

The Health Care Employer

An update on current labor, employment, benefits and immigration issues concerning the health care industry

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UNION REPRESENTATION

Health Care Employers Gain Victory in Supreme Court on Supervisory Status of Nurses

Before the close of its 2001 session, the U.S. Supreme Court issued a ruling of great importance for health care employers interested in protecting their management rights. In the case *NLRB v. Kentucky River Community Care, Inc.*, the Court held that the National Labor Relations Board's test for determining whether a registered nurse exercises sufficient "independent judgment" to be considered a "supervisor" was too restrictive. This ruling will make it easier for health care providers to prove their nurses are "supervisors" when they direct less-skilled staff in the delivery of services. Jackson Lewis attorneys Thomas Walsh and Thomas McDonough filed a "friend of the court" brief with the Supreme Court on behalf of the American Health Care Association in the case. [*NLRB v. Kentucky River Community Care, Inc.*, U.S. Supreme Court Docket No. 99-1815 (May 29, 2001).]

Under federal law, supervisors are excluded from bargaining units and may be prohibited from supporting unionization. Supervisors are defined as employees who are authorized to use independent judgment when directing other employees (i.e., they are empowered to use their own discretion). As a result, there is a generally recognized conflict of interest between supervisory duties and union loyalties.

Health care employers have long opposed the inclusion of registered nurses in unions because they seemingly fit this definition of supervisor. Despite this apparent fit, the Board has

often concluded that registered nurses do not exercise the requisite "independent judgment of a supervisory nature" when directing less-skilled health care staff in delivering services. Instead, the Board has reasoned that if a nurse's judgment is of an ordinary professional or technical nature, it does not rise to the level of independent judgment required by law.

Labor Board's Test Rejected

In *Kentucky River*, the union sought to include six registered nurses in a bargaining unit consisting of various other health care staff. The Board, applying its restrictive test, determined that the nurses were not supervisors because their judgments when directing less-skilled employees were based on their professional and technical expertise, not their connection with management. As a result, the Board ruled that the nurses could engage in union organizing activities and be included in the bargaining unit with other health care staff. On appeal, the federal appeals court rejected the Board's "independent judgment" test reasoning that directing other staff does not become merely routine by virtue of the nurses' professional training and expertise. Accordingly, the appeals court refused to enforce the Board's decision.

Agreeing with the lower court, the Supreme Court rejected the Board's independent judgment test. Writing for the Court, Justice Antonin Scalia reasoned, "[w]hat supervisory judgment worth exercising, one must wonder, does not rest on 'professional skill or experience.'" Moreover, the Court noted that the Board's restrictive interpretation applied only to nurses,

thereby introducing a categorical exclusion that is not suggested in the Act. As a result, not only was the Board's decision in *Kentucky River* rejected, but the Board's independent judgment test was rejected as too restrictive.

What the Decision Means

With unions targeting nurses and other health care employees in some of the most active organizing efforts in the country, this ruling by the Supreme Court strengthens the legal position of employers seeking to exclude supervisory nurses from bargaining units and prevent them from coercing staff into supporting unions. The decision may impact organizing among physicians, as the collective bargaining arm of the American Medical Association announced that it was calling off further organizing efforts among private sector doctors. PRN, or Physicians for

Responsible Negotiation, characterized the decision as "a major setback," saying it reopens the question whether doctors would also be considered supervisors when they exercise ordinary professional judgment in directing less-skilled health care workers.

In addition to assisting health care employers resist organizing efforts, this decision should enable health care employers successfully to challenge prior decisions by the Board based on its now defunct independent judgment test. Review of such decisions may be obtained with the assistance of legal counsel. For more information, please contact: Thomas Walsh in White Plains, NY at (914) 328-0404; or Roger Gilson in Stamford, CT at (203) 961-0404.

