Special Report on Labor Relations in Health Care

The Schism In Organized Labor: What Does It Mean For Health Care Employers?

Since before the AFL-CIO held its quadrennial convention in Chicago in July, news stories about discord within its ranks and challenges to incumbent leadership were numerous. Indeed, the events that have transpired since the convention are remarkable, and they have particular significance for employers in the health care industry, which is widely seen as one of the most fertile areas for what union leaders all agree is priority number one – organizing new members and saving the institution of organized labor from further decline.

Recapping events up to and including the AFL-CIO convention, which ended on July 28th, Andrew Stern, President of the Service Employees International Union (SEIU), sought to have incumbent AFL-CIO President John Sweeney replaced. Stern, who was formerly Sweeney’s protégé, alleged that AFL-CIO leadership has failed to revive flagging union membership. The SEIU, the only major union to have substantial membership growth in recent years, stresses in-the-field organizing.

Six weeks before the AFL-CIO Convention, the SEIU created an alternate organization comprised of a handful of significant unions. Called the “Change to Win Coalition,” the group now includes the SEIU, the Teamsters, UNITE HERE, the United Food and Commercial Workers, the Laborers, the United Farm Workers, and the Carpenters unions. A face-to-face showdown at the convention never occurred, partly because the SEIU and the Teamsters cut their ties with the AFL-CIO altogether and did not attend the convention. The UFCW and UNITE HERE also boycotted the convention and subsequently have withdrawn from AFL-CIO affiliation. The Carpenters Union had left the AFL-CIO four years ago.

Each member union of the Change to Win Coalition has ceased its financial support of the AFL-CIO. The immediate financial effect is significant: unpaid back dues of more than $10 million and $35 million more in lost annual dues. Published reports say the AFL-CIO was already facing financial difficulties, and recently laid off 25% of its staff.

SEIU President Andy Stern pledged that the Coalition would not “raid” established AFL-CIO unions by trying to lure away members to support the maverick unions, although it was noted that Stern has raided members of another union in California, giving pause for concern.

While President Sweeney initially refused suggestions to allow Coalition member locals to participate in central and local AFL-CIO labor councils, there has been considerable backsliding since the convention and proposals for state and local council participation were being considered.

As we go to press, the Change to Win Coalition is holding its first convention. Attended by 500 delegates from the seven member unions, Change to Win is planning to announce it will earmark 75% of its budget for organizing.
What Does It All Mean for the Health Care Industry?

Organized labor has been criticized for its failure to attract new members, given that the percentage of unionized workers in the private sector has fallen below 9%. The rallying cry for a greater commitment to organizing is in response to this steady decline in union membership. No matter what the result of the events before, during, and after the convention, dramatic changes in the labor movement's organization and focus are already occurring. The focus is shifting to a heavy emphasis on results – new initiatives to increase union membership significantly and build union bargaining power.

There is an immediate impact on health care employers – whether an organization is entirely unionized, entirely union-free or somewhere in between. This dispute within organized labor – and the steady decline in the percentage of unionized workers – should not lull employers into thinking the discord is a death knell for unions. In fact, the most likely results of the current strife is likely to be an increase in union organizing activity and more aggressive bargaining during contract negotiations by both the AFL-CIO and the Change to Win Coalition. The emphasis on organizing by the SEIU and other Change to Win Coalition unions will likely spike union organizing efforts, particularly in the health care industry, which is not susceptible to relocation off-shore or other strategic business alternatives. Efforts by the SEIU to increase its organizing clout are discussed below, and the AFL-CIO, which has targeted $22.5 million for organizing, has approved the creation of Industry Organizing Committees to achieve greater coordination within particular industries.

Why Pay Attention to the SEIU Now?

Behind the scenes – but not too far – Stern and the SEIU are in the process of a consolidation and restructuring program to merge separate health care locals into large regional unions. Mergers in some areas already have resulted in regional super locals with the potential for massive organizing and collective bargaining campaigns.

To understand the threat, it is important to note a few key facts about the SEIU:

- It has been the fastest-growing union within the AFL-CIO; it has grown by hundreds of thousands since the last AFL-CIO convention.
- Its preferred organizing model is to pressure employers to sign “neutrality agreements” and avoid NLRB-supervised elections altogether, sometimes using “corporate campaign” techniques to achieve its objective.
- Under these employer “neutrality agreements,” the SEIU claims a success rate of nearly 80%.
- Even in traditional NLRB elections, statistics show the SEIU has a success rate of nearly 75%.

The SEIU's website has more details about its aggressive organizing plans, as well as specific reports from the Health Care and Long Term Care Divisions on those plans through 2008.

