

EMPLOYMENT & IMMIGRATION LAW

MEDICAL EMERGENCIES

STATE LAW AIMS TO PROTECT HEALTH CARE WORKERS FROM VIOLENT PATIENTS



By **GEORGE O'BRIEN**

A new Connecticut statute requiring health care employers to take a variety of actions to protect employees from workplace violence took effect on Oct. 1, 2011. Connecticut thus joined several other states that recently enacted legislation to increase criminal penalties for attacks on health care workers (New York), to require health care facilities to establish violence prevention programs (New Jersey), or to provide other forms of protection for health care workers from what is widely perceived as a trend of increasing violence in workplaces.

The new Connecticut law, Public Act 11-175, covers all hospitals, residential care homes, health facilities for the handicapped, nursing homes, rest homes, home health care and home-maker agencies, assisting living service agencies, outpatient surgical facilities, infirmaries of educational institutions, community health centers, facilities for treatment of substance abuse, mental illness and intellectual disabilities, and other facilities providing services for the prevention, diagnosis, treatment or care of human health conditions, including state agency facilities, that have 50 or more full or part-time employees. Covered employers are required to:

- Establish and convene an ongoing workplace safety committee composed of representatives from administration, physician, nursing and other direct patient care staff,

security personnel and any other staff the institution deems appropriate. At least 50 percent of the committee members must be "non-management employees." The committee must meet at least once every quarter, and make minutes and other records from its proceedings available to all employees.

- Maintain records that "detail" incidents of workplace violence, including the specific area or department where the incident occurred, and report this information to the Department of Public Health at its request.
- Undertake a risk assessment of the factors that put any health care employee (defined to include volunteers) at risk of being a victim of workplace violence. This obligation continues annually thereafter.

Written Plan

By Jan. 1, 2012, and each January first thereafter, in collaboration with the workplace safety committee, covered employers are required to develop and implement a written workplace violence prevention and response plan.

Nine of the 14 witnesses who testified before the Joint Committee on Public Health concerning the proposed legislation identified themselves as union spokesmen or union members, and all nine advocated adoption. Mary Jane Williams, testifying for the Connecticut Nurses Association, said that in the previous 12 months she had received "repeated calls from

nurses who have been assaulted and/or have witnessed an assault and are working in environments that they feel are unsafe and a threat to their health."

Williams provided a variety of statistics indicating that workplace injuries from assaults are substantially more prevalent among nursing, psychiatric, home health aide and other health care and social service workers than among other job categories. She quoted Department of Justice figures indicating that the average annual rate for non-fatal violent crime for all occupations is 12.6 per 1,000 workers, whereas for mental health professionals it is 68.2 per 1,000 workers. Several hospital employees, including a registered nurse who had been shot three times trying to disarm a patient, described incidents of violence that had affected them and their co-workers.

With one notable exception, most provisions of the proposed legislation also drew support from spokesmen for hospitals and health care organizations. As originally proposed, the legislation would have prohibited health care employers from requiring an employee to treat or provide services to a patient who the employer

knew had "verbally or physically abused or threatened" the employee.

This provision was sharply criticized by hospital and disability rights advocates as violating patient rights. The Connecticut Hospital Association said its member institutions "are not permitted to abandon patients because they present in an aggressive or abusive manner – a problem that often is the result of a physical or mental condition that the patient cannot control." The chair of the Psychiatry Department of Danbury Hospital, Charles Herrick, said that "allowing health care employees to refuse to care for" such patients "would be nothing short of catastrophic to the health care delivery system."

Herrick pointed out that the risk of imminent violence is one of the major criteria mandated for immediate involuntary hospitalization to a psychiatric facility.

Heeding these concerns, lawmakers amended the original bill to limit the right of health care employees to refuse patient treatment. As adopted, the law instead requires that each health care employer, "to the extent practicable," adjust patient care assignments "so that no health care employee who requests an adjustment to his or her patient care assignment is required to treat or provide services to a patient who the employer knows to have *intentionally* physically abused or threatened the employee" (emphasis added). Patient behavior, including physical abuse or threats, will not be considered "intentional," however, if it is a "direct manifestation of the patient's condition or disability." In



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EMPLOYMENT & IMMIGRATION LAW

New Rules Would Affect Consultants To Employers

LAW FIRMS, OTHERS WOULD HAVE TO REPORT ACTIVITIES INVOLVING UNION ISSUES

By **NICOLE A. BERNABO**

The U.S. Department of Labor is proposing to expand the circumstances in which consultant services provided to an employer, which are used to inform employees about their rights to collective bargaining, have to be reported by the consultant and the employer under the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA). 76 Fed. Reg. 361788 (June 21, 2011).

The act provides standards for reporting and disclosure of certain financial transactions and administrative practices to the Labor Department by labor organizations and employers. The proposal would revise Form LM-10 (Employer Report) and Form LM-20 (Agreements and Activities Report, filed by labor relations consultants), which are required under Section 203 of LMRDA.

Currently, Section 203 of the LMRDA requires an employer to report to the Labor Department any agreements or arrangements with a third-party consultant when the purpose of such an agreement or arrangement is to persuade employees about their collective bargaining and organizing rights or to obtain certain information concerning the activities of employees or a labor organization in connection with a labor dispute.

The current requirement includes a reporting exemption for "advice" provided to an employer by a consultant or attorney. Neither an employer nor a consultant is currently required to file a report with the Labor Department covering the services of a consultant if the consul-

tant is merely giving or agreeing to give advice to the employer.

Under the proposed rule, any consultant or lawyer engaging in persuader activities beyond the plain meaning of "advice" would be required to publicly report such activity. These changes dramatically expand the scope of "persuader" activities and narrow the "advice" exemption that has been in place for over 50 years.

Specifically, the Labor Department proposes to adopt the plain meaning of the term "advice" as "an oral or written recommendation regarding a decision or course of conduct." "Persuader" advice refers to a consultant providing material or communications to, or engaging in other actions, conduct, or communication on behalf of an employer that, in whole or in part, has the objective, directly or indirectly, to persuade employees concerning their rights to organize or bargain collectively.

As proposed, reportable "persuader" activities could, therefore, potentially encompass virtually any activity in which a consultant engages that would directly or indirectly persuade workers concerning their rights to organize and bargain collectively, regardless of whether or not the consultant has direct contact with workers. This proposed reinterpretation of "advice" would call into question whether such advice or information was prepared to enhance its effectiveness and foster litigation on this issue.

