representation.

Regulations promulgated by the NLRB in the late 1980s governing union organizing in acute care hospitals specifically identify an all-physicians unit as one of the eight types of bargaining units appropriate for union organizing. In the non-acute care context, the threat of physician organizing has grown due to *Specialty Healthcare*, discussed above, which permits the establishment of micro-bargaining units in non-acute care facilities. As a consequence, non-acute care providers may potentially see union organizing drives aimed at doctors who specialize in a certain area of care, as opposed to a unit of all the doctors employed at the facility, as would be required if they worked in an acute care institution.

Some employed physicians will be excluded from any union organizing. “Employee” is a defined term under the NLRA, and there are a number of exclusions from that definition. Physicians are excluded from protection under Section 7 and, thus, do not have the protected right to form or join unions or engage in collective action with non-union colleagues if they: (1) have an ownership interest in the employing practice; or (2) are supervisors with authority to, among other things, hire, transfer, suspend, discharge, or reward employees; or (3) work at a managerial level because they formulate or effectuate policies for the employer; or (4) are working as independent contractors.

The NLRB’s proposed revisions to the representation election procedures will also disadvantage employers faced with physicians interested in unionizing. As mentioned above, because of the impact of the pending regulations on the length of the campaign period, employers should preemptively self-audit wages and benefits and engage physicians about the disadvantages of unionization before the threat of an election is imminent.

4. Growing Medical Practices Should Be Mindful That the Next Employee They Hire May Be the One Who Subjects Them to Federal Laws

As reimbursement payments shrink and regulation of the delivery of health care tightens, doctors are joining together in larger and larger practice groups. As these groups grow, they must be mindful that hiring more employees may result in their practice becoming subject to the jurisdiction of an increasing number of federal labor and employment laws.

Many federal laws governing the employment relationship will be triggered by the number of employees of the practice group. For example, employers are subject to Title VII of the Civil Rights Act of 1964 (“Title VII”), the Americans with Disabilities Act

(“ADA”), and the Genetic Information Nondiscrimination Act if they have 15 (or more) employees. Employers with 20 or more employees are also subject to the ADEA. Employers with 50 or more employees are subject to the FMLA. Multiple employers with fewer than 50 employees may also become subject to these laws if their operations are integrated to such an extent that two or more separate entities are determined to be a single integrated employer.

Jurisdiction under certain other federal employment and labor laws is based upon participation in interstate commerce. For example, the FLSA, Polygraph Protection Act, and OSH Act apply to all employers engaged in “commerce,” as that word is defined under the respective laws. Others, such as the NLRA, establish jurisdiction over employers that are engaged in interstate commerce (i.e., purchase goods and services from outside the state in which they do business) based upon economic thresholds that occur on a sliding scale differing from industry to industry. For example, jurisdiction is established over hospitals, dental offices, and residential care centers that have a gross annual volume of \$250,000. Jurisdiction is established over nursing homes and visiting nurses associations with a minimum gross annual volume of \$100,000.

As medical practices grow to the point at which federal laws apply, they must understand that certain of these federal laws impose notice posting, recordkeeping, and other affirmative obligations on employers. For example, many federal laws, including Title VII, the FLSA, and the FMLA, require employers to post notices in the workplace that inform employees of their rights under the respective laws. Certain laws, such as the FMLA, also require employers to promulgate policies and forms that facilitate compliance with the substantive provisions of the laws and maintain records for a number of years that demonstrate compliance. Similarly, employers subject to the ADA must promulgate workplace policies regarding, and under certain circumstances engage in, an interactive process with employees who have requested an accommodation for covered disabilities.

5. NLRB Continues Its Efforts to Regulate Employers’ Policies Concerning Communications in the Workplace

With the decline in union membership nationwide, the NLRB has sought to enhance its role in non-union workplaces. Lest employers forget, Section 7 of the NLRA protects the rights of all employees, union or non-union, to discuss amongst themselves or with third parties, their wages, benefits, and other terms and conditions of employment, and it is the NLRB’s responsibility to decide whether employers have violated those rights.

Under Chairman Pearce’s direction, the NLRB has assumed a particularly active role in cases involving non-union workplaces. Specifically, the NLRB has [issued a number of decisions](#) holding non-unionized employers’ social media, confidentiality, and “values and standards” employment policies unlawful on the grounds that a “reasonable” employee would construe them to restrict their participation in discussing terms and conditions of employment with co-workers or unions (i.e., activity protected under the NLRA).

As an example of the extent of these efforts, in April 2014, the NLRB issued a decision in *Hills and Dales General Hospital*, 360 NLRB No. 70 (2014), holding that the employer's policy that provided that employees "will not make negative comments about [their] fellow team members and ... will take every opportunity to speak well of each other" violated the NLRA because it was "overbroad and ambiguous" and may confuse a "reasonable" employee about whether it restricted his or her right to participate in protected activity, such as discussing the terms and conditions of his or her employment. In addition to requiring employers to revoke those policies on the grounds that they would interfere with a reasonable employee's efforts to discuss and disseminate information about wage and terms and conditions of employment (even if those policies had never been enforced), if an employee was terminated for violating such rules, the NLRB would also order reinstatement and back pay.

More recently, in *Purple Communications*, 21-CA-095151, the NLRB has set in motion a course to review and possibly overturn its 2007 decision in *Register Guard*, 351 NLRB 1110, which established that an employer can prohibit employees from using company email or company technology (smartphones, computers, etc.) to solicit support for unions if the employer also prohibited employees from using such resources to solicit for other outside organizations. Conversely, if an employer permitted the use of employer-provided technology to make non-business solicitations on behalf of other outside organizations, *Register Guard* held that the employer could not discriminate against an employee for using such technologies to enlist his or her co-workers' support of a union.

In reviewing the propriety of this holding, the NLRB has [asked that interested third parties submit briefs](#) regarding whether it should reconsider *Register Guard's* holding that employees do not have a statutory right to use their employer's email system for participation in activities protected under the NLRA. We will be providing updates as to the outcome of this case.

In light of the NLRB's recent focus on handbook policies and its ongoing efforts to expand its sphere of influence into non-unionized workplaces, employers should:

- be mindful that any attempt to restrict employee use of social media (on non-work devices and systems) to express views on terms and conditions of employment or from discussing ongoing internal investigations amongst themselves or outside of work may result in an employee filing a charge with the NLRB;
- self-audit their policies and procedures to assess the potential for an NLRB charge, based on overbroad, inappropriately worded policies; and
- assess the practical application of email and other electronic communications policies to ensure that they are not permitting solicitations by employees for personal reasons that might open the door to an NLRB-

enforced requirement to let employees use such resources for the purposes of union organizing.

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