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NLRB Continues To Set Sights On Healthcare Employers

By Jim Kurek (Cleveland)

The National Labor Relations Board (NLRB) has continued its aggressive attack on employers in the healthcare industry and nonunion employers generally. With a membership majority that is widely recognized as being pro-union, the NLRB has used a variety of mechanisms to make it easier for unions to challenge well-established employer practices and to organize employees in many industries, with particular emphasis on the rapidly growing healthcare industry. The following is a summary of some of the more significant actions taken by the NLRB in the past year.

Smaller Bargaining Units Recognized

In *Specialty Healthcare*, the NLRB significantly expanded the ability of a union to organize a smaller unit of employees. Although the NLRB has by regulation defined appropriate bargaining units in the acute-care hospital setting, it overruled a well-established practice of applying those categories to non-acute care facilities.

The decision signals that employers will not be able to challenge a smaller unit by claiming that the employees should be part of a broader unit, unless the employer can prove there is an "*overwhelming* community of interest" between the union's proposed unit and the excluded employees, to the point where the factors in the community of interest test must "overlap almost completely." This decision requires you carefully analyze the structure of your workforce to attempt to avoid the union's effort to organize only a small portion of your employees.

Social Media Policies Challenged

The NLRB General Counsel has issued three separate memorandums dealing with employer social media policies, the most recent one being issued in May, 2012. Using the general prohibition in Section 7 of the National Labor Relations Act (NLRA), the General Counsel will find unlawful a number of provisions commonly found in employer social media policies. For example, an employer policy prohibiting employees from having online discussions regarding confidential employee or company information would be considered impermissibly vague and overbroad. In addition, a policy that encourages employees to respect privacy and disclose personal information only to those authorized to receive it is also viewed as unlawfully broad.

Generally, to be permissible, a policy would need to expressly recognize that it does not in any way preclude employees from exercising their rights under Section 7 of the Act to discuss issues relating to their employment. On September 7, 2012, in *Costco Wholesale Corp.*, the NLRB adopted the General Counsel's approach in finding that rules contained in a handbook for nonunion employees were unlawful where they included a general prohibition on statements that damage the company's (or any person's) reputation, or the sharing of sensitive information.

Because the NLRB has adopted much of the analysis contained in the General Counsel's memorandums, there is a clear indication that the NLRB will pursue unfair labor practices challenging social media policies. You need to determine whether their current policy might be considered unlawful.

Employment-At-Will Language Found Unlawful

Many employers utilize employee handbooks to effectively communicate with their employees, and virtually all of those handbooks include some type of disclaimer language advising employees of their at-will status. Most also state that changes to such status can only occur by a written statement signed by an appropriate company official.

But in two separate cases earlier this year, the NLRB pursued unfair labor practice charges against employers that utilized that type of at-will provision as being a violation of employees' right to organize under the NLRA. It would appear that the NLRB either wants such disclaimers to be removed from employee handbooks, or to have those statements modified by expressly recognizing the right of employees to join with others to work toward altering the terms or conditions of their employment, including joining a union.

Confidentiality Of Internal Investigations Limited

In *Banner Health System*, as reported in our September 2012 Labor Letter, the NLRB held that a rule prohibiting employees from discussing an internal investigation was unlawful. In that case, as is a common practice for many employers, while human resources was conducting an internal investigation, employees were asked to maintain the confidentiality of that investigation.

Such requests are commonly aimed at protecting the integrity of the investigation. However, the Board found that the confidentially request violated Section 7 rights to protect discussions between employees concerning terms and conditions of their employment, as well as communications for other mutual aid and protection.

Union Insignia In Patient-Care Areas Protected

In *St. John's Health Center*, the Board found that a healthcare employer may have a presumptive right to ban union insignia in patient-care areas. But if the ban is selective, and other insignia permitted, then union insignia must also be allowed. In that case, because the hospital allowed employees to wear a ribbon that read "Saint John's mission is safe patient care," it could not prohibit a union ribbon.

Arbitration Clauses Prohibiting Class Claims Jeopardized

Many employers require employees to sign arbitration agreements, that include a waiver of the right to bring class or collective actions against the employer. Such provisions have been approved by the U.S. Supreme Court. However, in *D.R. Horton, Inc.*, the NLRB held that it is unlawful for an employer to require employees to sign such a waiver because it violates their Section 7 rights.