Confidential Information

The proposed rule would also require consultants and others, including attorneys and law firms who have engaged in any persuader activ-

ity, to disclose a substantial amount of confidential client information thus undermining attorney confidentiality requirements, including the existence of the client-lawyer relationship and the identity of the client, the general nature of the legal representation, a description of the legal tasks performed, and legal fees paid by employer clients on account of "labor relations advice or services" provided to any employer client.

Significantly, the Labor Department would require lawyers and law firms to disclose all client and legal fees paid for all labor relations advice or services provided to all employers during that same year, regardless of whether that advice related to "persuader" activity. These new reporting requirements would fundamentally undermine the attorney-client privilege and the right to counsel, which are critical for employers unfamiliar with the complexity of labor laws.

Further, the proposed rule would enhance



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the requirements for mandatory electronic filing (Form LM-21) for reporting receipts and disbursements. Employers would be required to report their own internal costs, including wages paid to the employer's managers and employees for "persuader" activities. The reports would be publicly available, and labor unions would likely use these reports against employers during their aggressive union organizing efforts.

Penalties for willfully failing to report "persuader" activities carry civil and criminal penalties. If this rule goes into effect as currently proposed, such penalties, coupled with the significant rule changes, would have a "chilling" effect on employers and third-party consultants who may choose to avoid putting themselves in a position that would require making a determination about whether the advice sought or given would be reportable.

Not surprisingly, the proposed rule drew strong criticism and elicited nearly 7,000 public comments last month at the end of the comment period, including submissions from the U.S. Chamber of Commerce, the American Bar Association, and many other business and labor groups.

Employers and labor lawyers should consider monitoring the Labor Department's progress with this proposed rule. Such rule changes could have a dramatic impact on the strategy and legal landscape of an organizing campaign for employers and third-party consultants, including law firms and attorneys. ■

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determining whether it would be practicable to adjust patient care assignments, health care employers are to give "due consideration to the employer's obligation to meet the needs of all patients."

Assistance From Co-Worker

If the institution determines that adjustment of a health care employee's patient care assignment is not practicable, any employee who has been physically abused or threatened by a pa-

tient may request that a second employee "be present when treating such patient."

This portion of the statute is not entirely clear. Because it refers to physical abuse and threats generally, not just to "intentional" conduct by the patient (as does the provision concerning adjustment of patient care assignments), a request for the presence of a second employee might be appropriate when patients are physically abusive or threatening as a result of mental illness or other medical condition. There is further ambiguity in the provision because it does not expressly require the employ-

er to comply when an employee makes such a request. These points might eventually be addressed in regulations that the statute empowers the Connecticut Labor Commissioner to adopt as necessary to carry out the purposes of the statute.

Public Act 11-175 also amends Section 53a-167c of the General Statutes to make assault on a health care employee a class C felony. At the same time the amendment specifies that it will be a defense to such a charge that the defendant has a mental or physical disability or mental retardation, and that the defendant's conduct

"was a clear and direct manifestation of the disability."

The new statute also requires that covered health care employers report to local law enforcement agencies within 24 hours "any act which may constitute an assault or related offense" under state criminal law "against a health care employee acting in the performance of his or her duties." This reporting obligation will not apply, however, if the act was committed by a person whose conduct is a clear and direct manifestation of mental retardation, physical disability or mental disability. ■

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EMPLOYMENT & IMMIGRATION LAW

Paid Sick Leave: A Law Of Unintended Consequences

MANY EMPLOYERS WILL HAVE TO MODIFY RULES TO COMPLY WITH ACT

By **BEVERLY W. GAROFALO** and
HOLLY L. CINI

The Jan. 1, 2012 effective date of Connecticut's Paid Sick Leave (CPSL) law is just around the corner. Yet, many employers are still struggling to understand how or whether it applies to their organizations. Others have been lulled into a false sense of security due to the law's so-called "safe harbor" provision.

The Connecticut Labor Commissioner is expected to issue non-binding guidance later this year. In the meantime, employers in the state must understand the basic thresholds of coverage and the requirements of the law. Coming into compliance may require wholesale changes to an employer's existing paid time off and attendance policies, procedures and practices.

The Basics

With limited exception, beginning Jan. 1, 2012, employers with 50 or more employees in the state must provide paid sick leave annually to each of their full- or part-time "service workers" (as that term is defined in the statute) at a rate of one hour of paid sick leave for each 40 hours worked to a maximum of 40 hours per calendar year. For those hired after Jan. 1, accrual begins on the date of employment.

An employer may not delay accrual of paid sick leave during an introductory period, but

service workers are not entitled under the law to begin taking the time until they have worked 680 hours, counted from Jan. 1, 2012 (or from the first day of employment if hired after that date).

A service worker may use sick leave for his or her, or a spouse's or child's:

- Illness, injury, or health condition.
- Medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition.
- Preventive medical care.

Additionally, sick leave may be used by a service worker who has been a victim of family violence or sexual assault.

Although not specified in the law, it appears that sick leave can be used in increments as small as one hour. Service workers are required to provide advance notice for foreseeable absences and as much notice as is practicable for unforeseeable absences. Employers cannot request documentation to support a request for, or the use of, CPSL unless an absence extends for at least three consecutive work days.

Up to 40 hours of unused sick leave can be carried over to the following calendar year, provided that an employee cannot use more than 40 hours of leave in a calendar year. Unused sick leave need not be paid out upon termination of employment.

No Retaliation

The law prohibits employers from disciplining or otherwise retaliating against any employee because he or she requests or uses paid sick leave as provided by the law, or in accordance with the employer's "own paid sick leave policy," or has filed a complaint with the Labor Commissioner.

Unlike the paid sick leave mandate, the anti-retaliation section is not limited to service workers and seemingly also protects exempt employees. Counting sick leave against an employee for purpose of eligibility for perfect attendance rewards or incentives may be viewed as retaliatory. The full impact of the retaliation provision, particularly for non-service workers, remains to be seen.

50 Or More Employees

CPSL applies to companies that employed 50 or more employees in the state during at least one quarter in the preceding calendar year. This determination is made based on the quarterly wage information submitted to the Labor Commissioner. Because that quarterly reporting is cumulative, an employer need not have actually employed 50 employees at any given time to be subject to the law.

