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EMPLOYER

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

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It Takes a Sharp Eye to Spot “Protected Concerted Activity”

he federal appeals court in Atlanta has enforced a National Labor Relations Board (“NLRB”) decision finding that a non-union, in-home health care services company violated the National Labor Relations Act (NLRA) by terminating an employee for engaging in protected concerted activity. National Labor Relations Board v. CSS Healthcare Services, Inc., No. 10-13736 (11th Cir. Mar. 30, 2011).

CSS Healthcare had hired Victoria Torley to perform some “startup” work for a subsidiary health program. Torley’s assignment was to seek accreditation and grants for the new program. She was paid by the hour and received direction from and reported to the company’s CEO. Once the accreditation application was filed, Torley was told to take a hiatus with the understanding that she would be called back if and when additional work became available. Two weeks later, CSS invited Torley back to work as a behavioral specialist.

After Torley began attending staff meetings at CSS, she started supporting workplace complaints raised by other employees. She told other employees at a staff meeting that they would have more leverage to get their complaints remedied if they “formed a collective bargaining unit.” Torley then approached the CEO and informed him that she and other employees had formed a collective bargaining unit. Shortly thereafter, the CEO found that the accreditation application Torley submitted for the subsidiary health program had been denied. The CEO terminated Torley based on her failure to get the new program accredited.

Torley filed a charge with the NLRB against CSS Healthcare, alleging she was unlawfully terminated for engaging in the protected concerted activity of attempting to organize her co-workers. CSS argued that Torley was not protected by the NLRA because the law only applies to “employees” and Torley was an “independent contractor.”

The Administrative Law Judge, the NLRB and, on review, the U.S. Court of Appeals for the Eleventh Circuit agreed that Torley was an employee, that she engaged in protected concerted activity, and that she was terminated unlawfully as a result of that activity. Further, they agreed that the company’s stated reason for terminating Torley was pretextual.

CSS Healthcare is one in a growing number of cases where totally non-union employers have been forced to defend themselves at the NLRB and were found to have violated the NLRA in reacting to an employee engaged in protected concerted activity, even when no union is on the scene. Whether unionized or not, your organization and its supervisors need to understand the limits of employees’ right to engage in “protected concerted activity,” as well as management’s lawful responses to such activity.

Practice Tips: What does “protected concerted activity” look like? As in CSS Healthcare, protected concerted activity need not involve a labor union or employees talking about joining a labor union. Examples of protected concerted activity include:

- Employees wearing buttons advocating a particular cause;
- Employees making statements that appears to attack their employer’s reputation or the employees’ supervisor, including on Facebook and other social media sites;
- Employees complaining about employer work policies or terms and conditions of employment; and
- Employees handing out leaflets in the parking lot while off duty.

To avoid potential unfair labor practice charges, health care employers who suspect employees are engaging in protected concerted activity should immediately contact the Jackson Lewis attorney with whom they regularly work before responding to such activity.
Third-Party Contract Workers Can Handbill on Company Property

The National Labor Relations Board ("NLRB") has ruled that employees of third-party contractors and vendors may handbill on company property in non-working areas. It reasoned that the vendor’s employees’ right to engage in union activity outweighed the right of the primary employer to prohibit non-employees from distributing materials on its property. New York New York, LLC, 356 NLRB No. 119 (3/25/11). This ruling will have a profound impact on health care employers as they regularly engage contractors or vendors, such as agency nurses or nurses’ aides, food services and environmental or cleaning services, to perform selected health care and ancillary services.

Employers may prevent their own off-duty employees from accessing interior areas of its property. However, in the case before the NLRB, the employer could not bar the contractor’s employees from accessing the interior areas of the property to engage in union solicitation and distribution of literature because there was no evidence that the company maintained a rule barring its own off-duty employees from returning to interior areas of the facility. The Board found that the company could not restrict off-duty vendor employees from remaining inside the property or returning to interior, non-working areas for the purpose of union solicitation and distributions if it did not maintain and enforce a rule preventing its own employees from doing so.

Ambiguous Handbook Policies Leads NLRB to Overturn Union Decertification Election

The National Labor Relations Board ("NLRB") has overturned a decertification election because it found that certain policies in the employer's handbook could have a chilling effect on employees' rights despite the absence of any proof that employees in fact were adversely affected by the rules. Jurys Boston Hotel, 356 NLRB No. 114 (3/28/11). The policies in question prohibited employees from loitering after their shift, soliciting and distributing materials on company property, and wearing emblems or buttons on their uniforms.

The loitering policy was found unlawful under the National Labor Relations Act ("NLRA") because it could be read to bar off-duty employees access to a facility's exterior non-working areas, such as a parking lot. The solicitation and distribution policy was ruled overbroad because it could be read to prohibit union-related solicitation during non-working times and distribution in non-working areas.

Finally, the uniform policy was found overbroad because employees may wear union-related buttons and emblems, subject to several exceptions (such as patient care and safety), none of which applied to this employer.

The employer had never disciplined employees for violating its rules and had never enforced any rules against union activity. In fact, the employer even took a “neutral, if not positive,” view about the union during the election period. In the handbook, the employer also specifically informed employees of their rights under the NLRA, “which supersede any possible interpretation of the rules in the handbook.”

