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Hospital Management Rights in a Union Organization Campaign

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The National Labor Relations Board (NLRB), the agency in charge of conducting representation elections and monitoring election campaign conduct relating to a union's attempt to organize a hospital's employees, has made some changes in the labor law that challenges hospitals' management rights and strategies to respond to a union election campaign. This article highlights the most important changes in the law and provides some insight into management's rights before and during a union election campaign.

The NLRB decided *Cemex Construction*[1] that permits recognition of a union upon request based on signed authorization cards by a majority of the employees in an appropriate bargaining unit. A hospital may challenge majority status or appropriateness of a proposed bargaining unit by filing a "RM" petition with the NLRB within 14 days of the request for recognition. A hospital's failure to do so could result in the union being certified as its employees' bargaining representative based on voluntary recognition. The challenge must be based on a good-faith doubt of majority status instead of a rejection of collective bargaining principles or to stall for time to respond to conduct a pro- employer campaign.

In addition, the current NLRB favors "micro-units" under the *Specialty Healthcare*[2] standard where small groups of employee—like a unit of certified nursing assistants—can organize to get a foothold in a hospital. The NLRB in other industries, for example, has allowed 15 of 400 technicians at IKEA to organize, although who can organize in a hospital is more limited and structured. In order to challenge the organization of the smaller unit instead of a larger one, the NLRB requires the employer to prove the micro-unit has an *overwhelming* community of interest with a broader unit of employees.

The NLRB also is tightening a hospital's ability to conduct a pro-employer campaign to discourage union organization. Captive audience speeches, where an employer requires employees to attend a meeting to listen to its views about why its employees should not vote for a union, are no longer lawful. Instead, under the NLRB's new *Amazon* standard, the hospital must: (1) announce the purpose of the meeting is to address unionization; (2) state the meeting is voluntary with reassurances that no one

will be disciplined for failing to attend or for leaving early; and (3) provide assurances that no records of attendance or early departure will be recorded.[3]

The NLRB is apparently also going to scrutinize employer comments to employees more closely before and during a union organization campaign that can lead to what is called a *Gissel* bargaining order requiring a hospital to recognize and bargain with the union.[4] Even though employers like hospitals have what is referred to loosely as a "First Amendment" right to make comments to employees discouraging unionization pursuant to Section 8 (c) of the National Labor Relations Act (the Act),[5] under the new *Starbucks* case,[6] relying on *Gissel*, a hospital employer's comments to employees must be "carefully phrased based on objective facts and relate to consequences beyond the employer's control" to avoid an unfair labor practice that could lead to a bargaining order.

But, unlike *Gissel's* application of the prohibited employer comments standard to impose bargaining orders only as an extraordinary remedy when "hallmark" unfair labor practices occurred that were "outrageous" and "pervasive," *Cemex* and *Starbucks* arguably lower the *Gissel* bar of what employer comments are lawful and will be applied more broadly to scrutinize employer conduct before and during a union election campaign to impose a bargaining obligation. Significantly, the NLRB has indicated it prefers a *Gissel* bargaining order to a rerun election where it believes serious unfair labor practices interfered with a fair election.

All these new changes in the law can make hospital HR personnel and in-house counsel unnecessarily passive in a union organization campaign to avoid a bargaining order—essentially self-censoring a hospital's lawful Section 8(c) right of expression to oppose unionization under the Act. Knowing hospital management's strategies and rights to address union organization campaigns provides confidence to act when union organization activity is identified.