Manufacturers Exclusion

Companies that are classified as manufacturers under Sectors 31, 32 or 33 in the North American Industrial Classification System are not subject to CPSL. This exemption applies to most, if not all, manufacturers. Subject to further guidance from the Labor Commissioner, it appears all employees at the site at which the manufacturing operations are conducted are exempt from application of the law.

However, if a manufacturer conducts manufacturing operations at one site and non-manufacturing activities at another, employees at the latter site may not be exempt from the paid sick leave law.

Meaning Of 'Service Workers'

The mandate for covered employers to provide paid sick leave applies only to service workers who are hourly or otherwise not exempt from the federal Fair Labor Standards Act. The categories of workers mentioned in the legislative history and by Gov. Dannel Malloy in his statement after the General Assembly's passage of the bill focused on occupations generally understood to be service workers, such as restaurant, child care and hospital workers.

However, the law extends to occupations that do not intuitively fall within the service worker category, such as "first-line supervisors of sales workers," "computer operators," "office clerks" and "secretaries and administrative assistants." Accordingly, covered employers must carefully review the list of occupation code numbers/ti-



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ties identified in the law. They must then decide whether they will differentiate between service workers and non-service workers for purposes of their paid time off policies and practices.

Safe Harbor Provision

According to the paid sick leave law's legislative history, approximately 86 percent of employers in the state already offer paid time off benefits that can be used for the purposes identified in the law. To that end, the legislature added a "safe harbor" in the law stating that an employer shall be "deemed to be in compliance" with CPSL law if it "offers any other paid leave" that (1) can be used for the same purposes as CPSL, and (2) that accrues at a rate equal to or greater than the rate described in the CPSL law — namely, one hour for every 40 hours worked.

Many employers offering paid time off benefits that meet or exceed these stated criteria have concluded that no further action is required by them to comply with the new law.

Unfortunately, while we await the Labor Commissioner's non-binding guidance, and ultimately decisional law from the courts, covered employers are well-advised not to take too much solace in the safe harbor provision. On the contrary, it appears that such employers will need to modify their paid time off and attendance policies and practices to comply with all other aspects of the law discussed above.

What this also means is most covered employers that do not currently track the reasons for an employee's absence under a neutral paid time off policy will need to begin doing so on Jan. 1, 2012. Otherwise, it will not know when it can or cannot discipline an employee under its attendance policies or when paid sick leave has been exhausted for purposes of calculating carry-over.

Penalties

The potential penalties for non-compliance are steep, including up to \$100 for each violation of the general provisions of the bill and up to \$500 for each violation of the retaliation provision. The Labor Commissioner can also award the employee all appropriate relief, including payment for used paid sick leave, reinstatement and back wages. ■

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EMPLOYMENT & IMMIGRATION LAW

Common Misconceptions Infect Sick Leave Law

UNCLEAR AND IMPRECISE LANGUAGE MAY CONFUSE SOME EMPLOYERS

By EDWARD F. 'BUD' O'DONNELL and
KYLE A. McCLAIN

Since its enactment in July of this year, countless lawyers, business owners and human resources personnel have reviewed the provisions of the country's first statewide paid sick leave law. The intent of this article is not to review the plainly stated mandates of Public Act 10-52, but to explore its intricacies.

Initially, there are a number of common misconceptions as to the applicability of the act that can be resolved upon close scrutiny of its language.

50 does not really mean 50: The act defines an "employer" under the statute as an entity that "employs fifty or more individuals in the state in any one quarter in the previous year . . ." As a result, 50 employees is widely considered the all-important benchmark for determining coverage under the law.

Unfortunately, the casual observer may not realize that the 50-employee benchmark is not calculated from the number of employees on the payroll *at any one time*; rather, this number is calculated using the *total* number of *individual* employees that performed work during any one quarter. Therefore, entities must look not at the number of *positions* customarily filled, but instead, at the *total* number of persons filling those positions during any one quarter.

An employer that never employs more than 45 individuals *at any one time* may, through normal hiring to fill vacated positions, regularly

May an employer deny an employee's requests to use paid sick leave in increments of two hours? 45 minutes? 15 minutes?

exceed the 50-employee benchmark, and be covered by the act.

Not just for service workers: The act's major focus — its paid sick leave mandates — applies only to those employees defined as "service workers." With that in mind, many readers of the law assume that its anti-retaliation provisions also apply only to "service workers." This assumption is incorrect, as the anti-retaliation provisions apply to all "employees," not just "service workers," and, as discussed below, the language of these provisions further extends their effect beyond the act's paid sick leave requirements.

Most notably, the anti-retaliation provisions prohibit retaliation against "employees" based on requests to use, or actual use of, paid sick leave "in accordance" with the act. Therefore, an employer is liable for retaliation against service workers for requests or use of paid sick leave mandated by the law. Additional language, however, prohibits retaliation against "employees" based on requests to use, or use related to, an employer's "own paid sick leave policy." Effectively then, any entity meeting the definition

of "employer" which has some kind of "paid sick leave policy" — even if the entity employs no service workers at all — is potentially liable for retaliation against "employees."

Problematic Interpretations

The above-noted misconceptions are not the only areas of concern for individuals reviewing the act. A number of ambiguities arise from the law's language, a few of which the Connecticut Department of Labor has sought to address.

While the act does not authorize the Department of Labor to adopt regulations, the Department of Labor intends to clarify ambiguities by issuing guidance on its web site. Some guidance, however, may not resolve disputes regarding the terms of the act.

Incremental use rule: While the act goes into great detail in describing how paid sick leave accrues, and the purposes for which it can be used, the act does not say whether paid sick leave may be used in any *particular* increments. This is problematic for employers, particularly in light of the penalties under the anti-retaliation provisions of the act.

May an employer deny an employee's requests to use paid sick leave in increments of two hours? 45 minutes? 15 minutes? May an employer require an employee to use paid sick leave in particular increments (e.g., two hours) or during particular periods of time (e.g., the end of a shift)?

In response to the act's oversight of this issue, representatives of the Department of Labor have stated their intent to impose a strict one-hour incremental use rule which restricts both employees and employers. The rule will require service workers to use paid sick leave in one-hour increments, and prohibit employers from creating policies that require employees to use paid sick leave in increments of greater than one hour.

The rule's limitation on employers' abilities to implement minimum incremental-use rules greater than one hour is troubling. For example, consider an employer that has a policy under which an employee that uses paid sick leave mid-shift — for a doctor's appointment, for example — is required to use accrued paid sick leave to take off the rest of that shift.

