

Doctors, Unions, and Protected Activity

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As the delivery of health care continues to change, fewer and fewer doctors open or continue private practices, and more and more become employees of major health care systems or large medical practices. As employees of private employers, including large voluntary hospital systems, doctors secure rights under Section 7 of the **National Labor Relations Act** (“NLRA” or “Act”). Among those protected rights are the rights to form, join, or support labor unions, or to act collectively even in the absence of a union.

Physicians and the NLRA

The NLRB has long held that interns and residents are employees with the right to form or join unions. See *Boston Medical Center Corp.*, 330 NLRB 152 (1999). The NLRB, in its regulations defining appropriate bargaining units in acute care hospitals, finds that bargaining units of physicians are presumptively appropriate for organizing purposes. 29 C.F.R. § 103.30.

Not all employed physicians have protected rights under the Act. Doctors who hold managerial positions in which they have authority to make, change, or authorize exceptions to the employer’s policies are not “employees” under the Act. Similarly, the Act does not cover doctors who meet the statutory definition of “supervisor,” usually because they have the authority to hire, fire, discipline, or responsibly direct employees. Doctors with such authority do not have the right under the Act to form or join unions.

The **Committee of Interns and Residents** (“CIR”), an affiliate of the SEIU, has long represented interns and residents in major medical centers. Many young doctors who were represented by CIR during their residencies and are now employed in health care systems may recall that they had benefits or protections in their CIR collective bargaining agreements and look for continued union representation as employed physicians. There are other unions currently representing employed physicians, such as the Doctor’s Council SEIU. Many of these unions focus on doctors employed in the public sector, but as the number of doctors employed in private hospitals and health systems continues to increase, these unions may expand into the private sector as well.

Recent Developments

Recent rulings by the NLRB are designed to make it easier for unions to organize, and these

changes could ease the way for union organizing of employed doctors. For example, outside of acute care hospitals, the NLRB's ruling in *Specialty Healthcare & Rehabilitation Ctr. Of Mobile*, 357 NLRB No. 174 (2011), in which the NLRB held that it would find appropriate even a very small unit of employees that it deems a "discrete group," could easily lead to findings by the NLRB that small bargaining units of doctors are appropriate for organizing, such as all the doctors at a particular office of a medical practice, or all the doctors in a particular specialty in a health care system. Such "micro units" make for easier targets for organizing by a union.

Further, under the NLRB's new "quick election" rules, a health care employer may find itself faced with an organizing campaign in a unit of doctors with an election scheduled in a matter of a few weeks, giving that employer little time to make a case to the doctors opposing the union campaign.

Rights and Protections Under the Act

If a union is elected as representative of employed physicians, the employing institution would then have a duty to bargain in good faith with the union over terms and conditions of the physicians' employment, such as wages, benefits, hours, schedules, vacations, holidays, and grievance and arbitration procedures.

Among the collective actions protected by the Act is the right to strike. This past April, doctors represented by the Union of American Physicians and Dentists engaged in a strike at the student health clinics at University of California campuses in Southern California. While the NLRB may recognize the right of physicians to strike under the Act, the American Medical Association ("AMA") has cautioned that there are ethical considerations that require that physicians engaged in collective action must ensure that the health of patients is not jeopardized and that patient care is not compromised. The AMA also advises that physicians should refrain from the use of a strike as a bargaining tactic. AMA Opinion 9.025 issued December 1998, updated June 2005.

Even in the absence of union representation, physicians have the protected right to engage in collective actions for their mutual aid and protection. Thus, for example, a group of doctors gathering together to protest wages, hours, and/or other terms and conditions of employment are engaging in activity protected by the Act, even if no union is involved.

Preventive Measures

So what should health care employers be doing now?

First, look at what unions representing doctors are promising them and then review where your organization stands on these issues:

- **Wages/Benefits:** Are your salaries and other forms of compensation, health insurance, retirement plans, vacations, education, leave, and malpractice coverage competitive?
- **Job Security:** Under what circumstances can an employed doctor be disciplined or terminated? What procedures are in place for the doctor to grieve a disciplinary action?
- **Hours:** Are the hours that your doctors work in line with the hours expected of doctors in similar institutions?
- **Professional Development:** Do you provide time off and reimbursement for continued medical

education?

- Fairness: Do you ensure that workplace policies as applied to employed physicians are fair and enforced in an even-handed manner?
- Legal Compliance: Remember that as employees, doctors have protected rights under federal, state, and local laws. Is your organization complying with such laws as the Family and Medical Leave Act (“FMLA”), the ADA, the Age Discrimination in Employment Act (“ADEA”), and Title VII of the Civil Rights Act of 1964 with regard to your employed physicians?

Second, prepare now for the possibility of facing the new expedited NLRB election rules by identifying and defining potential bargaining units in which physicians might be included. Employers should identify those doctors holding managerial or supervisory authority and make sure that it is clear that they have and regularly exercise such authority.

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