The SEIU has adopted ambitious organizing plans for specifically targeted states, including Florida, Pennsylvania, Connecticut, Maryland and the District of Columbia. Drawing on the assistance of members in the union stronghold states of California and New York, the “New Strength Unity Plan” was designed to spread the organizing “super strength” of the SEIU by creating single, state-wide unions.

At the same time, the SEIU health systems division agreed to unite around a single national plan to raise standards for pay, benefits, staffing and quality care by negotiating “standard-setting” agreements with national for-profit hospital chains. In non-profit facilities, the plans included development of outreach strategies to workers, patients, and communities, as well as enlisting the assistance of Roman Catholic and other faith-based health systems. The health care and long-term care divisions also pledged to step up efforts in contract negotiations with unionized employers to win “neutrality agreements” that require employers to remain neutral during a union organizing campaign, thus gaining leverage with union-free facilities.

East Coast Restructuring: “1199 Eastern Region”

Somewhat behind the scenes, the SEIU has been consolidating health care locals along the eastern seaboard from Maine to Florida. The “1199 Eastern Region” is the domain of Dennis Rivera, President of New York’s District 1199. Rivera is well known for placing an emphasis on aggressive organizing and adept political maneuvering. The consolidation plan began in November 2002 with the merger of Local 1199 New York upstate with Local 1199 New York downstate, creating a single, state-wide union of more than 240,000 health care workers under Rivera's leadership.
In June 2003, the SEIU created a single, state-wide health care local in Massachusetts – Local 2020. Now, the enlarged Local 2020 is in the process of merging with New York's SEIU 1199 under Rivera's leadership, with voting by mail ballots scheduled to begin September 15, 2005. If approved, the merger will become effective November 1. Already the Massachusetts local has set its sights on organizing the major nonunion hospitals in the Boston area, primarily the teaching hospitals, according to union officials. With the impending retirement of its current president, it is expected that New England District 1199 also will become a part of the 1199 Eastern Region under Rivera.

Florida has followed suit with the merger of two South Florida locals to create 1199FL, with more than 10,000 members and the expectation of additional public-sector employees. Additional merger activity on the Eastern seaboard involved the merger of Maryland's SEIU 1199E-DC and Local 1998/Professional Staff Nurses Association with the 250,000-member 1199/SEIU New York. The new Baltimore-Washington Division announced plans for a massive organizing campaign and the formation of a new unit, the 1199 Eastern Region.

**West Coast Consolidation**

On the West Coast, SEIU Local 250 has swallowed SEIU Local 399 to create a state-wide local called United Healthcare West. The new mega-local has been aggressively waging corporate campaigns against large health care systems and some long-term care providers. Additionally, the union is in partnership with a number of key players in the California long-term care industry. The union's stated objective is a state-wide uniform expiration date for collective bargaining agreements, ultimately leading to a single state-wide contract. They have succeeded in lining up the expiration dates of most of the contracts. Empowered by the success in California, the SEIU is moving aggressively in Washington and other Western states.

On September 2, United Healthcare Workers West issued a strike notice to 13 hospitals in the Sutter Health hospital system, affecting approximately 4,500 employees, who are members of the SEIU local. Under the health care industry provisions of the National Labor Relations Act, the notice is required 10 days in advance of any strike. Other unions, including the California Nurses Association affiliate, locals of the Teamsters, UNITE HERE, Office and Professional Employees and the Stationary Engineers, along with the California AFL-CIO, announced their support for the strike, with some vowing to engage in a sympathy strike. The SEIU indicated the issues in the dispute involved giving workers a voice in staffing decisions and creating a training and education fund to help recruit and retain additional staff, along with increased wages, enhanced retirement benefits, and a promise from Sutter not to oppose organizing efforts. The parties have been unable to reach agreement on new contracts for more than a year, during which time there was a one-day strike and four-day lockout of employees, and most recently the union postponed a threatened August strike, but talks broke down shortly afterward.

**Midwest SEIU Initiatives**

In the wake of the SEIU break from the AFL-CIO, the SEIU's Midwest coordinator, Bruce Colbern, declared that freed from the constraints of the AFL-CIO, the Teamsters and SEIU plan on “taking more chances and trying new ideas” to organize entire industries and take on issues such as health care and immigration.

In the health care industry, the SEIU faces increasing competition from the National Nurses Organizing Committee, a national organization that was started by the California Nurses Association to take an aggressive approach to organizing nurses nationwide. NNOC has set up offices in Chicago, and recently replaced the Illinois Nurses Association as the representative of nurses at Cook County’s Stroger Hospital and other Cook County health care facilities. NNOC is not a member of the AFL-CIO, and purportedly does not hesitate to raid other unions representing nurses. The SEIU can be expected to join the fray, taking an aggressive approach to organize nurses in the Midwest in competition with NNOC.
A Preventive Program

With the possibility that employers will be targeted by two separate and determined entities, health care employers should (among other things):

- Clarify which employees fit within the “supervisory” category. For example, do these individuals meet the test for supervisory status under the National Labor Relations Act? This is particularly true with regard to the Head or Charge Nurse classification.
- Make supervisors “feel” they are a part of the management team. Recognize, respect and, when appropriate, honor their status; without recognition, they may align themselves with their “employees.”
- Conduct supervisory skills and other training to give supervisors the tools to do their jobs effectively. When treated as important players, they will respond. Recognize and fulfill supervisors’ legitimate needs, which are different from other staff.
- 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.