Such a policy minimizes the employer's exposure to coverage problems, as well as the resulting consequences when the one-hour doctor's appointment "unforeseeably" turns into two. The Department of Labor, however, has said that such a policy violates its strict one-hour incremental-use rule, and therefore, violates the act — an interpretation not supported by the Act's explicit language.

'Lifetime' 680-hour rule: One provision of Section 2 of the act states that service workers are not entitled to the use of accrued paid sick leave until completion of the service worker's 680th hour of employment from Jan. 1, 2012, or if hired thereafter, from the service worker's date of hire. It is clear that this is a one-time requirement that need not be met by an employee more than once while continuously employed. The provision is unclear, however, in light of a

separate "break in service" provision contained in Section 4, as to how it should be applied if a service worker leaves employment and later returns.

The Department of Labor has indicated that it will interpret the 680-hour requirement as only having to be met once during the *lifetime* of the employee. That means, for example, if an employee meets the 680-hour requirement, leaves employment, and subsequently returns 10 years later, that employee need not meet the 680-hour requirement again before being entitled to use paid sick leave subsequently accrued.

Such an interpretation creates arguably the most unrealistic of several new recordkeeping burdens the act imposes on employers, forcing them to, at least theoretically, keep track of every employee they have ever employed, or risk violating the act.

Uncertainty Creates Challenges

Uncertainty abounds as Jan. 1, 2012, the date the law goes into effect, approaches. On the one hand, the unclear and imprecise language of



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the Connecticut Paid Sick Leave Law presents a unique challenge to employers already struggling to survive. On the other hand, the Department of Labor must meet the challenge of consistent interpretation of the act.

As a result, when implementing these new paid sick leave mandates, employers must be cognizant of the fact that much of the act is still evolving — the misconceptions and troublesome interpretations considered above are just the first of the many ambiguities presenting difficult compliance challenges. ■



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EMPLOYMENT & IMMIGRATION LAW

A Small Poster Could Have A Big Impact

EMPLOYERS MUST DISPLAY NLRB NOTICE ADVISING WORKERS OF RIGHTS

By **ROBERT G. BRODY** and
ALLISON E. SMITH

The Obama Administration has vowed to help unions since before the 2008 election. The next pro-labor initiative will begin in a few months. As of Jan. 31, 2012, most employers will be required to post a notice in their workplace informing employees about their rights to unionize. The National Labor Relations Board originally opened its proposed rule to public comment in December 2010. After receiving more than 7,000 comments, the board adopted the final rule this past August. The poster was originally mandated for Nov. 14, but has been delayed until January.

All employers who are covered by the National Labor Relations Act, which is practically everyone, will have to display this poster wherever they normally post notices to employees. The poster must be 11-by-17 inches, or you may print it on two 8-by-11.5-inch pages and tape them together. You can find a free downloadable version on the board's web site.

If more than 20 percent of employees are not proficient in English, employers must also post the notice in the language spoken by the employees. In addition to posting it in the workplace, if an employer normally posts information to employees on an internet or intranet site, the notice must be placed there as well.

What Poster Says

In the opening paragraph, the notice instructs employees to contact the National Labor Relations Board "if you have any questions about specific rights that may apply in your particular workplace." Next, the notice lists various rights employees have under the NLRA, including the right to:

- "Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment."

- "Form, join or assist a union."
- "Take action with one or more co-workers to improve your working conditions by . . . seeking help from a union."

Further, the notice warns employees about seven different types of possible illegal conduct by their employer. The notice concludes by instructing employees who feel their rights (or the rights of other employees) have been violated to promptly contact the Board. The notice contains the Board's web site and toll-free 800 number.

Poster Challenges

Three groups representing the interests of employers filed lawsuits against the Board, claiming the board exceeded its authority in creating this new rule. The National Federation of Independent Business, National Association of Manufacturers and U.S. Chamber of Commerce each filed separate suits in different federal courts asking for an injunction stopping the implementation of the rule. The Chamber's lawsuit is representative of the arguments made by the other groups. First, the Chamber argues the Board does not have the statutory authority to promulgate or enforce a rule requiring workplace notices.

Next, the Chamber argues the NLRB did not properly consider the impact this rule will have on small businesses. Under federal law, the agency is supposed to analyze the impact a new law will have on small businesses. According to the Chamber, the board relied on old studies and anecdotal evidence in confirming the rule will not have a disproportionate impact on small businesses. The board said the burden on small businesses will only total two hours of time. However, the board failed to consider small businesses' lack of compliance staff, the time it will take to train human resources professionals

and managers, educate employees, ask and get answers to questions regarding the poster, and monitor the poster over time. All this time put together represents a significant burden. Failure to take these steps, or inadvertent non-compliance with the rule could result in costly litigation and penalties.

Finally, the Chamber argues the National Labor Relations Board also failed to balance the rights of employers with the rights of employees in drafting the language of the poster. Specifically, there is nothing on the poster telling employees in Right to Work states that they have the right not to join a union.

The Chamber argues this demonstrates a bias in drafting the poster. According to the Chamber, compelling employers to post this notice violates an employer's right to free speech because the poster contains ideological viewpoints that may be antithetical to the employer.

Employer Sanctions

Failure to post the notice is an unfair labor practice by the employer. Also, the board may toll the statute of limitations for filing other unfair labor practice charges during the time period the notice is not posted. If the board finds the employer willfully failed to post the notice, it may use this as evidence of the employer's anti-union motivation pertaining to other alleged violations of the National Labor Relations Act. This small poster can have a big impact.

Over the years, the board has outlined what policies are considered legal and illegal under the NLRA. Unfortunately, most employers are unaware of these cases. As a result, many employers would be surprised to find their no solicitation policies, no-access policies and social media policies may violate the NLRA. With employees becoming more aware of their rights under the NLRA, it is much more likely your common policies will come under attack. Em-



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ployers should be sure their policy falls within the current board guidelines, so they do not become yet another report on the news.

It is possible employees will heed the Board's invitation to contact them with all kinds of complaints. Worse yet, there may be an increase in discrimination and retaliation claims under the NLRA. Finally, the poster's mere existence may give employees the impression that unions are gaining strength in the workplace and encourage more and successful union organizing. Employers must be ready to address all of this.

The NLRA sets forth what employers and their supervisors can and cannot say about unions. The line between legal and illegal can often times be blurry. Between now and January, employers should train their supervisors on how to discuss union issues with employees. Every supervisor needs to know what they can and cannot say to employees about unions and how to respond to inquiries about this new poster. By discussing the possible effects of unionization supervisors may sway employees who otherwise might turn to a union for support.

