A new report sends a clear warning: Unions are resorting to ever-tougher tactics—including negative publicity campaigns—to organize workers in hospitals and other health care institutions.

The 29th Labor Activity in Healthcare Report by IRI Consultants, based on its annual survey of 3,300 members of the American Society for Healthcare Human Resources Administration (ASHHRA) to assess labor trends in healthcare, shows:

- More than three-fifths (62%) of respondents said they were “very concerned” or “someewhat concerned” about union efforts to organize workers.
- More than a quarter (26%) of respondents reported negative publicity campaigns, or “corporate campaigns,” against healthcare organizations, doubling last year’s figure of 13%.

Corporate campaigns are designed to damage an organization’s reputation and image by inflicting significant external pressure on the organization to gain leverage. Union-sponsored campaigns often aim for negotiating strength or to force employers to accept neutrality, free access, or card check recognition agreements that make it easier to organize workers. Such agreements enable the union to sidestep traditional secret-ballot elections overseen by the National Labor Relations Board and are often more successful organizing strategies than traditional elections.

The Labor Activity in Healthcare Report shows a significant increase over 2006 in respondents who report pressure from unions to agree to card check (32%, up from 17%), neutrality agreements (26%, up from 19%), and “fair” election agreements (10%, up from 6%). The Service Employees International Union (SEIU) was the union cited in more than 50% of reported corporate campaigns and continues to be among the most aggressive unions targeting the health care sector.

Respondents reported that registered nurses (RNs), service and nonprofessional employees, and technical workers were the most common focus of union organizing efforts among ASHHRA member organizations. Among the most frequent issues used to organize workers were:

- Pay (80%)
- Benefits (70%)
- Staffing levels (60%)

The survey also revealed that unions are relying more on electronic and online techniques to reach potential members and create coalitions. They are using such low-cost communications tools as e-mails, blogs and Web sites to network and disseminate information. Unions are also leveraging social networking sites such as MySpace and YouTube.
Recent organizing activities in several large states highlight what health care employers nationwide are currently—or soon will be—facing.

Massachusetts

In September, Local 1199 of the SEIU launched a drive to organize some 60,000 workers at Boston's mostly nonunion teaching hospitals. SEIU also participated in a representation vote among more than 20,000 workers who provide home care for Medicaid patients in the state. (The executive vice president of Local 1199, Mike Fadel, said his ultimate goal is to organize all of Boston's hospitals, where nurses usually are union members but most other employees are not.)

The union asked CEOs of Boston hospitals to agree to a code of conduct to ensure “free and fair elections,” and ran radio ads and rallies to publicize the campaign. The hospitals targeted included Massachusetts General Hospital, Brigham and Women's Hospital, Beth Israel Deaconess Hospital, Caritas St. Elizabeth's Medical Center, Tufts-New England Medical Center, Children's Hospital, New England Baptist Hospital, Faulkner Hospital, and Dana-Farber Cancer Institute. The goal was to merge a Massachusetts health-care worker union with New York-based Local 1199, which has absorbed SEIU health care locals from other Northeast states and has more than 250,000 members.

In mid-October, SEIU carried out a mail-ballot election, sending 4,000 cards to personal-care attendants. In November, 94% of the 22,000 personal care attendants in Massachusetts voted to join SEIU 1199. As noted in the fall issue of this publication, the vote was facilitated by a recently passed special law, supported by SEIU, that required only a 10% “showing of interest” (rather than the usual 30%), and an election conducted by the American Arbitration Association (rather than the Massachusetts Labor Relations Commission).

On October 16, a rally was held at the Longwood Medical Area in Boston to support hospital workers who want to form a union. On that same day, the Boston City Council considered a resolution asking hospital CEOs to sign agreements pledging not to “intimidate” hospital staff trying to form unions. (Some of the hospitals already had policies stating that supervisors and managers would not interrogate employees about union activities.)

Hospitals opposed such a measure as unnecessary and one-sided, arguing that they already provide for fair elections through a process established by the National Labor Relations Board (NLRB), whereby workers can hear from both unions and management before secret ballots are held.

The SEIU's efforts to unionize in Boston were fueled by some highly public figures: actor Ben Affleck, whose father was a janitor at Harvard University, voiced his support of the union's push at an October 17 press conference, as did Boston Mayor Thomas M. Menino.

