

Labor Law Update for Healthcare Employers

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Topics

- Union activities and trends
 - Updates re: health care unions
 - Recent healthcare settlements, strike activities
 - Developments re: Nurse Staffing Legislation
- Legal Developments
 - Updates re: NLRB decisions, status of NLRB
 - Wage and Hour cases

Unions in the Workplace

- Nationally, unions represent less than 7% of the employees in the private sector
- Contrary to national trends, unions are finding success organizing healthcare workers
- Unionization of physicians
- NLRB decisions assisting union organizing
- Political power of unions

Key Unions in Healthcare Organizing

- National Nurses United (NNU)
 - 185,000 registered nurse members (Source: NNU.org)
- Service Employees International Union (SEIU)
 - 1.1 million members in healthcare, with over 110,000 nurses and 40,000 doctors (Source: SEIU.org)

Strikes in Healthcare

- One to three day strikes are in vogue
 - Quincy Medical Center, Massachusetts (RNs):
 - 1-day strike, April 2013, Mass. Nurses Assn./NNU
 - Sutter Health, California (RNs):
 - 9 limited duration strikes, most around holidays, 2011-2013, CNA/NNU
 - Northside Medical Center, Ohio (RNs):
 - 1-day strike, September 2013, Ohio Nurses Assn.

Strikes in Healthcare

- HCA affiliated San Jose Hospitals (RNs):
 - 3 limited duration strikes over Thanksgiving and Christmas 2012, Memorial Day 2013, CNA/NNU
- Six hospital systems, Minnesota (RNs):
 - 1-day strike 2010, MNA/NNU
- Union efforts to coordinate bargaining involving multiple hospitals
- 10-day strike notice requirement under the National Labor Relations Act

Key Issues

- Staffing
- Concessionary Hospital Proposals
- Money and Benefits

Recent Nursing Settlements

- Sutter Health (California), September 2013, CNA/NNU: 6% over four years
- Dignity Health (California and Nevada), August 2013, CNA/NNU: 7% over four years
- St. Louis University Hospitals (Missouri), June 2013, NNU: 8.5-9.5% over three years
- John Muir Mount Diablo Hospital (California), CNA/NNU: 7% over three years

Recent Nursing Settlements

- Twin Cities Hospitals (Minnesota), June 2013, MNA/NNU: 4.5% over three years
- St. John's Hospital (California), October 2012, CNA/NNU: up to 12% over two years
- University of Mass. Medical Center (Mass.), July 2013, MNA/NNU: 3% over three years (includes staffing ratio language)

State Mandatory Staff Ratios

- California
 - Only state to have adopted mandatory ratios for nurses in hospitals
 - Law passed in 1999, implemented in 2004, required Department of Health to establish specific ratios
 - NNU claims that ratios lead to better results; evidence does not appear to support the claim
 - Costly for hospitals to implement

Legislative Alternatives to Mandatory Ratios

- Nurse staffing plan laws (7 states)
 - require hospitals to adopt staffing plans that have been developed with input by direct care nurses and set staffing based on patient acuity. CT (2008), IL (2007), NV (2009), OH (2008), OR (2005), TX (2009), WA (2008)
- Mandatory disclosure of nurse staffing levels (6 states)
 - require hospitals to make public their nurse-to-patient ratios or staffing plan. MN (2013), IL (2003), NJ (2005), NY (2009), RI (2005), VT 2006, MA (voluntary)

Legislative Efforts to Pass Mandatory Ratios

- **Federal**

- Nurse Staffing Standards for Patient Safety and Quality Care Act (HR 1907)
- National Nursing Shortage Reform and Patient Advocacy Act (S 739)
- Both laws would establish minimum nurse-to-patient ratios, require hospitals to implement and make public nurse-to-patient staffing plans, provide whistleblower protections and penalties of \$25,00 for each violation

Legislative Efforts to Pass Mandatory Ratios

- **State**

- Legislation that would require nurse staffing ratios was introduced during the 2012-2013 legislative sessions in FL, IA, MI, MN, NJ, NY, TX, Washington DC (City Council)
- Mass. Nurses Assn. has started a ballot initiative to put mandatory ratios before voters

Supreme Court to Decide Validity of NLRB Appointments

- Supreme Court will decide whether President Obama's appointments to the NLRB were valid because they were made while the Senate was in a pro forma session, and not while the Senate was in "recess."
- 1,200 NLRB cases in doubt

Bargaining Units

- Non-Acute Care
 - The NLRB in *Specialty Healthcare*, 357 NLRB No. 83 overruled decades of precedent by allowing employees to form smaller bargaining units such as units that consist of only one department or possibly even one job classification.