Hopefully if this poster is required, it will not foster an increase in litigation against employers or union activity, but employers need to be prepared. ■

'Sham Evidence' Insufficient To Defeat Summary Judgment

RULING SAYS JUDGE RIGHTLY CONSIDERED PLAINTIFF'S INCONSISTENT HARASSMENT CLAIMS

By **BERNARD JACQUES**

The standards for summary judgment in federal court are well-established. Summary judgment is only appropriate when, construing the evidence in the light most favorable to the non-moving party, "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Federal Rules of Civil Procedure 56(a).

A fact is material if it might affect the outcome of the action and an issue is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248

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(1986). But, according to the *Anderson* court, "the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient, there must be evidence on which a jury could reasonably find for the plaintiff."

Courts are cautioned that in deciding summary judgment they "should not weigh evidence or assess credibility of witnesses." *Hayes v. N.Y. City Department of Corrections*, 84 F.3d 614, 619 (2d Cir. 1996). But what if the only evidence opposing summary judgment is from the plaintiff and that testimony is suspect? That was the issue faced by the 2nd Circuit Court of Appeals in *Rojas v. The Roman Catholic Diocese of Rochester*, 2011 WL 4552460 (2d Cir. 2011), a sex discrimination and retaliation case, in which the trial court granted summary judgment after determining that plaintiff had offered "sham evidence" in her opposition to the

summary judgment motion.

Sandra Rojas was employed by the Rochester Diocese as its coordinator for the Hispanic Migrant Ministry and her immediate supervisor was the Diocese's director for Parish Support Ministries. She worked out of an office on the campus of a parish, which was a separate corporate entity from the Diocese. Ms.



Bernard Jacques

Rojas claims that she was subjected to sexual harassment by the pastor of the parish, which created a hostile environment, and fired in retaliation for complaining about the harassment.

The Diocese sought summary judgment and the critical issue was whether the pastor's conduct could be attributed to it. This depended on (1) whether the pastor was her supervisor and (2) whether she had made any complaints about his conduct. The only evidence submitted suggesting that the pastor was her supervisor and that she had complained to the Diocese was plaintiff's affidavit in opposition to the summary judgment and some excerpts from her deposition.

Contradictory Complaints

However, that evidence was contradicted by

■ Continued on **PAGE 22**

Formal, 'Informal' Rulemaking Alter Labor Landscape

NLRB DRAWS THOUSANDS OF COMMENTS ON POSTER, 'QUICKIE ELECTION' PROPOSALS

By **RICHARD F. VITARELLI and SAMI ASAAD**

It is common to see changes in policy at the National Labor Relations Board following changes in presidential administrations. Historically, policy changes have occurred through individual case decisions issued by the Board majority appointed by the president. Historically, changes to significant policies have been gradual.



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However, beginning with President Barack Obama's March 2010 recess appointments, the NLRB has engaged in formal rulemaking to make changes in policy. The board has also infused rulemaking elements into its individual case adjudications, evidencing a much more active initiative to systematically and deliberately change the labor law landscape. Below is a brief overview of the board's formal and "informal" rulemaking and three examples

of its use of rulemaking to change labor law.

Formal Rulemaking

As Justice Antonin Scalia once noted, "The [NLRB], uniquely among major federal administrative agencies, has chosen to promulgate virtually all the legal rules in its field through adjudication rather than rulemaking." *Allenton Mack v. NLRB*, 522 U.S. 359, 374 (1998). The Administrative Procedures Act sets forth the process for formal rulemaking by administrative agencies such as the NLRB. This process includes providing sufficient notice of the rule, an opportunity to submit argument or comment, and publication in the Federal Register at least 30 days prior to the rule's effective date.

The NLRB has rarely used formal rulemaking in carrying out its role of interpreting and applying the terms of the National Labor Relations Act. Prior to President Obama's election, the last time the NLRB used formal rulemaking was 1989, in a multi-year process which involved appropriate bargaining units in acute care hospitals. Now, over 20 years later, the NLRB has purported to use formal rulemaking twice in less than a year, with one rule already final and another pending.

Final Poster Rule

On Aug. 30, 2011, the notice-of-rights rule became final, requiring virtually all employers to display an 11-by-17-inch poster advising employees of their union organizing rights and ex-

amples of unlawful conduct by employers and unions. The poster directs employees to contact the NLRB to complain about alleged violations. Although the original deadline for posting the notice was Nov. 14, 2011, it has since been extended to Jan. 31, 2012.

This new rule has been viewed by many business groups as political payback for unions, to promote union organizing and stem ever-dwindling union membership. The rule is also expected to result in an increase in unfair labor practice charges filed by individual employees.

'Quickie Elections' Rule

The proposed, so-called "quickie elections"

rule seeks to change the election process used when a union seeks to represent workers. Among other changes, the rule reduces the process from roughly seven weeks following the filing of a representation petition to as few as 10 days, severely limiting the time employers have to educate employees on the merits of remaining union-free prior to an election.

While the hotly contested poster rule drew 7,000 comments, this proposed rule drew more than 60,000 comments. Whether the rule will go into effect imminently is an open question. The board is down to three sitting members, including Republican Brian Hayes, who publicly opposes this rule. Traditionally, the board

has not acted to change existing rules without at least three votes, but it is possible to see a final rule before Democratic Member Craig Becker's recess appointment expires later this year or early next year.

'Informal' Rulemaking

In *Specialty Healthcare* (decided Aug. 31, 2011), the NLRB issued a decision which not only affected the litigants, but set forth a new rule applicable to most employers. In this "informal" rulemaking, the board incorporated formal rulemaking elements into its case ad-

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EMPLOYMENT & IMMIGRATION LAW

A Revitalized NLRB Flexes Its Muscles

ACTIONS AFFECT SOCIAL MEDIA USE AND UNION ELECTION RULES

By **ROBERT B. MITCHELL**

Perhaps what is in many ways the most interesting, but seemingly least known, National Labor Relations Board development of 2011 came out of *Continental Group Inc.*, 357 N.L.R.B. No. 39 (Aug. 11, 2011). The facts involved a fairly simple story of an employee fired pursuant to an employer policy that forbids employees from being on the property unless on duty, picking up a paycheck or given managerial permission.