California

In California, SEIU United Healthcare Workers–West targeted more than 200 contracts, due to expire in 2008, with hospitals and nursing homes in Silicon Valley, and planned bargaining talks in other western states. Union leaders described their plans as the single largest coordinated campaign in health care in the United States. Their plans revolve around wages and benefits, worker training and education, and “a growing voice in patient care decisions.”

The union had plotted for years to “get the contracts lined up” so that they would be able to target such a large number of facilities at the same time. It achieved this goal by such tactics as negotiating short-term and long-term contracts and allowing contracts to lapse over periods of months. The union also laid the foundation for the upcoming negotiations by meeting in small groups with a total of 2,000 leaders from hospitals and nursing facility locals across six states at its annual conference in San Jose.

The union has a track record of succeeding with this type of strategy. In 2004, 70 of its contracts expired within a short time and it quickly settled with every hospital and nursing home in California, except Sutter Health. Its strong-arm tactics included strikes by health care workers. Some hospitals have already commenced talks with the union although their contracts do not expire until next spring.

In October, the California Nurses Association (CNA) staged a two-day strike against 16 Sutter Health hospitals; it involved 5,000 nurses and was the largest nurses' strike in more than 10 years. The nurses had authorized the strike in August when their contract negotiations reached an impasse. The strike, publicly endorsed by the AFL-CIO, was to protest such issues as reductions in health care coverage, an “unacceptable retirement plan,” and proposals that the union deemed inferior to Northern California standards in patient care protections.

A large number of nurses crossed picket lines and showed up for their shifts. Some nurses reported being unhappy about the strike and there has been an organized effort to decertify the union.
Ohio
In September, a whopping majority—85%—of independent home health care workers in Ohio voted to be represented by SEIU District 1199. They expect to begin negotiations with the state in January.

Continuing a trend seen in other states, earlier in 2007, Governor Ted Strickland had signed an executive order giving collective bargaining rights to approximately 7,000 independent-contractor home health care workers. (Similar executive orders have also been signed in Illinois, Iowa, and Michigan.) SEIU District 1199, a significant contributor to Strickland’s campaign, helped draft the governor’s order, which has allowed the union to organize thousands of home health workers paid through state programs. SEIU donated $90,000 to Strickland’s gubernatorial campaign last year, part of $2 million it has given to Democratic-party committees and candidates in Ohio since 2006.

What Employers Can Do
Union-Proofing Your Facility

Unions will eventually set their sights on the employees at your health care facility, if they haven’t already. Forward-thinking organizations will take proactive steps to “union-proof” employees. If employees are happy with their working conditions, they won’t be as vulnerable to a union’s advances. Here’s what one health care company targeted by SEIU is doing.

A large provider of residential services to seniors in more than two dozen states has recently become a target of one of the biggest corporate campaigns the unions are currently waging—the Campaign to Improve Assisted Living (www.improveassistedliving.org). This health care campaign, supported by the SEIU, is designed to connect assisted-living caregivers with residents, family members, and senior advocates to “stand for quality services for seniors and a voice on the job for caregivers.” More than one million health care workers in hospitals, nursing homes, and in-home care have united under SEIU Healthcare.

This targeted employer has made it a goal to “continue to attract the brightest, most dedicated, and most caring people in the assisted living industry, and provide them with a reason to remain on staff for many years by creating a work experience that is personally, professionally and financially rewarding,” according to one of its HR executives. The residential-service provider has launched an incentives program to help it recruit and retain talented employees. The company plans to invest approximately $7 million in the reward program during its first year alone. The program includes a wide variety of rewards, in addition to annual bonuses and salary increases:

**Career commitment hourly rewards**: compensation increases based on an employee’s years of service with the company.

**Career commitment anniversary gifts** that recognize employees’ date-of-hire anniversaries every five years, beginning with their 10th service anniversary.

**Healthcare savings rewards**: company-funded, pretax flexible spending accounts for employees in addition to their regular medical insurance.

**Customer satisfaction rewards** based on the results of a customer satisfaction survey for each employee.

**Quality assurance rewards** based on the results of an internal evaluation that is conducted to ensure that the company’s standards for care are continually met.