Elections Expedited And Notices Required

Last year, the NLRB attempted to create a rule that would require more expedited union elections, which would minimize the employer's ability to communicate with employees regarding the negative effects of union representation. The Board also issued a rule that would require all employers, including nonunion employers, to post a notice advising employees of their rights under the NLRA. Both of those proposed rules are

Continued on next page

Hospital Receptionist Harassed By Patient – EEOC Sues

By F. Kytle Frye (Atlanta)

Today, most healthcare employers are sensitive to issues of workplace harassment, although the focus of that sensitivity is usually upon issues involving co-worker to co-worker and supervisor to subordinate conduct. It is important to remember that the law's protection applies also to harassment from third persons who are not employees. And, given the presence of so many non-employees in the typical healthcare setting, the opportunities for problems arising are enormous.

The EEOC has recently filed a lawsuit which reinforces the need to be vigilant concerning harassment by non-employees in a healthcare environment. *EEOC v. Southwest Virginia Community Health System.*

Comments From An Unusual Source

In a lawsuit filed in federal district court, the EEOC charged a Southwest Virginia Community Health System with violating federal law by subjecting a female employee to a sexually hostile work environment. According to the EEOC, a receptionist at the hospital was subjected to sexual harassment by a male patient from April to December of 2009, and again from June to September of 2010.

As described by the lawsuit, the harassment included unwelcome sexual comments, such as an invitation that she "run away" with the patient, statements that he was "visualizing her naked," and suggestions that she have sex with him. The Commission alleges that these kinds of comments were made both in person when the patient visited the facility and by telephone when he called in to the facility. Significantly, the lawsuit also alleges that the receptionist complained about these statements to her supervisor, who did nothing to stop them. On these facts, the EEOC seeks both compensatory and punitive damages, as well as injunctive relief, against the Health System.

Assuming that these allegations are provable, when the receptionist complained to her supervisor about this patient's conduct, the Health System was legally put on notice of the alleged conduct – even if the supervisor said nothing to anyone else in authority. At that point, it became incumbent upon the employer to investigate and, if appropriate, take prompt remedial action, even though the offender was a patient and not another employee.

Assuming the employee did complain to her supervisor, we can only speculate as to why nothing more was done, but it is quite possible and consistent with what has happened elsewhere, that the harasser's status either caused the supervisor to conclude that there was nothing that could be done, or chilled the supervisor from further pursuing the matter. Either way, the Health System was put at risk.

Preventing This Type Of Problem

So, how should an employer sensitive to harassment in all its forms deal with complaints about patients or other non-employees? The first, and most obvious, remedy is to make absolutely sure that supervisors are aware that harassment by patients – indeed, by any non-employee – is every bit as serious as harassment by employees. Employers should review their anti-harassment policies on that point and should make that clear in periodic training given to supervisors.

By the same token, nonsupervisory employees should be made aware that you expect them to raise complaints about such conduct from patients and other nonemployees, just as they are expected to advise of conduct by fellow employees.

Second, in the event that harassing conduct is brought to your attention, you must conduct a serious and thorough investigation. Of course, such investigations are often more difficult than more typical complaints, since you usually may not compel cooperation from nonemployees to the extent that you can from employees. But that does not mean that you should not gather as much information as possible, and then reach a reasonable conclusion.

Third, you must promptly act on the results of the investigation in such a way as is reasonably calculated to resolve the complaint. In many cases, this may result in a consultation with the patient or other non-employee. In other cases, it could even result in advising a patient to seek care elsewhere or in restricting the patient's access to certain areas of the facility, or at least actively monitoring the patient's conduct while at the facility.

In any case, the complainant should always be advised of at least the general action taken, and encouraged to report further misconduct. In addition, you should also periodically and on your own accord, inquire of the complainant concerning any recurrence.

Training, vigilance and prompt corrective action are the keys to avoiding the often huge cost of harassment lawsuits. These are no less important in the case of harassing conduct from patients, as from other employees.

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Continued from previous page

currently tied up in court challenges, but the Board is expected to continue to pursue those efforts.

As the foregoing demonstrates, the Board continues to use a very broad interpretation of the NLRA to make it easier for unions to organize employees, particularly in the healthcare setting. Proactive measures need to be considered to address this continuing attack.

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