Union Infighting: What it Means for Health Care Employers

When is a cancelled union election a problem? When two unions are hungry to organize your hospital’s nurses.

In March 2008, the Catholic Healthcare Partners (CHP) hospital chain of Ohio and the Service Employees International Union (SEIU), District 1199, agreed to an unusual “no campaign” pre-election period. With SEIU’s support, CHP filed an “RM petition” with the National Labor Relations Board (NLRB) calling for an election among the health system’s nurses to decide whether to be represented for the purposes of collective bargaining by the SEIU. Since RM petitions are filed by management, SEIU did not have to submit evidence in the form of union authorization cards signed by at least 30% of the registered nurses as proof that the nurses were interested in having SEIU represent them. Moreover, since only CHP and SEIU were parties to the agreement, the SEIU was the only union on the ballot. Many of the nurses knew nothing about the arrangement and there was an agreement by CHP and SEIU not to engage in any campaigning or debate of the facts and issues. This election was fast tracked, that is, until a competing union, the National Nurses Organizing Committee (NNOC) of the California Nurses Association (CNA) found out about it. NNOC/CNA has been active in organizing and assuming control of professional nurse unions across the country.

SEIU alleged that CNA “flooded” the hospital with organizers and pamphlets lambasting SEIU. SEIU went so far as to call the CNA’s tactics “union busting.” It characterized CNA as an out-of-state agitator that knew nothing about nurses' local concerns. SEIU claimed that CNA used bullying tactics to sabotage an election that took three years to plan.

In response, CNA characterized SEIU as a union that used dirty tactics to stifle dissent. SEIU, according to the CNA, harassed CNA/NNOC organizers who tried to distribute information. The two unions have agreed to mediation proposed by AFL-CIO President John J. Sweeney. (CNA/NNOC has grown more than 375% in the past 12 years and now has 80,000 members nationally.)

SEIU Raiding of New York State Nurses Association

The New York State Nurses Association (NYSNA) contends that SEIU, Local 1199, raided its bargaining unit at a hospital in Far Rockaway by filing a petition for a decertification election. To decertify a union, the raider union files a “representation challenge” petition with the NLRB, along with authorization cards signed by at least 30% of the bargaining unit. If a majority of members vote for decertification, the raiding union takes over and the existing contract becomes invalid if it has not yet expired. In light of the SEIU’s actions, NYSNA, along with the state nurses associations in seven other states, disaffiliated from the United American Nurses (UAN), partly in opposition to a proposed alliance between UAN and SEIU. In the wake of this disaffiliation, the NNOC/CNA is trying to persuade these state associations to come under their umbrella to “protect” them from the encroachment of what CNA calls the “unprofessional” and “undemocratic” tactics of the SEIU. Its efforts have included mass mailings to NYSNA nurses.

Elsewhere, CNA also has been trying to convince SEIU hospital nurses to decertify their union in California and Nevada. SEIU narrowly avoided decertification by the CNA at a Las Vegas hospital. Both SEIU and NNOC are in a fierce competition for nurses in predominantly
non-union states like Florida and Texas. The competition has become heated and vicious, allegedly resulting even in a few incidents of violence, according to legal papers filed by the CNA.

Ironically, in light of raiding accusation made against his own union, SEIU head Andy Stern criticized rival CNA for wasting “time and resources on efforts to reorganize the already organized” and offered to sign a no-raid agreement with it. Both organizations have been chastised for being overly zealous in their attempts to expand nationally.

Use of Lawsuits

Rival unions are currently fighting each other in court, as well. For example, CNA obtained a temporary restraining order against SEIU and Stern, claiming that SEIU was harassing CNA leaders. In response, SEIU filed an anti-Strategic Lawsuit Against Public Participation (anti-SLAPP) motion—which prevents parties from using lawsuits in an effort to curtail or chill another’s exercise of constitutional rights to free speech—claiming CNA’s only motive in petitioning for a restraining order was “to smear SEIU and Mr. Stern in the national media and to chill free speech.”

CNA also accused SEIU of engaging in a broad pattern of harassment against its members, including following them in cars, yelling at them, and refusing to leave until being warned the police had been called. SEIU countered that CNA filed for a restraining order as a publicity stunt and grossly misrepresented efforts to question CNA leadership. A judge recently vacated a temporary restraining order CNA had obtained.