Bargaining Units

- Acute Care (NLRB Rule)
 - Registered Nurses
 - All Other Professionals
 - Technical Employees
 - Service and Maintenance Employees
 - Physicians
 - Office Clerical Employees
 - Skilled Maintenance Employees
 - Guards

Proposed NLRB Election Rules

- Currently
 - the Regional Director conducts a full representation hearing to decide issues related to proposed bargaining unit composition
 - Matter can be appealed to the Board
 - Time from petition to election is generally about 42 days
- Proposed Rule
 - Board aims to cut time between petition and election significantly
 - Elections will not be delayed to permit time for a pre-election appeal to the Board.
 - Board’s review of post-election appeals is “discretionary” and limited to cases that present a “serious issue for review”
 - Was enjoined by federal court in May, 2012 due to lack of quorum

NLRB: Confidentiality of Witness Statements

- Board reversed 34 year-old precedent exempting witness statements gathered from an employer's internal investigation from disclosure to unions. *Piedmont Gardens*, 359 NLRB No. 46 (2012).
- Going forward, employers must apply a balancing test set forth in *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979), when arguing that there is a confidentiality interest in protecting witness statements from disclosure
- Difficult standard for employers

NLRB: Collection of Union Dues

- Board reversed a rule in place for 50 years, determining that an employer's obligation to check off (i.e. withhold) union dues from employees' wages does not terminate upon expiration of a collective-bargaining agreement that establishes such an arrangement. *WKYC-TV, Inc.*, 359 NLRB No. 30 (2012)

NLRB: Union Involvement in Employee Discipline

- Board reversed a long-standing precedent, holding that an employer whose employees are represented by a union must bargain with the union before imposing discretionary discipline on a unit employee. *Alan Ritchey, Inc.*, 359 NLRB No. 40 (2012).

NLRB: Employee Use of Social Media

- Employees' Facebook comments about another employee's criticism of their job performance were protected concerted activity under Section 7 of the National Labor Relations Act. Thus, the employer could not terminate the five employees for their Facebook comments. *Hispanics United of Buffalo, Inc.*, 359 NLRB No. 37 (2012).

NLRB: Employer Work Rules and Policies

- Board found certain employer policies dealing with confidentiality were unlawful based upon the fact that employees would understand the provisions to restrict discussions on their wages and other conditions of employment. *Costco Wholesale Corp.*, 358 NLRB No. 106 (2012).

NLRB: Employer Work Rules and Policies

- The Board found the following rules in an employee handbook to be unlawful:
 - Prohibited having a conflict of interest with the hotel
 - Prohibited behavior that violated common decency or morality or publicly embarrassed the hotel

NLRB: Employer Work Rules and Policies

- Prohibited insubordination or failure to carry out a job assignment

Remington Lodging and Hospitality, 359 NLRB No. 95 (2013)

NLRB: Private Meeting with Human Resources Manager

- The Board found that a human resources manager's questioning of an employee about how she and others felt about their supervisor's management style was coercive and in violation of the NLRA. *Grand Canyon Education*, 359 NLRB No. 164 (2013).

Recent Wage and Hour Cases

- FLSA violations: Recent cases continue pattern of class action lawsuits against health care organizations which include claims for back pay, liquidated damages, attorneys fees
- “Regular Rate of Pay”
 - Harris Health System, Houston, TX paid \$4.12 million in overtime violations in 9/13
 - Failed to include incentive pay, longevity pay, shift differential in “regular rate of pay” for purposes of computing overtime
- On duty meal breaks
 - SSM Health Care of WI, paid \$3.5 million in overtime violations in 7/13
 - Hospital had automatic 30 minute deduction for meal breaks but nurses worked through lunch

Questions