100,000-Member Nurses Union Votes to Affiliate with AFL-CIO

In a troubling sign for health care employers, the United American Nurses, the 100,000-member union arm of the American Nurses Association, has voted to affiliate with the AFL-CIO, raising its number of health care employee members to 1.2 million. Excerpts from the UAN press release are below:

Washington, DC -- Registered nurse delegates of the United American Nurses (UAN) National Labor Assembly voted to affiliate with the AFL-CIO, forming an historic partnership with the federation's 64 unions. AFL-CIO President John Sweeney addressed UAN delegates and congratulated nurses on their unanimous vote to affiliate with the AFL-CIO at Washington's Omni Shoreham Hotel this afternoon.

The ANA is the largest and oldest professional association of registered nurses in the country and has had no formal external labor affiliation until this time.

"This new partnership with the AFL-CIO and its member unions can have a tremendous impact on health care in this country," said UAN President Cheryl Johnson, RN. "With their vote to accept our AFL-CIO charter, UAN delegates sent a message loud and clear that we are ready to roll up our sleeves and get down to the business of solving together the patient care crisis in this country."

"Together, the UAN and unions of the AFL-CIO can provide a powerful and effective alliance that will take on the current health care system's inadequacies, unfair policies and unsafe conditions that plague both American families and health care workers," said AFL-CIO President John Sweeney.

Maine Governor Vetoes Legislation to Prohibit Funding for Union-free Training

On June 15, 2001, Maine Governor Angus King vetoed a bill aimed at preventing the state's hospitals and nursing homes from receiving Medicare, Medicaid or any state administered funds as reimbursement for union avoidance activities. Noting that the bill represented "an impermissible interference

with federal law," Governor King stated that its language was overbroad and "could have an adverse impact on health care employers who seek to hold otherwise legitimate and lawful meetings with their employees." Because the bill was narrowly passed by the legislature (76-55 in the House and 18-16 in the Senate), it is unlikely that Governor King's veto will be overridden.

STRIKES AND SETTLEMENTS

Connecticut Nursing Home Strike Ends With A Whimper While Negotiations Continue

On June 7, the New England Health Care Employees Union, District 1199, came to terms with the last of four companies that operate 21 nursing homes in Connecticut, thereby ending the state-wide strike that had affected 39 homes. Strikers at all of the homes had already voted to return to work on May 17, but many homes resisted their immediate reinstatement. In fact, a number of the homes agreed to reinstate strikers only to positions that were not yet filled by permanent replacement workers.

Union Fails to Achieve Goals

The union's return to work was a pragmatic response to the nursing homes' apparent ability to withstand the strike indefinitely with permanent replacement employees to fill positions vacated by strikers. These same factors

played a role in the union's willingness to agree to contract terms that fell far short of their demands. The contracts that have been settled to date were separately negotiated but share a number of common features: four-year contract; no staffing requirements; no neutrality language; reduced wage increases; no retroactivity of wage increases; no wage increases before January 2002.

In some contracts the union agreed to delete the wage scales, which may have the effect of reducing wage levels over time. While the union did achieve agreement on limited increases (1%) in contributions to its benefit funds, it also accepted substantial increases in employee health insurance contributions in some homes that do not participate in the union's health and welfare fund.

Finally, the union did not succeed in raising its second and third-tier contracts ("B" and "C" contracts) to the level of its first tier contracts (the "A" contracts).

Editor's Note: The trend towards coordinated expiration dates and large-scale strikes is just beginning. SEIU 1199 is currently setting the stage for a similar showdown in New York State, where the union has been negotiating contracts that are simultaneously set to expire next year on April 1, 2002. Every

health care provider, union and non-union, should study the Connecticut strike of 2001 to learn how to withstand this tactic and achieve a favorable settlement. You can be sure that organized labor and its political allies will use the experience to learn how to wage a more successful campaign the next time.