The rewards program not only keeps employees happy but also provides incentives for them to provide outstanding patient care.

Your Jackson Lewis attorney can help you prepare your management and supervisors to understand what to do today to remain union-free and to withstand possible corporate campaign tactics.
**Court Watch**

**Court Defines Facility for Purposes of INRA**

In *Alden Mgmt. Svcs. v. Chao*, the federal District Court for the Northern District of Illinois addressed the Immigration Nursing Relief Act of 1989 (INRA), which created the H-1A admission program allowing foreign, qualified registered nurses to work in the U.S. as non-immigrant aliens to alleviate shortages in the nursing workforce. Any facility employing such alien nurses has to submit letters attesting that: (1) the employment of the alien would not undermine the wages and working conditions of nurses already employed at the facility; and (2) the facility would pay the alien the same wages as registered nurses similarly employed at the facility. *Alden Mgmt. Svcs. v. Chao*, No. 06-1262 (N.D. Ill. Oct. 23, 2007).

**The Facts:** Between 1992 and 1995, Alden, a corporation that provides health care management services to nursing homes, hired 119 nurses from the Philippines, with accompanying letters of attestation. Nursing homes employed the nurses as “registered nurses license pending” and “certified nurse aids,” and paid them less than registered nurses. In April 1995, the U.S. State Department received a telegram complaint, alleging that Alden recruited nurses using consular bribes abroad, hired foreign nurses where no shortages existed, used vague employment contracts, and paid aliens at lower rates or in ways that violated the terms of their attestation letters.

In April 1996, after it was contacted by the State Department, the Department of Labor (DOL) found that Alden had violated INRA. In August 2002, the DOL Administrative Review Board held that Alden was liable for back pay for the entire time the foreign nurses worked for Alden, rather than just one year. An administrative law judge thereafter awarded the nurses $1,031,824 in back pay and penalized Alden $40,000.

**The Federal Court Decision:** Alden argued that it was not a “facility” under INRA, and that the State Department could not be an aggrieved party, had no “reasonable cause” to investigate Alden, and exceeded the scope of the telegram’s complaint in its inquiry. The federal judge held that Alden qualified as a “facility,” a term that includes any employer of registered nurses that provides health care services in nursing homes or other sites of employment. The court gave a broad interpretation to the phrases “aggrieved party” and “reasonable cause,” finding that the State Department’s investigation was proper in light of the allegations.

Finally, Alden argued that because the aliens never performed registered nursing duties, even though Alden attested it would pay them the same wage as registered nurses, it did not owe them further compensation. The court rejected that argument, and held neither INRA nor any statute of limitations limited back pay to anything less than full reimbursement.

**What should employers do?** Any employer that petitions to bring immigrant nurses to the U.S. qualifies as a facility regulated by INRA. Under *Alden*, the DOL can investigate improper hiring of foreign nurses *even in the absence of formal complaints*. Employers should hire foreign nurses only when they can attest to INRA provisions—including local shortages of qualified U.S. nurses—and must pay them equal wages.

For further information about INRA, or how to hire and register foreign nurses, please contact the Jackson Lewis attorney with whom you regularly work, or William Manning, at ManningW@jacksonlewis.com, of our Immigration Practice Group.
NLRB Update

In 2007, the National Labor Relations Board reduced its case inventory for the fifth consecutive year, in this instance, from 305 to 207; it issued 391 decisions, of which 287 were unfair labor practice cases, and 104 were representation cases. A number of NLRB decisions reached in September 2007 fell on the side of employee rights but reversed long-standing anti-employer procedures and dramatically bolstered the rights and options of employers in responding to questionable union tactics. Following are brief synopses of some of the NLRB’s decisions.

Anheuser-Busch, Inc.,
351 NLRB No. 40 (9/29/07)
In a 3-2 vote, the NLRB reaffirmed that the National Labor Relations Act (NLRA) prohibits it from granting make-whole remedies to employees disciplined or discharged for misconduct discovered through their employers’ illegal conduct. Without union consent, the employer installed hidden surveillance cameras, revealing that some employees were engaged in actual misconduct. Implying that such employees had “dirty hands” themselves, and affirming that it was against public policy to “reward parties who engaged in unprotected conduct,” the NLRB found that these disciplined or fired employees were not entitled to reinstatement and back pay.