What Employers Can Do

The tactics unions are using against one another are similar to the tactics they have used—against employers. As an employer, you may have the opportunity to point out the ways that unions are treating each other. This can be a powerful message for employees. It may raise the question how they, as possible new members, can expect to be treated. More important, employers need to be aware that infighting between unions can create instability and unpredictability for your employees. The disruptions and distractions can, at its worst, compromise patient care. You will need to make sure your facility does not become a victim in the crossfire.

SEIU 2008 Convention Targets Health Care Employers

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resumptive Democratic Party presidential nominee Barack Obama speaks via satellite to 3,500 SEIU leaders, staff, and delegates at its quadrennial convention in early June in San Juan, Puerto Rico. Obama credits SEIU President Stern with his win in the primaries and announces his support for EFCA. Despite growing disension from within its ranks, the convention majority votes for Stern’s “unity” agenda that calls for a continued strong push to “organize” unorganized health care workers in hospitals, nursing homes and home care.

During the convention, calls for reform were heard from members who feel disenfranchised by President Andy Stern and his supporters who are seeking a strong, centrally controlled labor union that decides policy and organizes from the top down. At one point, California-based United Healthcare Workers West members walked out to protest Stern’s reelection. Sal Rosselli, President of UHW, praised the delegates that dared to disagree and dared to voice dissenting opinions to SEIU leadership’s plans during the convention. He exhorted the crowd to sit down and refuse to vote either for or against the “unity” resolution. Not surprisingly, UHW is one of the groups in danger of being dismantled and reorganized for “unity”.

Events of keen interest to health care employers took place on the first day of the convention, when SEIU healthcare division members voted to support Healthcare's Strategic Unity Plan and Program to Win. The resolution calls on SEIU to pursue efforts to coordinate organizing strategies with other health care unions “that are committed to the principle of no raiding” and to consider convening “a summit meeting” of unions to achieve this goal.

The unity plan seeks to organize 350,000 members over the next four years. On the SEIU’s Unity website homepage, Dave Regan, president of SEIU 1199 in West Virginia, Kentucky, and Ohio, said, “We don’t believe that the way we get to 350,000 is the way we’ve done it previously, which is NLRB elections. We have to look to employers in the health systems, long-term care industry and emerging healthcare industries across this country.” The following are some SEIU resolutions of particular interest to health care employers:

Strategic Unity Plan-Key Points

• Unite 350,000 workers in SEIU Healthcare over next four years
• Create National Bargaining Councils, within both hospital and nursing home industries
• Pool collective resources to organize “unorganized” health care workers
• Unite long term care workers in single union, by state

Promotion of Nursing Issues
• The creation of federal/state “nurse policy committees” to consult with legislators
• Increased funding for research on nurse practice issues
• Support for candidates committed to passing legislation banning mandatory overtime and establishing nurse-patient ratios

Healthcare Organizing Summit
SEIU will “immediately convene a Health Care Summit of major healthcare unions”:

SEIU Top Priority is to Win Passage of EFCA
“SEIU will make the passing of the Employee Free Choice Act a top priority”
• Union cards instead of official, government-supervised secret ballot elections
• Binding arbitration for initial contracts
• Enhanced penalties against employers
• SEIU will raise $10 million for “post-election accountability” and commit staff and resources during the first 100 days of a new administration to pass EFCA

SEIU Turns Up Heat on Boston Teaching Hospitals
SEIU is asking hospitals to sign agreements that would modify federal labor rules in order to implement what it designates as “free and fair” elections; such agreements typically require earlier voting dates and prevent hospitals from criticizing the union or taking any position against organizing efforts. Instead of focusing on workplace issues, many unions now attempt to unionize a target organization by quashing free debate about elections, pressuring board members and trustees, and questioning the ability of non-union hospitals to provide patient care.

SEIU is trying to organize custodians, laboratory technicians, cooks, and other workers at largely nonunion Boston teaching hospitals associated with universities. Health care workers at Boston’s most prestigious teaching hospitals claim one out of six Boston jobs is in a hospital setting, and that more than 50,000 of those hospital workers would vote to organize if allowed to do so without intimidation. Most nurses in Boston already belong to unions, but most other workers do not. Mike Fadel, the executive vice president of the local 1199SEIU, said his goal is to organize all Boston hospitals.

