

## The NLRB Brings Change to Healthcare Employers

### **Will Landmark Board Action Reinvigorate Union Organization Efforts?**

#### Introduction

The Obama Administration initially experienced difficulties translating its message of change into action at the National Labor Relations Board. The Board lacked a quorum until March 2010 (and the White House achieved that result through recess appointments). Since then, and particularly in 2011, the Board aggressively implemented actions under the National Labor Relations Act that materially change Board precedent on a host of issues.

This Article discusses three Board actions taken between August and December 2011 that incentivize unions to increase their efforts to organize healthcare employees:

- The decision to adopt the “community of interest” method to determine an appropriate bargaining unit for healthcare employees employed by non-acute care employers;
- The publication of a rule requiring employers to post a notice regarding employee rights under the NLRA;
- The amendment of Board Rules to change the election procedures for union representation.

Absent intervening events (judicial and/or political), these actions will dramatically change labor relations for many healthcare employers.

#### What Is An Appropriate Bargaining Unit For Healthcare Workers In Non-Acute Care Workplaces?

When a union files a petition for an election to represent a group of workers, a fundamental question asked by any Board Regional Director is whether the petitioned-for unit is “appropriate” under Board regulations and decisions. In 1989, the Board adopted 8 specific appropriate bargaining units for acute care hospitals - but expressly excluded from its rule “facilities that are primarily nursing homes, primarily psychiatric hospitals, or primarily rehabilitation hospitals”. By definition, excluded healthcare facilities also include ambulatory and outpatient clinics, and dialysis centers.

#### *The Park Manor Standard*

The Board’s 1991 decision *Park Manor Care Center*, 305 NLRB 872, first applied the “empirical community of interest” test to determine appropriate bargaining units for all health care facilities other than acute care hospitals. The standard incorporated what are known as “community of interest” factors with

other elements such as the acute care methodology and prior cases. The *Park Manor* standard tended to exclude employees only when their interests were sufficiently distinct from the group described in the union's petition. Employers generally preferred this result because, with a larger group, the union required more individual votes to secure the majority necessary to win recognition as the representative of the proposed bargaining unit.

*The Board Overrules the Park Manor Standard and Limits Employer Challenges to the Appropriateness of the Proposed Unit*

On August 26, 2011, the Board overruled *Park Manor* in *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB 83, in favor of the community of interest standard. The basic factors applied under this test are the similarity of wages, benefits, working conditions, skills, and supervision. Under this standard, the Board emphasized that it needed only to find *an* appropriate unit – not *the most* appropriate unit. The Board essentially announced that, if the petitioned-for unit is appropriate, the inquiry ends. The smallness of a proposed unit “is not alone a relevant consideration”.

The Board also clarified that if a party opposes the petitioned-for unit by contending that it should be more inclusive, that challenge will not prevail unless it shows an “overwhelming” community of interest between the initially proposed group and the additional employees sought to be added to the unit. Meeting this test requires proof that there is no legitimate basis to exclude the additional employees, and that the commonalities between the 2 groups “overlap almost completely”.

*A Dissent and a Prediction*

Board Member Hayes wrote that the majority's decision was prompted by “the purely ideological purpose of reversing the decades-old decline in union density in the private American Workforce”. The approach adopted by the Board raises the threat of unit proliferation, fragmenting the workforce. Hayes said the decision would encourage unions to engage in “incremental organizing in the smallest units possible”. Going forward, Hayes predicted that it will be “virtually impossible” to prove that any excluded employees should be included in the unit.

Can The Board Compel Employers To Post A Notice Regarding NLRA Rights?

On August 30, 2011, the Board published a rule requiring employers to post a notice informing employees of their rights under the NLRA. The required information disclosure includes a general description of employee rights to act collectively and the protections afforded to prevent interference with those rights; specific rights regarding solicitation and distribution and union insignia; and proscriptions against illegal conduct by employers and unions. The Board's rule also provides an enforcement mechanism to compel employer compliance.