The Board used the case to expand on its *Double Eagle* doctrine; so named after an earlier case. The most interesting aspect of *Continental Group* was the board's clear statement that the National Labor Relations Act protection can extend to individual employees disciplined for protected activity under an overbroad employer workplace rule even though the employee was *not* engaged in activities that were either "concerted" or undertaken for "mutual aid and protection," the ordinary prerequisite for board action.

The NLRB concern with social media issues should be of interest to union and non-union employers alike. "A Report of the Acting General Counsel Concerning Social Media Cases, Operations Management Memo," No.11-74 (Aug. 18, 2011), describes the general counsel's views on 14 different cases. While each was unique, some NLRB policy concepts are presented and discussed that have a broad application to every workplace.

The General Counsel noted the *Lafayette Park Hotel* principle, 326 NLRB 824, 825(1998), *enfd.*, 203 F.3d 52 (D.C. Cir. 1999), which states that an employer violates the NLRA by maintaining a work rule that would "reasonably tend to chill employees in the exercise of their Section 7 rights."

He then described the *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), a two-step inquiry used to determine if a particular work rule has a *Lafayette Park Hotel* effect. First, rules that explicitly restrict Section 7 activities are unlawful. Second, if a rule does not explicitly restrict protected activities, it is unlawful upon

a showing that: (1) employees would reasonably construe the language to prohibit protected concerted activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of protected rights."

In the cases discussed in the report, the issue was generally whether the rule in question could be reasonably construed to restrain protected activity. When coupled with the *Continental Group* holding, the general counsel's social media report maps out a potential path for individual employees to bring their employers before the board without the need to demonstrate concerted activity. Whether a particular social media or other policy violates the National Labor Relations Act because of a "chilling effect" on protected activity is a point to be seriously considered by anyone drafting such rules, seeking to enforce them or trying to protect an employee who has run afoul of them.

Streamlining Elections

In its more traditional role of protecting employee rights to participate or refrain from participating in collective activities, the board also took some interesting steps in 2011.

First, it issued new proposed rules to streamline the union election process. Second, it promulgated a rule requiring employers to post a notice in the workplace to further employee awareness of their NLRA rights. Finally, the General Counsel's Office issued a controversial unfair labor practice complaint against the Boeing Co.

The new election rules would have two primary immediate effects. First, they would shorten the time between the filing of an election petition and the election date. It has been claimed that they would cause elections to be held within 10 to 21 days of the petition's filing. This would be approximately half the time that the average election takes under the current rules.

Second, they would substantially limit the opportunity for full board review of contested issues concerning the appropriate bargain-

ing unit, voter eligibility and election misconduct. The proposed rules, for example, call for the use of a mandatory questionnaire, a proposed "Statement of Position Form," that would require an employer to state its position on bargaining unit

appropriateness, any election bars, dates, times and location of the election and any other issues that it intended to raise at the pre-election hearing, which in turn is to be held seven days after the election petition and Statement of Position Form are served on the employer.

The proposed rules would bar an employer from offering evidence or cross-examining witnesses as to any issue not raised either in its own statement or in response to another's statement, thus, giving the employer just those seven days to investigate, resolve and prepare to contest any of the issues that are customarily considered in a pre-election hearing.

Other portions of the proposed rules, such as their deferral of certain voter eligibility questions until after the election, would introduce substantial uncertainty into the campaign process. After receiving public comment and facing heated criticism from business, the proposed rules have been put into limbo, perhaps until after the 2012 elections.

Posting Notices

The NLRB has also issued rules requiring employers subject to its jurisdiction to post no-



Robert B. Mitchell

tices advising employees of their rights under the NLRA.

The notice outlines the NLRA's prohibitions against employer and union coercion or discrimination against employees who exercise their right to either participate or refrain from joining in protected activities. Some claim that the notice as formatted is too pro-union. There have been questions raised about the need for such a notice and even the Board's power to compel such postings. The notice rule is to take effect at the end of January 2012.

Finally, the general counsel's decision to issue a complaint against the Boeing Co. to prevent it from locating work on its new Dreamliner aircraft to a non-union plant has led to a storm of controversy. The complaint alleges that Boeing decided to build its airplane in the non-union plant to retaliate against its unionized employees for their strike history.

In that view, it seems akin to a "runaway shop" case. Board opponents note that Boeing is not moving any existing work, but simply declining to add a new production line to its unionized plants. In their view this is no "runaway shop" or retaliation situation, but a new venture that has incorporated sound business judgments unrelated to any protected employee rights. The complaint has resulted in passage of a house bill that some NLRB supporters say would "gut" the board's powers to correct labor law abuse.

These 2011 NLRB actions have brought a sometimes forgotten agency back to the employee relations forefront. The results were predictable — business community howls, adverse congressional reaction and congratulations from organized labor and some academics. What remains to be seen as we enter the 2012 political season is whether this year's NLRB activity will prove a prelude to continuing agency revitalization or turn out to be that proverbial flash in a pan. ■

Robert Mitchell is a partner at Mitchell & Sheahan P.C. in Stratford, where his civil trial practice focused on representing employers and employees in labor and employment law cases. He also advises public sector employers, private company management and individual employees on their rights and obligations under federal and state labor and employment laws.

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the complaint and other sworn statements that the plaintiff had made, including statements in the criminal trial, about the pastor, who had been arrested based on plaintiff's claims that he had sexually assaulted her. The pastor was tried and acquitted of all charges.

In her original complaint, Ms. Rojas claimed that the pastor was her "co-worker" and the director of Parish Support Ministries was her "supervisor." The Diocese moved to dismiss the complaint, which the court granted with leave to replead. In granting that motion, the court *sua sponte* raised the issue of whether the Diocese could be held liable for the actions of a co-worker. The plaintiff filed an amended complaint and again claimed that the pastor was a "co-worker." However, in opposition to summary judgment, the plaintiff submitted an affidavit in which she claimed that the pastor was her supervisor.

Similarly, plaintiff's statements on whether

she had alerted the Diocese to the alleged harassment were contradictory. In her Equal Employment Opportunity Commission charge, which was sworn, she claimed that she complained about the pastor's conduct on three separate occasions. However, in response to an interrogatory, she claimed that she complained about his conduct on only one occasion when she told her supervisor that the pastor was "making [her] life miserable." But in the pastor's trial for sexual assault, she testified that she had not notified the Diocese because she felt intimidated by the pastor. In her deposition, her story changed again. She initially repeated her claim that she had told her supervisor that the pastor was "making [her] life miserable." And when asked if there was anything else, she said, "No."