The campaign to organize Boston’s teaching hospitals, led by 1199SEIU and the Area Trades Council—a bargaining coalition comprised of IBEW Local 103, New England Council of Carpenters, Operating Engineers Local 877, Painters DC 35 and Plumbers Local 12—staged a rally of hundreds of workers on May 8. The demonstration included endorsements from political leaders such as Boston Mayor Thomas Menino, who said he wanted “these workers to have the same benefits [as] other hospital workers”; the actor Ben Affleck, who previously supported efforts to raise wages for Harvard University workers and endorsed SEIU’s current campaign; and the popular local band the Dropkick Murphys.
More than 22,000 home care workers in Massachusetts voted by a margin of over 94% to join 1199SEIU, the state's largest health care union, in the largest union election in New England history. (Comprised of approximately 300,000 workers and retirees, 1199SEIU claims to be the world's largest union local, with about 155,000 health care and child-care workers, university employees, and public sector workers in New England.) SEIU's recent growth enabled it to negotiate wages and benefits for thousands of home health care workers, who are paid by the state's Medicaid program, Mass Health. Home health care aides currently are hired by their patients, though they are paid by Mass Health. Under a law passed last year, the thousands of individual health aides are recognized as a bargaining unit, but still will be hired and fired by individual clients.

Ninth Circuit Overturns Ruling Prohibiting Union Buttons

On May 20, the Court of Appeals for the Ninth Circuit held in a 2-1 decision that the NLRB had no grounds or “special circumstances” to allow an acute care hospital in Spokane, Washington, to forbid nurses from wearing union buttons in areas where patients or family members might see them. The Ninth Circuit directed the NLRB to reinstate findings that the button ban violated employee rights under the NLRA.

Under the NLRA, employees have a protected right to wear union insignia such as buttons. However, in the health care environment, restrictions on the wearing of union message buttons in immediate patient care areas are “presumptively valid.” Outside immediate patient care areas, however, such a restriction is “presumptively invalid,” and the employer must prove that there are “special circumstances” showing that the restriction is necessary to avoid disrupting health care operations or disturbing patients.

In late-2003 and early-2004, the Washington State Nurses Association, which represents approximately 1,200 registered nurses, was negotiating a collective bargaining agreement with the hospital. The hospital banned the wearing of union buttons, including those stating “RN's Demand Safe Staffing”, on the grounds that they might upset patients and their families and create the impression that the hospital was not providing adequate care. The NLRB reversed an administrative law judge's decision that the ban was unlawful under the NLRA. Even though such a broad ban on union emblems was presumptively invalid under the NLRA, the Board majority found specific buttons would “inherently disturb” patients and might lead reasonable people to fear that the hospital's staffing levels were unsafe.

On review, the Ninth Circuit held that special circumstances could warrant a hospital-wide proscription of union insignia if it were “necessary to avoid disruption of health-care operations or disturbance of patients,” even though such restrictions are presumptively invalid when applied outside immediate patient care areas. In this instance, however, the court concluded the NLRB had no evidence to demonstrate that the buttons' slogans did or would have an adverse effect on patients. The court found the NLRB's reasoning was speculative at best, and therefore insufficient to justify the ban.

Tips for Hospital Employers

Efforts to avoid the disruption caused by employees wearing controversial union buttons require careful factual and legal assessment. Employers are urged to consult with legal counsel before preparing policies addressing this and other labor-related expressive activities.
An independent arbitrator has ordered Connecticut-based Yale-New Haven Hospital to pay $4.5 million to SEIU because “the hospital ruined any chance for a fair election by intimidating union supporters and spreading misinformation.” SEIU affiliate, the New England Health Care Employees Union, District 1199, fought a protracted campaign to recruit the hospital’s 1,800 health care workers, including initially trying to block the construction of a $430 million cancer center until employees became unionized.

SEIU and the hospital agreed to hold an election campaign, with specified codes of conduct for both sides. But in a move that recalls its tactics with the CNA (see “Union Infighting: What it Means for Health Care Employers” on page 1), SEIU canceled the secret ballot election, claiming the hospital violated the election terms both sides had created, and filed unfair labor practices charges against the hospital.

By agreement, the disputes were submitted to a neutral arbitrator. Finding that the hospital had undermined a fair election by intimidating union supporters and spreading misinformation, the arbitrator fined the hospital $4.5 million (an amount arrived at by adding the $2.3 million SEIU spent trying to organize—including $0.5 million the union spent on a negative ad campaign that contravened the election agreement—and the $2.2 million the hospital paid consultants to help oppose the campaign).