## *Controversial Requirements Prompt Lawsuits & Delay Implementation*

Dissenting Member Hayes projected that the Board's rule will affect as many as 6 million employers. The most controversial aspects of the Rule are: (a) a requirement for employers to post the notice on its intranet or internet site if it uses either customarily to communicate with its employees regarding personnel rules or policies; (b) a provision that failure to post the notice is potentially an unfair labor practice; and (c) a provision to toll the Board's 6-month statute of limitations for filing a ULP charge if the employer has failed to post the notice.

The Rule has been challenged in 2 separate federal cases filed in September 2011. The plaintiffs' principal arguments against the Rule are: (a) lack of statutory authority to either compel employers to post the notice or punish them for failing to post the notice; (b) lack of statutory authority to toll the 6-month statute of limitations applicable to ULP charges; and (c) violation of employers' First Amendment rights. At the time this article was prepared, cross motions for Summary Judgment were pending in both actions.

The Board has postponed the Rule's effective date twice; currently, the Rule is to become effective April 30, 2012.

### How Will The Board's Rule Amendments Change Representation Elections?

On December 22, 2011, the Board published several Amendments to its rules controlling election procedures for union representation. The 2-member majority explained that the changes, set to become effective April 30, 2012, are intended to streamline Board procedures to facilitate expeditious resolution of representation questions.

As support for the need for change, the 2-person Board majority noted that the election rules as currently written contain elaborate procedures for contested issues in representation elections. The rules currently set aside significant periods of time to accommodate utilization of these procedures. As only 10% of representation cases fail to proceed by a written election agreement between the parties, the Board majority concluded that the rules unnecessarily delay the election in the other 90% of cases. The Board underscored its position by noting that voting takes place in 50% of all elections more than 38 days after the petition for representation is filed with a Regional Director.

The new rules significantly curtail the scope of the pre-election hearing that precedes a Regional Director's decision and direction of election. In addition to restricting the evidence presented at the hearing, the rules eliminate the parties' right to request pre-election Board review of the Regional Director's decision, deferring all review requests until after the election. Corresponding to this change, the rules eliminate the current recommendation that the Regional

Director not schedule an election sooner than 25 days after the decision and direction of election.

On December 20, 2011, the U.S. Chamber of Commerce commenced suit in federal court, contending that the restrictions on pre-election hearings and Board reviews violate the NLRA. But the Chamber's most forceful attack is pragmatic: the rule changes will significantly reduce the amount of time between the date that the representation petition is filed and the date that the election is held. This reduction of time will restrict an employer's counter-campaign opportunities. At the time this article was prepared, cross motions for Summary Judgment were pending in the action.

Member Hayes contends that the true goal of the election rule changes is to "...make it virtually impossible for an employer to oppose the organizing effort either by campaign persuasion or through Board litigation". The Board majority has denied that elections will be held in as short a time period as 10 days. However, there is little reason to doubt that, if upheld, the amended rules will reduce the amount of time for employers to conduct counter-campaigns to a span as short as 15-21 days.

#### What Does The Immediate Future Hold For Healthcare Employers?

##### *"Micro-Units" Appropriate for Representation*

*Specialty Healthcare* affords unions greater flexibility to decide which workers to organize, raising the prospect for discrete units of healthcare employees formed along departmental lines. This potential raises the risk of unit proliferation: multiple units that may be represented by more than one union. The associated transactional costs include an increased drag on resources for bargaining and strike threats. An attendant risk is incremental organization; the election of a union to represent one unit of workers could lead to a subsequent election for another unit. All of these consequences will pressure healthcare employers to allocate resources for proactive measures that include analyzing the community of interest of their employees and reformulating post-election strategies.

##### *"Snap" Elections*

Unions already win a majority of elections to represent healthcare employees. It is reasonable to assume that the judicial challenges to the Board's Notice Posting Rule will not prevail, at least not entirely. Just as probable is the possibility that the Board's Election Rule changes will survive judicial scrutiny, at least in part and, more importantly, to the extent that the amount of time between the filing of the petition for representation and the election will be materially reduced. That outcome will produce two immediate consequences for healthcare employers: first, increased emphasis on deterring organization at the pre-petition

level; and, second, intensified processes to respond more rapidly to filed representation petitions.