Mandatory Overtime Legislation Gaining Momentum

Staffing, overtime, and greater participation in patient care decision-making are among the most common themes in strikes, union contract negotiations and organizing efforts for acute care and long term care nursing staff. The State of Maine recently enacted the nation's first law limiting the amount of mandatory overtime that nurses may be required to work. Under the new law, nurses who refuse to work more than 12 consecutive hours may not be disciplined. The only exception is if there are "unforeseen emergency circumstances when overtime is required as a last resort to ensure patient safety." In such emergency situations, however, nurses who work in excess of 12 consecutive hours must receive at least 10 hours off before resuming work. According to the Maine State Nurses Association, the union that pushed for the

law's passage, this law will prevent hospitals from using overtime in lieu of increased staffing.

While Maine is the first to enact such a law, several other states are considering similar legislation. In Pennsylvania, a bill drafted by the Pennsylvania State Nurses Association was introduced in the State Senate to prohibit mandatory overtime practices. The overtime and staffing issues have drawn national attention and were the focus of a national lobbying effort in conjunction with the second annual meeting of delegates of the United Nurses Association, the union arm of the American Nurses Association, which has recently voted to affiliate with the AFL-CIO (see related article this issue).

UNION ACTIVITY ONLINE

Internet Is Powerful Union Tool for Communicating with Health Care Employees

Health care settings traditionally have posed challenges for union organizers when communicating with employees because of the special rules restricting access to patient care areas and because of 24-hour shifts and rotational schedules. All of that has changed dramatically with the advent of the Internet through union web sites, online discussion areas, and email list serves.

Internet communications have supplied the union's arsenal with a powerful tool, providing easy and inexpensive access to hard to reach employees. However, management also can benefit by the information that unions are posting on their web sites and in other public online areas.

Among the richest sources of Internet information on union activities for health care employers are the following web sites:

- American Medical Associations' Physicians for Responsible Negotiation (www.prn.org);

- Service Employees International Union (www.seiu.org);
- American Federation of State, County and Municipal Employees (www.afscme.org);
- American Nurses Association's United American Nurses (www.ana.org/uan); and
- various state nursing associations, such as the Pennsylvania State Nurses Association (www.pсна.org).

The National Labor Relations Board, which has taken the position that a policy restricting the use of employer provided computers "for company business only" violates the National Labor Relations Act. The Board's general counsel has issued complaints against employers where employees have been disciplined for using company computers for union activity, such as announcing an upcoming union election.

Health care employers must be vigilant about what unions are doing on the new frontier of online communications. The *Health Care Employer* will assist your efforts by regular monitoring of union web sites and will report the results in "Union Activity Online."

PRACTICING PREVENTION

Management Cannot Take Supervisory Support For Granted

By Patrick L. Vaccaro

Many health care employers when faced with union organizing activity are "shocked" to learn that the attitude of the facility's first line management and supervisory staff often ranges from indifference to outright support and encouragement of the activity.

What is truly "shocking" is that a facility needs a "crisis situation" to see the extent of loyalty and commitment of its supervisors.

Few "truisms" are more true: it is virtually impossible to stay union free without a supervisory team in sync with the organization's commitment to staying the course and in alignment with the philosophy of top management.

This loyalty, dedication and commitment, however, cannot be taken for granted and must be earned. Some steps to consider:

1. First, be clear you know who your supervisors are; e.g., do they meet the test for supervisory status under the National Labor Relations Act. This is particularly true with the Head or Charge Nurse classification.
2. Second, make your supervisors "feel" they are a part of the management team. Do you recognize, respect and celebrate their status? If not, do not be surprised if they align themselves with their "employees".
3. Third, give supervisors skills training and other tools to do their jobs effectively. When you treat supervisors as important players, they will respond.
4. Fourth, recognize and fulfill supervisors' legitimate needs. We often ignore the fact that they have special "needs".

Facility management can and should expect supervisors to act "supervisory" as the voice and representation of management. By taking these steps, management's expectations can become a reality.

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