The arbitrator denied SEIU’s request for a bargaining order that would require the hospital to recognize the union without secret ballot election, though SEIU contended that most employees had signed cards to join the union. SEIU indicated it had no plans to pursue another election.

In related news, a proposed NLRB regulation would enable consenting employers to accept unionization without going through disruptive election campaigns. The proposal would create a new, voluntary procedure whereby a labor organization and an employer could file jointly a petition for certification consenting to an election. No showing of interest by employees is required to be filed with the petition.

Selected State Staffing Plans
Legislatures can mandate specific nurse-to-patient ratios. California enacted a law in 1999 requiring that identical, unit-specific minimum nurse-to-patient ratios be implemented in all California hospitals. Governor Arnold Schwarzenegger suspended the law, which required one nurse for every five patients in medical-surgical units, a reduction of the previous one-to-six ratio. A judge, however, barred delaying the implementation of the staffing ratios. Since 1986, California hospitals also have been required to use a patient classification system, which is meant to establish nurse-staffing levels for hospital according to the needs of patients, and by unit and shift. Some states require ratios in specialized areas such as intensive care, but only California requires ratios for every patient care unit of every hospital.

care. The Council instead recommended the evaluation of 15 nurse-sensitive indicators in hospital settings, and the use of standardized staffing-plans and acuity tools.

**New Jersey** in 2005 enacted requirements that general hospitals and nursing facilities post daily staffing information for each unit and shift.

**Oregon** requires hospitals to implement written hospital-wide staffing-plans for nursing services. The staffing-plan must be developed by a committee that includes an equal number of hospital managers and direct care registered nurses, and must specify the number, qualifications and categories of nursing staff needed for all units. Hospitals violating this 2005 law face civil penalties and random audits by the Oregon Health Division.

**Vermont** added a provision to the Bill of Rights for Hospital Patients, in 2006, requiring public access to information concerning nurse-staffing ratios.

As did Maine, the **District of Columbia** also eliminated staffing ratios in 2004, that had been enacted in 2002 in response to the nursing shortage.

### Assisted Living

**Unions Continue to Set Sights on Senior Living Companies**

Using a “divide and conquer strategy,” some of the most aggressive unions in the country have joined forces to organize the senior care industry’s nine million nonunion employees. Targeting some of the most successful companies, unions hope to convince the industry that unionization is unavoidable.

Desperate for new members, unions are targeting the expanding and competitive senior living industry. Largely unorganized, most senior living companies have little experience in responding to union activity. Unions have financed corporate campaigns and filed shareholder actions against corporate executives and directors to pressure companies into remaining “neutral” in the face of union organizing.

Many small senior living companies are taking a wait-and-see approach, hoping the industry's large companies will prevail. Over the last decade, unions’ strategies have helped organize the fragmented and competitive nursing home industry. Many large nursing home companies no longer oppose unionization in certain markets, and are eager to sign “neutrality agreements” that waive certain employer rights under the NLRA.

Organized labor currently represents about 8% of the private sector American workforce, the lowest percentage since 1901. Trying to reverse the trend, in 2005, some of the largest and most influential U.S. unions—SEIU, UNITE-HERE, United Food & Commercial Workers, the Laborers, and the Teamsters—resigned from the AFL-CIO and, with the Carpenters Union and the United Farm Workers, formed the Change to Win (CTW) Federation. CTW now represents approximately six million workers. The existence of two major labor federations, the AFL-CIO and the relatively new CTW, has led to unprecedented rivalry for new members. In a press release, CTW pledged “to carry out [the] most aggressive organizing campaign in 50 years.”

**Union Tactics**

When unions target a company, they often conduct vulnerability assessments secretly, which can involve identifying stakeholders, using government regulation to prevent new construction, generating negative publicity regarding care deficiencies, and investigating a company’s business practices and nonprofit status. Unions also have financed lawsuits against employers, ranging from antitrust to wage and hour class actions.

Designed to exploit an employer’s weaknesses, corporate campaigns are waged against nonunion and partially unionized employers to pressure them to sign

### Staffing Legislation Introduced in 2008

**Arizona (HB2041)** – guidelines for patient protections and nurses’ rights in hospitals, specifying nurse-to-patient ratios and requiring a patient classification system.

**Hawaii (SB2781)** – specifies a maximum number of patients for each registered nurse.

**Iowa (SB2296)** – requires a staffing committee, with direct care nurses making up half of its membership, to devise policy and a staffing-plan for each unit. The staffing-plan must be submitted to the regulatory agency semiannually.