Management Rights in a Union Organization Campaign

1. **Be strategic with your culture**. Try to mirror important provisions in union contracts that deal with meat and potato issues like layoffs, staffing, promotions, application of seniority, and vacation time off with your personnel policies. The most effective way to address a union organization campaign is not to criticize the union, but to demonstrate that your policies and procedures are like union contracts without having to pay union dues. The Bureau of Labor Statistics of the Department of Labor maintains copies of available labor contracts. Contact the Office of Labor Management Standards (olms-public@dol.gov or 202-693-0123). Another good source is Cornell University LIR Library (607-255-2222). Or simply call a HR colleague in a unionized hospital for that hospital's union contract.
2. **Adopt an open-door philosophy**. Consider an Open-Door *philosophy* (not a policy that can be construed as a term and condition of employment in a

handbook or other document that the employee must sign or be held accountable) that underscores that the hospital prefers direct communication with employees instead of with third party representatives. This helps send a message that third parties are unnecessary in the relationship. The NLRB has scrutinized employer policies for "chilling effect" in *Stericycle,*[7] but an aspirational philosophy that does not have consequences for lack of conformity or accountability would seem to be beyond that review.

3. **Keep rounding**. The time between the filing of a petition for a representation election and the election, normally about 30 days, is referred to as the "critical period." A hospital's conduct toward its employees is especially scrutinized during this time, and if the hospital never paid attention to employees' satisfaction with and views of the hospital before the petition was filed that raises a red flag. If rounding and engaging employees about their satisfaction with working conditions or suggestions for improvement is a normal and continuous part of the culture, however, that undermines the NLRB's scrutiny of the hospital's motives for engaging employees about working conditions during a union election campaign.
4. **Carefully screen referral agencies.** If your hospital uses a referral agency to support staffing, ensure that you are being referred the right employee profile to avoid Salts—union employees who are specifically trying to gain employment with your hospital to organize it.
5. **Do a boundary and local ordinance assessment.** Know the parameters of your hospital's property so you can immediately respond to picketers, hand billers, or inflatables like rats. Knowledge of local ordinances may also be helpful to limit this activity on your property.
6. **Train the security force.** A hospital's security force is the eyes and ears of activity surrounding the hospital's property and parking lots. Make sure security is familiar with the typical signs of union organization activity and knows to alert management if seen.
7. **You still control your cafeteria and parking lots.** These areas can become quasi-public forums, but you can prohibit solicitation activity by *non-employees* if you are consistent with restrictions on other kinds of outside vendors or persons soliciting "sales" or "memberships." Approved vendors selling goods like scrubs to employees for work will not set a precedent for union access. Caution that this is an area of the law that can fluctuate.
8. **You still control your email software and bulletin boards.** At least for now, and change likely may be coming, the current law allows you to prohibit the use of hospital email software and bulletin boards for union business and solicitation, assuming the hospital consistently prohibits its use for other vendors or persons who solicit for sales and memberships and does not allow employee use for non-business related purposes.
9. **You still control your uniforms.** This also is a tricky area of the law because even if you supply the uniform employees probably can wear buttons and stickers. If the hospital can demonstrate special circumstances, it may prohibit

these add-ons in immediate patient care areas. If an employee substitutes a hospital issued scrub that is part of the issued uniform for a union T-shirt, however, that likely can be prohibited.

10. **Facts, opinion, and experience.** If a union is attempting to organize your hospital, stick to facts, opinion, and experience when addressing employees about the merits of unionization to avoid objections to the election and unfair labor practices.

Given the recent changes in the law that are tilted in the union's favor, a union avoidance campaign is an *ongoing process* to preserve a hospital's culture, not a reaction to a union demand for recognition or an election petition. Preparation and knowledge are power. So be prepared!

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[1] *Cemex Construction Materials Pacific, LLC and International Brotherhood of Teamsters*, 372 NLRB No. 130 (Aug. 25, 2023).

[2] *Specialty Healthcare and Rehabilitation Center*, 357 NLRB 934 (2011); *American Steel Construction, Inc.*, 372 NLRB No. 23 (Dec. 14, 2022).

[3] *Amazon.com Services, LLC.*, 373 NLRB No. 136 (Nov. 13, 2024).

[4] *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969).

[5] 29 U.S.C. §158 (c).

[6] *Starbucks Corp.*, 373 NLRB No. 135 (Nov. 8, 2024).

[7] *Stericycle, Inc. and Teamsters Local 678*, 372 NLRB No. 113 (Aug. 2, 2023).