Importance of Employer Speech at Heart of Second Blow to California’s Union Neutrality Legislation

Another decisive blow has been delivered to the California law that effectively mandates most health care employers in that state to remain neutral when faced with union organizing efforts. In its first order of business after the Labor Day holiday, the U.S. Court of Appeals for the Ninth Circuit found the state law, Assembly Bill 1889, went too far in interfering with the exchange of speech and ideas during union organizing campaigns. The court ruled, again, that the California law is preempted by the federal National Labor Relations Act. This is the second time the same court has rejected the state law, which prohibits thousands of employers receiving state funds from using any of those funds to “assist, promote, or deter union organizing” [Cal. Govt. Code § 16645(a).] Chamber of Commerce v. Lockyer (9th Cir. 2005) 2005 U.S. App. LEXIS 19208* (Lockyer II)

There is a careful balance of the speech rights of employers and unions that is established under the National Labor Relations Act. One result of that balance is that unions historically win about 55% of the secret ballot elections conducted by the National
Labor Relations Board after what has traditionally been a period of both union and employer campaigns. When that balance is disturbed by the imposition of neutrality on the side of the employer, the results are vastly different. Indeed, a 1999 AFL-CIO study determined that unions win 84% of elections when employers are bound by one-sided neutrality clauses. State laws, such as AB 1889, would have the same effect.

Not surprisingly, over the past several years, unions have shifted their focus from seeking secret ballot elections to pressuring employers for neutrality agreements and to lobbying for legislation that encourages or mandates employer neutrality at the state and local levels. To date, legislation similar to California’s neutrality law has been proposed in at least 18 states, with New York and Massachusetts passing similar legislation. On May 17, 2005, the United States District Court for the Northern District of New York struck down the New York legislation in *Healthcare Association of New York State, Inc., v. Pataki*.

Health care employers are particularly vulnerable to this kind of legislation, which has been introduced in Arizona, Connecticut, Missouri, Maryland, Florida, Georgia, Illinois, Indiana, Iowa, Louisiana, Maine, Missouri, New Hampshire, North Dakota, Oregon, and Pennsylvania. In addition to legislation on the state level, a number of cities, for example, San Francisco, require entire industries to maintain union neutrality policies.

The Ninth Circuit’s decision is an enormous victory and will likely have far-reaching implications. Over the past several years, unions have shifted focus from seeking neutrality agreements with specific employers, to obtaining legislation encouraging or mandating employer neutrality at the state and local levels. This decision marks an important turning point in reestablishing open and honest communications between employers and employees regarding potential unionization.

To discuss these developments and their impact, please contact the Jackson Lewis attorney with whom you regularly work, or partners Michael J. Lotito, (415) 536-6322; LotitoM@jacksonlewis.com; Bradley W. Kampas, (415) 536-6313; KampasB@jacksonlewis.com.

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**Disability Management**

**EEOC Issues Questions & Answers about Cancer and the ADA**

Marking the 15th anniversary of the signing of the Americans with Disabilities Act, on July 26, 2005, the EEOC issued a series of questions and answers addressing the ADA’s application to individuals in the workplace who have, or have had, cancer. This is the fourth question and answer document issued by the EEOC addressing particular disabilities in the workplace. Earlier Q&A documents addressed the ADA’s application to individuals with diabetes, epilepsy, and intellectual disabilities. Each of these documents is available on the EEOC’s website, www.eeoc.gov.

The Q&A’s on Cancer address a wide range of issues including: when cancer is a disability under the ADA; whether and how employers may obtain, use and disclose medical information regarding individuals with cancer; types of reasonable accommodations employers may need to provide to individuals with cancer; and whether and when employers may restrict individuals with cancer from working due to safety concerns.

The EEOC takes several positions in the document that might surprise employers. After the U.S. Supreme Court’s decision in *Toyota Motor Manufacturing of Kentucky Inc., v. Williams*, many courts and employers have assumed that impairments must be long term or permanent to be ADA disabilities. The EEOC’s Cancer Q&A provides several examples of individuals with cancer who would be disabled under the ADA even though they are only limited in their ability to perform major life activities for a relatively short period.