Despite these factors, the NLRB found that the “mere maintenance” of these rules could have affected the results of the union decertification election because they “could be reasonably construed” by employees as precluding them from communicating about the union at their workplace. The Board ordered a second election.

This case highlights the importance of maintaining unambiguous and lawful handbook rules. Even if a union loses an election to represent employees at a health care facility, it could succeed in overturning the results of the election and force a re-run if the employer's handbook contains certain unlawful or ambiguous policies.

Practice Tips: Before there is any union-organizing activity, health care employers should review their solicitation/distribution and off-duty access rules to ensure they are lawful and consistently enforced. In addition, employers who contract with third-party vendors should consider doing the following:

- Ensure their vendors’ contracts contain language requiring the vendor to apply and enforce certain property rules as to their own employees.
- Train their own managers concerning these rules and how to enforce them.
- Train their managers to spot and report to top management any violations by a vendor’s employees, so that they can notify the vendor immediately to correct the problem. It is the vendor’s responsibility to supervise its own employees.
Medical Residents Stipends Subject to FICA Taxes

The question of whether medical residents are "students" exempt from FICA taxes (under 26 U.S.C. § 3121(b)(10)) received a unanimous “no” answer from the U.S. Supreme Court. 

_Mayo Fdn. for Med. Educ. & Research v. United States_, 562 U.S. ___, 131 S. Ct. 704 (2011). In reaching this decision, the Court relied heavily on an Internal Revenue Service (“IRS”) regulation interpreting the “student exemption.” It stated that individuals regularly scheduled to work at least 40 hours per week cannot claim the exemption.

Chief Justice John Roberts wrote, “Mayo does not dispute that the Treasury Department reasonably sought a way to distinguish between workers who study and students who work. Focusing on the hours an individual works and the hours he spends in studies is a perfectly sensible way of accomplishing that goal.” Health care employers should review their pay practices with respect to doctors in residency programs, and the hours spent working versus studying, to ensure appropriate tax withholdings are made.

2010-2011 NNU and Affiliate Strikes and Threatened Strikes

The National Nurses United (“NNU”) union was founded in December 2009 when three nurses’ unions (California Nurses Association, United American Nurses, and Massachusetts Nurses Association) merged. Since the unification, many state unions have affiliated with the NNU. It now has more than 150,000 members. The following is a chart of strikes by the NNU and its affiliate state unions since 2010.

<table>
<thead>
<tr>
<th>Facility</th>
<th>Strike Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Temple University Med. Center (PA)</td>
<td>3/31/10 (28 days)</td>
</tr>
<tr>
<td>University of California Hospital</td>
<td>6/10/10 (prevented)</td>
</tr>
<tr>
<td>Minnesota Hospitals (largest nursing strike in history)</td>
<td>6/10/10 (1 day)</td>
</tr>
<tr>
<td>North Adams Regional (MA)</td>
<td>9/3/10 (averted 9/2)</td>
</tr>
<tr>
<td>Children's Hospital Oakland, CA</td>
<td>10/12/10 (3 days)</td>
</tr>
<tr>
<td>Eastern Maine Med. Center (Bangor)</td>
<td>11/23/10 (1 day)</td>
</tr>
<tr>
<td>Wilkes-Barre Hospital (PA)</td>
<td>11/24/10 (averted)</td>
</tr>
<tr>
<td>Wilkes-Barre Hospital (PA)</td>
<td>12/23/10 (1 day)</td>
</tr>
<tr>
<td>Washington Med. Center (DC)</td>
<td>11/24/10 (averted)</td>
</tr>
<tr>
<td>Washington Med. Center (DC)</td>
<td>3/4/11 (did not return until 3/9 because of Temporary Agency Contract)</td>
</tr>
<tr>
<td>Children's Hospital Oakland, CA</td>
<td>5/4/11 (5 days)</td>
</tr>
<tr>
<td>Tufts Medical Center (MA)</td>
<td>5/6/11 (averted, scheduled for 1 day)</td>
</tr>
</tbody>
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Health Care Worker Conscience Regulations Narrowed

The Department of Health and Human Services (HHS) has narrowed its 2008 "Bush era" final rule on health care worker conscience laws effective March 25, 2011.

The 2008 final rule, entitled, "Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law," was promulgated by HHS late in the Bush Administration to clarify that federal "health care provider conscience protection" statutes prohibit recipients of certain federal funds from discriminating against doctors and other health care providers based on their refusal to participate in health care services they find religiously or morally objectionable, such as abortions and sterilizations. That final rule included definitions, a written certification requirement, and a complaint procedure, among other things.

In its amended regulation, HHS rescinds all but the complaint procedure, asserting that parts of the 2008 final rule were "unclear and potentially overbroad in scope." However, the amended regulation adds an initiative led by HHS's Office of Civil Rights (OCR) to increase health care providers' awareness of the protections provided by the conscience protection statutes and the resources available to those who believe their rights have been violated. Supporters of the amendments say it will counter a trend in which health care providers reportedly have refused to provide certain legal medical services they find religiously or morally objectionable, such as a doctor refusing to perform in-vitro fertilization for lesbians, pharmacists refusing to fill prescriptions for emergency contraceptives, and an ambulance driver turning away a woman needing transportation for an abortion. Critics say HHS's amended regulation weakens the conscience protection statutes and does not sufficiently inhibit health care employers from discriminating against employees who decline to participate in services they find objectionable on protected grounds.