BE&K Construction Co.,
351 NLRB No. 29 (9/29/07)
Resolving a dispute that began two decades ago, the NLRB issued a new standard for evaluating employer-initiated lawsuits challenging union campaign tactics: “the filing and maintenance of a reasonably based lawsuit does not violate the NLRA regardless of whether the lawsuit is ongoing or completed, and regardless of the motive” for initiating it. (A lawsuit lacks a “reasonable basis” when no reasonable litigant could realistically expect to win).

Since the Supreme Court held in 2002 that “reasonably based” ongoing lawsuits cannot be enjoined as unfair labor practices, the NLRB decided the same protection must be afforded to completed lawsuit that were reasonably based, even when motivated by retaliation, to prevent a “chilling effect on the right to petition.” Employers therefore have more leeway to contest union tactics by filing “reasonably based” legal actions alleging labor law or antitrust violations, even if those claims are not ultimately successful.

Jones Plastic & Engineering Co.,
351 NLRB No. 11 (9/27/07)
Strikers who unconditionally return to work are entitled to immediate reinstatement unless their employer hired permanent replacements to continue operations during the strike. Once strikes are resolved, employers are not obligated to fire workers hired to replace strikers, as long as they can demonstrate a mutual agreement that the workers are permanent.

The employer in Jones gave replacement workers forms stating they were permanent, often specified whom they replaced, and told strikers it was hiring permanent replacements. The employer established the necessary understanding that its replacement employees would not be displaced by returning strikers. Here, the NLRB found the replacements had the status of probationary or “at-will” workers who could be fired without cause. However, overruling its 1997 decision in Target Rock, 324 NLRB 373, the NLRB decided that at-will disclaimers do not detract from other evidence demonstrating the replacements’ status as “permanent employees.”

Dana Corp.,
351 NLRB No. 28 (9/29/07)
Since 1966, if union recognition was gained through a voluntary card-check agreement with an employer, a “recognition bar” applied, proscribing the filing of a decertification or rival union petition for a reasonable period. Significantly altering the recognition bar doctrine and reversing 40 years of precedent, the NLRB, in a 3-2 ruling, creates a 45-day notice period during which employees can file petitions for union decertification or for rival union representation. Employers must post notices making sure employees are aware of their rights to overturn union representation. The ruling, which will be applied prospectively only, affirms the NLRB’s preference for employee secret ballot determinations. Even where more than half the employees indicate they desire a union, a 30% minority of employees can, within 45 days of voluntary recognition, petition to decertify the union, stop the parties from bargaining, and require employees to use the NLRB’s election process.
Raymond F. Kravis Center for Performing Arts, 351 NLRB No. 19 (9/28/07)
The NLRB ruled that an employer's obligation to recognize and bargain with an incumbent union following a union merger or affiliation continues unless the changes are so dramatic they transform the identity of the bargaining representative. Union members are no longer guaranteed the right to vote on such mergers. Reversing precedent, the NLRB also held that an employer is not relieved of bargaining obligations solely because the union merger or affiliation lacked due process or was not voted on.

Ryder Memorial Hosp., 351 NLRB No. 26 (9/28/07)
To curtail litigation over claims that employers and unions have deceived employees about the NLRB’s neutrality—by circulating sample ballots that look like NLRB documents but endorse particular election choices—the NLRB revised its official election ballot to express its neutrality in elections and disclaim its participation in the alteration of sample ballots. This new language will preclude any impression of NLRB endorsements, and obviate the need for the NLRB to evaluate allegedly objectionable altered sample ballots on a case-by-case basis.

The NLRB will not invalidate an election because of altered sample ballots, so long as the ballots reproduce the NLRB's form and includes the new disclaimer language; however, if a party distributes an altered sample ballot without the disclaimer, the NLRB will deem the omission intentional and those ballots as objectionable per se.