But later in the deposition she claimed, not merely that she had informed her supervisor that the pastor was "making [her] life miserable," but that she had told him that the pastor was "touching and kissing her." She added that

she would "constantly cry" to her supervisor and other Diocesan officials about being sexually assaulted by the pastor.

There is no question that plaintiff submitted "evidence" to oppose summary judgment. She submitted an affidavit claiming that the pastor was her supervisor and excerpts of her deposition in which she claimed that she had repeatedly complained about the harassment to Diocesan officials. But, after cataloging the inconsistencies and contradictions of her sworn statements, the District Court granted summary judgment concluding that there were no genuine issues of material fact that would allow a reasonable jury to find in plaintiff's favor.

Credibility Concerns

The woman appealed, and the 2nd Circuit affirmed. It repeated the well-established precedent that the trial court should not make credibility determinations at the summary judgment stage, but added that when the plaintiff relies almost exclusively on his or her own

testimony and that testimony is contradictory and incomplete, the court must make some assessment of the plaintiff's account. Where "the facts alleged are so contradictory that doubt is cast upon their plausibility, the court may pierce the veil of the complaint's factual allegations and dismiss the claim," the 2nd Circuit ruled in *Jeffreys v. City of New York*, 426 F.3d 549, 555 (2d Cir. 2005).

In the *Rojas* case the 2nd Circuit noted that plaintiff was given ample opportunities to explain or reconcile her inconsistent statements but rather than do so, she insisted that credibility determinations are left to the jury. That is simply not enough.

As the 2nd Circuit held: "In certain cases, a party's inconsistent and contradictory statements transcend credibility concerns and go to the heart of whether the party has raised *genuine* issues of material fact." In those cases, the evidence offered to oppose summary judgment is such that no reasonable jury would find in favor of the plaintiff. ■

The Ever-Changing Definition Of 'Special'

NEW INTERPRETATIONS AFFECT COMPANIES BRINGING MULTINATIONAL MANAGERS TO U.S.

By MEGAN R. NAUGHTON

Immigration law allows U.S. employers to sponsor workers from related entities abroad as multinational managers/executives or specialized knowledge employees (L-1A and L-1B status, respectively). The L visa category, which Congress created in 1970, has benefited many Connecticut employers with foreign parent, subsidiary, or affiliate companies from their establishment to ongoing success.

Connecticut employers have relied on this visa category to bring managers, executives, and highly skilled and trained workers from offices and factories abroad to the U.S. to grow their business and/or to customize, service, and market their machinery, software, and other products in the U.S., the thought being that the knowledge of these workers was invaluable to the company's success in the U.S. Since 2008, U.S. Citizenship and Immigration Services (USCIS) has taken an increasingly narrow view of who is a multinational manager or executive and even more so regarding what defines "specialized knowledge."

The USCIS' scrutiny regarding "specialized knowledge" workers has reached a fever pitch in

Congress acted to end the confusion in 1990. Through the Immigration Act of 1990, Congress adopted the "advanced knowledge" aspect of the 1987 regulation but omitted the "proprietary" language. Congress also took out the requirement that the knowledge not be readily available in the U.S. labor market. In its attempt for clarity, Congress fell short by indicating in its new law that an alien is considered to be serving in a "capacity involving specialized knowledge" if the alien has "specialized knowledge."

From the 1990 act, we are left with the following statutory definition: "...an alien is considered to be serving in a capacity involving specialized knowledge with respect to a company if the alien has a special knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company."

Turning To Dictionary

The legislative history regarding Congress' action in 1990 indicated a desire to broaden this visa category. At this juncture, Congress allowed accounting firms to have access to this visa type despite their ownership structure that previously did not comply, and Congress also incorporated the "blanket petition" option (typically open to larger companies with a higher number of L-1 transfers) into the statute for companies to use more freely. In addition, Congress

changed the requirement that employees have one year of qualifying experience abroad immediately preceding their transfer to the current standard, which allows for one year of employment at any time during the three years prior to transfer. Finally, Congress increased the maximum stay for multinational managers and executives to seven years.

All of these benefits when viewed with the deleted requirements mentioned above, the vague and circular language of the regulation, and the prosperity of the 1990s influenced the interpretation by INS and immigration practitioners in the 1990s and well into the 21st century.

Many INS memos followed the 1990 act in which INS interpreted the concept of "specialized knowledge." INS officers were advised in these memos to apply Webster's Dictionary definitions of "special" and "advanced" to interpret the act. The immigration bar was left with proving that employees transferring from abroad had special knowledge that was "surpassing the usual; distinct among others of a kind," or "distinguished by some unusual quality; uncommon; noteworthy," or that their advanced knowledge was "highly developed or complex; as a higher level than others" or "beyond the elementary or introductory; greatly developed beyond the initial stage."

These standards proved workable and INS and subsequently USCIS approved most cases. Thus, at the cusp of the century, the initial concept that only key employees who possessed proprietary knowledge not available in the U.S. were eligible for the L-1B visa was gone but, as it later turned out, not forgotten.

Closer Controls

Congress passed visa reform in 2004 to more closely control the employment of L-1B workers. The L-1 Visa Reform Act of 2004 greatly limits

the ability of an L-1B worker to be stationed primarily at the worksite of an employer other than the petitioning employer or a related employer. Congress attempted to prohibit the "outsourcing" of L-1B workers, so they could not be placed at

third-party sites and perform work that did not require specialized knowledge (particularly IT work), presumably taking jobs of U.S. workers.

The Bureau of Immigration Appeals (BIA), considering legislative history, congressional action, and INS regulation and memorandum, upheld the denial of an L-1B petition for an SAP-ERP consultant in 2008 who, counsel argued, was a team leader who possessed knowledge of not only SAP but also of his employer's software and implementation methodologies. It did not help that the employer in question in this case had filed over 800 L-1B cases per BIA's decision. In its decision, BIA gave little weight to the memos of the 1990s and looked all the way back to 1970. Although mentioned in the INS memos interpreting the 1990 act, the notion of material evidence to prove "specialized knowledge" had been overlooked to some extent by immigration adjudicators until this decision. Per the decision, unsupported statements by the employer and its lawyers were not good enough to prove "specialized knowledge." Notwithstanding the lack of material evidence in



Megan R. Naughton

the case, BIA applied its 2008 definition of "specialized knowledge" to the facts of the case. BIA stated that by itself work experience or knowledge of a firm's technically complex products will not equal "special knowledge."