According to the EEOC, a computer sales representative could be disabled under the ADA if, following a lumpectomy and radiation for aggressive breast cancer, she experienced extreme nausea and fatigue for six months. In the example, the EEOC assumed the individual continued to work during her treatment, but frequently came to work later in the morning, took breaks when she experienced nausea, was too exhausted when she returned home to cook, shop, or do household chores, and had to rely almost exclusively on her husband and children to do these tasks.

Even when itself not a disability (such as when it is diagnosed and treated early), the EEOC explains that cancer may lead to other impairments that could be disabilities. For example, if an individual develops depression as a result of cancer, the treatment for the depression alone or for both depression and cancer lasts more than several months, and the treatment substantially limits major life activities, such as interacting with others, sleeping, or eating, the depression would be a disability under the ADA.

Employers may not tell co-workers that an employee has cancer, or that the employee is receiving a reasonable accommodation, such as working at
The Department of Homeland Security has announced that it will not impose penalties on employers who hire evacuated or displaced Hurricane Katrina victims unable to provide documentation of their identity and work authorized status as required for completion of Form I-9. This moratorium on civil penalties will extend for 45 days, at which point DHS will review this policy.

The employee must be eligible for employment in the United States. Employers are required to complete Form I-9 to the extent possible and should note on Form I-9 that documents are not available because of Hurricane Katrina.

Under Section 274A of the Immigration and Nationality Act, U.S. employers are responsible for completing and retaining an Employment Eligibility Verification Form, Form I-9, for all new employees.

The employer must review original identity and employment authorization documents presented by the employee as part of this process. Many evacuated or displaced victims of Hurricane Katrina currently do not have their documents. Moreover, damage to government facilities in the affected area makes it likely that many victims will not be able to obtain replacement copies of their documents in the near future.

For more information, please contact the Jackson Lewis Immigration Practice Group coordinator William J. Manning; (914) 514-6115; ManningW@jacksonlewis.com.
Management Training

*Deadline for Supervisory Training under California AB 1825 Is Rapidly Approaching*

Employers with 50 or more employees are reminded that they have until December 31, 2005, to complete the education and training of all personnel holding supervisory positions as of July 1, 2005, in the prevention of sexual harassment. This deadline applies not only to California employers but also out-of-state employers with employees within California. New supervisors as of July 1, 2005, must receive the required training within six months of assuming the position. The training must be two hours in length, must be interactive in format, and must be repeated every two years.

**Jackson Lewis Offers Briefings**

As part of its management education initiative, Jackson Lewis is offering a series of briefings on the new requirements of California AB1825 and how an organization can meet them. The briefings are designed for supervisory employees—anyone who can “recommend” disciplinary action—as well as decision makers with employee relations responsibilities, such as human resource professionals, chief executive officers, and in-house counsel. Please visit our website – www.jacksonlewis.com “Events” – for the schedule of briefing dates, times and locations.

For a complete analysis of AB 1825, see “AB 1825: A California Training Mandate for Supervisors” on www.jacksonlewis.com.

**Wage and Hour**

*Illinois Bans Mandatory Overtime For Hospital Nurses*

The Illinois Hospital Licensing Act has been amended to prohibit mandated overtime for nurses except in “unforeseen emergent circumstances.” The amendment is effective immediately, and prohibits discipline, discharge, or any adverse employment action solely on the basis of a nurse’s refusal to work overtime absent an unforeseen emergent circumstance.

The definition of “nurse” includes any advanced practice nurse, registered professional nurse, or licensed practical nurse, as defined by applicable state law, who receives an hourly wage and has direct responsibility to oversee or carry out nursing care. It does not include a certified nurse anesthetist primarily engaged in performing the duties of a nurse anesthetist.

“Unforeseen emergent circumstances” is defined as any declared national, state, or municipal disaster or catastrophic event, or any implementation of the hospital’s disaster plan, that will substantially affect or increase the need for health care services, or any circumstance in which patient care needs require specialized nursing skills through the completion of a procedure.

The Act specifically provides that an unforeseen emergent circumstance does not include a situation in which the hospital fails to have enough nursing staff to meet the usual and reasonably predictable patient needs. Even during an unforeseen emergent circumstance in which mandated overtime may be required, such overtime is limited to four hours beyond the end of the nurse’s pre-determined shift, and a nurse required to work up to 12 consecutive hours must be allowed at least 8 consecutive hours of off-duty time immediately thereafter.

Alleged violations will be investigated by the Dept. of Public Health, and complaints must be filed within 45 days of the alleged violation. Violations must be proven by clear and convincing evidence that the nurse was required to work overtime against his or her will. To defend, the hospital must present clear and convincing evidence that an unforeseen emergent circumstance requiring overtime existed. For more information, contact Chicago managing partner Peter R. Bulmer, (312) 787-4949; BulmerP@jacksonlewis.com.
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