St. George Warehouse, 351 NLRB No. 42 (9/30/07)
Reversing nearly 50 years of precedent, the NLRB shifted to employees the burden of producing evidence regarding job search mitigation. The NLRB ruled 3-2 that its General Counsel now has the burden of producing evidence regarding an employee's efforts to locate interim employment after an unlawful discharge in order to establish entitlement to back pay. Though retaining the burden of proof, an employer no longer has to mount a difficult affirmative defense. Instead, once an employer shows that comparable jobs were available in the area, the General Counsel must offer testimony or other evidence that employees conducted reasonable interim job searches during the back-pay period.

Toering Electric Co., 351 NLRB No. 18 (9/29/07)
The NLRB reduced employer exposure to liability for refusing to hire an applicant because of union affiliations. An applicant for employment must now be “genuinely interested” in employment to be protected against discrimination based on union activity. The NLRB's General Counsel has the burden of proving that individual's genuine interest by showing that an employment application was filed, and reflected a genuine interest in becoming employed by that employer.

The NLRB indicated that while some “salts”—job applicants sent by unions to promote unionism or entrap employers for unfair labor practices—genuinely desire to work for nonunion employers and advise co-workers about unions, others lack “genuine interest” and are only trying to level baseless, unfair labor practice charges.

Jackson Lewis attorneys have handled thousands of matters before the NLRB, state labor boards, and state and federal courts and have preserved management rights in contract negotiations, contract administration, grievance and arbitration proceedings, and work stoppages. Jackson Lewis attorneys can assist employers in identifying legal needs, building a solid defense, meeting compliance requirements, and developing best practices.
A final rule requiring employers to pay for employee personal protective equipment has been issued by OSHA, eight years after it was first proposed.

The Occupational Safety and Health Administration of the United States Department of Labor (“OSHA”) announced in the Federal Register of a final rule on Employer paid personal protective equipment (“PPE”). The rule, published November 15, 2007, requires employers to pay for any PPE used by an employer to comply with the PPE requirements in OSHA’s standards. If PPE is not required by the standards, the employer is not required to pay. When an employer selects a specific type of PPE to be used at the workplace to comply with an OSHA standard, the employer is required to pay for that PPE. The standard requires employers to pay for employee PPE such as lifelines, lanyards, face shields and protective clothing. While the rule takes effect February 13, 2008, employers are given until May 15, 2008, to fully implement the PPE pay requirements.

The final rule contains exceptions for certain ordinary protective equipment such as safety-toe footwear, prescription safety eyewear, everyday clothing and weather related gear and logging boots. Employees can still be required to pay for these types of PPE, if (with the exception of logging boots) they are permitted to wear it away from work.

If employees choose to use PPE they own, employers will not need to reimburse the employees for the PPE. However, the standard provides that employers may not require employees to provide their own PPE and an employee’s use of PPE he or she already owns must be completely voluntary. Even where an employee provides his or her own PPE, the employer must ensure that the equipment is adequate to protect employees from workplace hazards.

The standard generally requires employers to pay for replacement PPE. However, should an employee lose or intentionally damage his or her PPE issued and paid for by the Company, the employer is not required to pay for its replacement under the rule.

According to OSHA, the rule’s enactment likely will reduce workplace injury, illness and death by an estimated 21,000 instances per year.

Employers are urged to revise existing PPE payment policies and to comply with the final rule before enforcement begins next May. A copy of the full standard can be found at: http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/07-5608.htm.

Jackson Lewis attorneys have experience at all levels of OSHA compliance. For more information, please contact the attorney with whom you regularly work or Attorney Roger Kaplan, at KaplanR@jacksonlewis.com.
Jackson Lewis News

Jackson Lewis is pleased to announce the opening of new offices in New Orleans, Louisiana and Phoenix, Arizona, office. The firm now has 32 offices nationwide. René E. Thorne, a nationally recognized employee benefits and employment law litigator is the Resident Manager of the New Orleans office. The New Orleans office is located at 650 Poydras Street, Suite 1900, New Orleans, LA 70130; telephone (504) 208-1755.

Prominent labor and employment attorney Amy Gittler is the Partner heading the Phoenix office. Ms. Gittler has over 30 years of experience advising, counseling, and defending corporations and business owners on all aspects of workplace law. The Phoenix office is located at 2375 East Camelback Road, Suite 500, Phoenix, AZ 85016; telephone (602) 714-7044.

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