This decision became a turning point in the adjudication of L-1B petitions. It triggered a subsequent slew of requests for additional evidence on L-1B cases asking for documentary evidence regarding the employee's specialized knowledge. Most recently, USCIS goes further and seeks documentary evidence that resembles the evidence used to qualify applicants for the higher ranking "outstanding researcher" or "extraordinary ability" green card categories (everything from proof the employee commands a high salary to copies of any patents awarded or published materials).

This further tightening of the standard through these new USCIS requests is undoubtedly in reaction to a letter written earlier this year by U.S. Sen. Chuck Grassley (R-Iowa) to Department of Homeland Security leadership. In his letter, he expressed concerns over the misuse of the L-1B category indicating that "there's growing concern by many experts that companies are turning to L visas when the supply of H-1B visas are low. There is also a general consensus that L visas are being used to bring in 'rank-and-file' employees rather than top-level professionals with truly 'specialized knowledge.'"

Thankfully, the supply of H-1B visas has not been low during the past three years, and the H-1B category is being used more instead of the L-1B category because of the unpredictability in the adjudications of L-1B petitions. Given the continuous irregularity in the adjudication standards, perhaps Congress should try again to define "specialized knowledge." After all, another 20 years have passed. ■



2011. If it becomes any more difficult to prove an employee abroad possesses specialized knowledge, the category will become unworkable.

Changing Definitions

Between 1970 and today, the legacy Immigration and Nationality Service (INS), the courts, and Congress have all interpreted "specialized knowledge." Per legislative history, the L category began as a way for American companies with offices abroad to transfer small numbers of key employees to the U.S. The first regulation promulgated by INS in 1983 regarding the original law made it clear that "specialized knowledge" had to be knowledge relating to the organization's product or service or equipment techniques, management, or other proprietary interests not readily available in the job market.

Less than four years later, in 1987, another modified definition was provided by INS in the regulations, which indicated that the L-1B category was not for people who have general knowledge or expertise that enables them merely to produce a product or provide a service. This regulation also indicated that the knowledge should be "advanced" and "proprietary." The definition continued to narrow in 1988 when INS adopted a precedent decision as the standard for "specialized knowledge." This decision indicated that, even if a company has proprietary products and processes, the worker must be a key person with materially different knowledge and expertise which are critical to the business.

Adding to the mire, only months after the adoption of the precedent decision by the INS commissioner, an associate commissioner at the INS argued that possession of proprietary knowledge was an indicator of specialized knowledge but not a necessary condition. While the definition seemed to be narrowing, the confusion was expanding during the 1980s.

Megan Naughton is head of Robinson & Coles' Immigration Practice Group. She focuses on business immigration, with the majority of her work involving advising businesses, schools, and nonprofits on nonimmigrant and immigrant visas for their employees and preparing visa petitions for submission to the U.S. Citizenship and Immigration Services.

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judicative process to create a general rule for determining whether a bargaining unit a union petitions to represent is an appropriate grouping for an election.

In considering the case, the NLRB solicited public comment in the form of amicus briefs on several questions relating to various policies, some of which were directly related to the legal standards to be applied in the case and others

that were not directly related to the case. The board issued its decision, and in it addressed commentary submitted by various associations and interest groups on the questions posed.

Prior Standard

In simplest terms, when a union seeks to represent a group of employees, it first petitions for an election and designates the group it seeks to represent (the bargaining unit). Employers have historically enjoyed the right to contest the ap-

propriateness of a petitioned-for unit by claiming that the grouping is selective, excludes other groupings of employees who should be included or is otherwise inappropriate for bargaining.

In non-acute health care facilities such as nursing homes, the board historically applied the traditional "community of interest standard," which analyzed specific attributes and common working conditions of employees when deciding appropriate units. For non-acute care health settings, the board acknowl-

edged a presumption against "proliferation" of units that would consider whether a voting unit should include employees other than the group petitioned for by a union based on such factors as the size of the employer, to avoid the possibility that too many units would be certified separately in one workplace. *Park Manor Care Center, 305 NLRB 872 (1991)*.

Specialty Rule

In *Specialty Healthcare*, the board not only sought to overturn its long-standing standard, it sought to create a new rule applicable to employers in *all* industries covered by the NLRA, not just non-acute health care facilities.

This new rule essentially allows unions to seek representation of workers based only on discrete classifications and perhaps by job titles, even if those workers share a community of interest with co-workers having a different job title. The rule also increased the burden on employers to demonstrate that other groups of employees should be included in a petitioned for voting unit, by requiring employers to show that an "overwhelming community of interest" exists to include them.

When it then issued its decision, the Board announced its new rule, which it stated not

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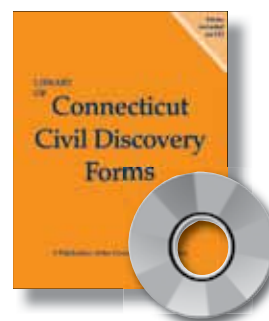
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This new rule essentially allows unions to seek representation of workers based only on discrete classifications and perhaps by job titles.

only applied to the litigants in the case and non-acute healthcare industry employers, but to all employers subject to the NLRA regardless of industry. The Board has already applied this new rule to an election outside the health care context. See *First Aviation Services, Inc.*, 2011 NLRB LEXIS 595 (2011).

The Rule's Impact

Employers and employer associations believe the new rule will likely lead to the creation of multiple micro-bargaining-units in facilities and workplaces that might, under the traditional analysis, have had one or a few bargaining unit consisting of multiple classifications sharing a community of interest.

The groups assert that allowing elections in smaller units chosen by unions will increase the probability that a union will win elections by cherry-picking isolated groupings they believe they can successfully organize. Proliferation of smaller units could also require an employer to bargain with several smaller units, where previously it may have to bargain with one or two.

What To Expect

The board's rulemaking has been under attack by pro-business associations, individual employers and pro-business politicians. Lawsuits have already been filed opposing implementation of the posting rule. Other legal challenges are anticipated with respect to the proposed rule requiring "quickie elections". For labor law practitioners, the need to anticipate changes to long-standing policies and to advise clients on a daily basis concerning the impact of such changes on their businesses, is more acute than ever. No longer is NLRA practice evolving at a glacial pace. More challenges and changes are sure to come.

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