**New York (AB6119/SB1551)** – the “Safe Staffing for Quality Care Act” mandates that acute care facilities submit a staffing-plan to the Department of Health annually and implement minimum ratios. The bill also allows nurses to refuse assignments.
neutrality agreements. Such agreements waive certain rights under the NLRA, including the right to communicate freely with employees about unionization and the right to insist upon secret ballot elections. Some neutrality agreements even require employers to provide unions with the contact information on nonunion employees. While most employers oppose these tactics initially, some find it too costly to fight a lengthy campaign. A prolonged fight, they fear, can tarnish their reputation, disrupt operations, erode their consumer base, and threaten profitability.

Some unions, such as SEIU and UNITE-HERE, have perfected their organizing techniques through technology, training, and the recruitment of young and dedicated adherents to the labor cause. Organizers have an array of resources, including research staff to evaluate the employer and workplace issues; handheld computers to contact and collect employee addresses and profiles; and specialists to develop communication strategies.

Due to the fracture in the AFL-CIO, CTW unions have received a huge infusion of cash in retained per-capita taxes that were previously used to finance the AFL-CIO’s bureaucracy and political activities. Further, CTW unions are required to spend 75% of their budgets, amounting to hundreds of millions of dollars a year, on organizing new members. Nowadays, many unions have more resources than some large companies. Smaller companies are clearly at a disadvantage.

Union Legislation Stacks the Deck

The labor movement is also engaged in a massive political effort to advance its institutional interests. The primary vehicle for this is the “Employee Free Choice Act” (“EFCA”). Though unlikely to pass under this session of Congress, EFCA would fundamentally change the NLRA and deny employees the right to vote for union representation by secret ballot in a government-supervised environment.

Union leaders and lobbyists formed a coalition called “They Work for Us” to target Democratic representatives who fail to support union-sponsored legislation. It is ironic that some Democratic senators promoting passage of EFCA opposed similar legislation in Mexico because it was “undemocratic.” Sadly, many representatives are unaware of the implications of EFCA, that it eliminates employee free choice, for instance.

EFCA has other disturbing provisions, including a mandatory “interest arbitration” of issues where parties to a first labor contract negotiation are unable to reach an agreement within a certain number time following union recognition. An outside arbitrator will then decide wages, hours, benefits, and other terms and conditions of employment for the company. Interest arbitration is used to settle labor contracts for many public employees who, unlike private-sector workers, have no right to strike. This process is partially responsible for the historically higher wages and benefits of public employees and the legendary difficulty public employers have in implementing quality and efficiency improvements.

Unions also are more actively developing political alliances to support their agenda on both the federal and state levels. With respect to the senior living industry, the most significant is the alliance of SEIU, AARP, and the Business Roundtable. The alliance’s agenda includes “fair-share” bills requiring business to pay a defined portion of employees’ health insurance premiums, minimum wage legislation, and union neutrality bills that would bar health care employers from using Medicaid funds in connection with preventive labor relations services.

What Employers Can Do Now

- Conduct awareness training for board members and executives.
- Conduct a vulnerability assessment. Preempt union campaigns by commissioning your own vulnerability assessment, correcting issues, and developing strategies to make the company an unattractive target.
- Audit your employment policies for adherence to “best employment practices.” Best practices tend to eliminate the perceived need for outside, third party representation.
- Conduct a preventive labor assessment at all sites every year. Pay particular attention to the quality of supervision, the openness of communications, and the effectiveness of problem-solving. Analyze potential “bargaining units” and the appropriate labor strategy for future labor relations and potential organizing.
- Create and implement a communication plan. Establish key messages and communicate these proactively before the union seeks to define you.
- Conduct corporate campaign and preventive labor relations training for supervisors. This should cover management free-speech rights and legal restrictions, early warning signs of union activity, and effective and legal responses to employee questions.
Management Education Opportunities

How to Keep Your Health Care Organization Union Free

Jackson Lewis is pleased to present a full-day executive seminar designed for operations, human resources, and legal officers with responsibility for keeping their health care facilities union-free. This is a practical, theory-free workshop. We will give you strategies to fortify your defense against organizing attempts.

DATES & LOCATIONS:
September 18 – Dallas, The Tower Club
September 19 – Houston, The Downtown Center Club

More information: Glennie Coffman, 214-520-2400, or www.jacksonlewis.com/events/location.cfm?sid=TX

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