



Unions Maintain Focus On Healthcare Employers

By A. Kevin Troutman (Houston)

While their overall membership rates continue to decline, unions remain focused on attracting and organizing new dues-paying members in the relatively untapped healthcare market. Maintaining a historic trend, union membership dropped again last year; it's now less than 9% of the private sector workforce, roughly 12% counting public employers.

But in healthcare, activity has intensified. Now, CNA is trumpeting its recent victory in an election to represent nurses at a major Houston hospital. With this win in its pocket, the unions seem certain to go after more targets.

Hospitals and other industry employers should therefore assess their readiness to respond to efforts to organize their workers.

A Look Back

During the past 18 months, unions won slightly more than 70% of representation elections held among healthcare employers. This success far outshined the unions' overall win rate of about 51%. Even more alarming, the Service Employers International Union (SEIU) and the CNA are increasingly and effectively using alternative organizing tactics.

"SEIU Healthcare" boasts an annual budget of \$100 million and 4,000 organizers. SEIU has even reached out collaboratively in organizing efforts with United American Nurses, the American Nurses Association and in limited circumstances, the CNA. It also teamed up with the American Association of Retired Persons (AARP) in an effort to influence national healthcare policies. Meanwhile, the union continued backing class actions in several regions around the country, alleging that hospitals illegally conspired to suppress nurses' salaries.

Not to be outdone, CNA hosted showings of Michael Moore's propaganda piece/movie, *SICKO*. It also staged marches, distributed thousands of direct mail and e-mail flyers and continued its efforts, with some success, to influence state legislatures to adopt mandatory nurse-patient ratios. In addition to its recent election win in Texas, CNA staged a high profile walk-out at Sutter Health hospitals in California. In fact, it is now openly accusing SEIU of collaborating with the hospital industry to undermine its purported efforts to improve patient care. It also recently forced the SEIU to cancel elections at nine Catholic Health Partners hospitals in Ohio.

And Looking Ahead

AFL-CIO president John Sweeny has announced that healthcare will be his organization's primary issue in the 2008 elections. And it reportedly has amassed over \$50 million to devote to voter outreach efforts.

To top it off, last year the unions almost succeeded in eliminating the process by which employees have the right to choose whether or not they want to be represented. The so-called Employee Free Choice Act (EFCA) would have directed the National Labor Relations Board to certify a union, without a secret ballot election, if a union presents signed authorization cards from a majority of employees in a bargaining unit. Given the misleading methods often used in gathering signatures on authorization

cards, this legislation would give unions tremendous opportunities to effectively conduct stealth campaigns.

The EFCA passed the U.S. House of Representatives before being narrowly defeated in the Senate. Labor vows to re-introduce this measure, which is likely to pass if the Democrats gain a greater majority in the Senate or control of the White House.

Finally, unions have increased their effective use of "corporate campaigns." This term broadly describes a campaign of public and political pressure to coerce employers into capitulating to a union's organizing efforts.

In light of these trends and the unions' publicly coveting healthcare workers, hospitals, clinics and nursing homes should carefully monitor their employee relations programs and be prepared to respond at the first sign of possible organizing activity.

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Short-Shift Differential Shortchanges Employees, Court Rules

By Karen Gieselman (Columbia)

Many healthcare employers adopt shift differentials to encourage staffing on unpopular shifts. For example, employers may reward employees who work unpopular shifts or perform unpopular tasks with extra pay in order to maintain adequate staffing levels and provide round-the-clock patient care. Employers are encouraged to devise creative, lawful solutions to staff all shifts and ensure all tasks attendant to patient care are performed.

But before adopting any shift differentials or wage payment policies, pay careful attention to both federal and state laws. If you don't, shortchanged employees can come back to penalize your company. Recently, a California hospital was ordered to pay over \$32 million in

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restitution to a class of hourly employees that the court held were underpaid by the hospital's use of short-shift differential payment. *Mutac v. Huntington Memorial Hospital*.

The Legal Landscape

Under the federal Fair Labor Standards Act, employees must be paid 1.5 times their regular rate of pay for all time worked in excess of forty hours in a workweek. Hours worked in one workday, regardless of the number, do not require time and a half payment under federal law.

But the FLSA does not prohibit state or local governments from adopting more stringent wage and hour provisions. In California, employers must pay time and one-half to employees who work more than eight hours in one day, and double pay for all time worked in excess of twelve hours in one day. Overtime under both federal and state law is calculated not on the employee's base rate, but rather using an employee's "regular rate" of pay which includes "all remuneration for employment paid to, or on behalf of, the employees..." subject to certain limited exclusions.

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Huntington's Pay Plan

Huntington Memorial Hospital operated two shifts for its hourly employees: 1) a standard eight-hour shift; and 2) a twelve-hour shift. Due to the popularity of the twelve-hour shifts and California's laws requiring overtime pay for all time worked in excess of eight hours in a day, the Hospital lowered the hourly rate of pay for employees working twelve-hour shifts, so that wages paid to twelve-hour shift workers, including overtime pay, would be roughly equivalent to the pay earned by eight-hour shift workers.

Some twelve-hour shift employees frequently found themselves working less than a full shift due to lack of work caused by low patient census. As a result, those employees were earning significantly less than their eight-hour shift co-workers because they weren't receiving overtime pay. In an effort to address the inequity, the Hospital adopted a "short-shift differential" to encourage twelve-hour shift employees to accept assignments that were less than ten hours, and to offset the loss of pay incurred when employees did not work a full shift.

If a twelve-hour shift employee worked less than ten hours, the employee would receive short-shift differential pay for every hour worked. In particular, if a twelve-hour shift employee worked less than ten hours, approximately four dollars an hour was added to his or her hourly rate. If a twelve-hour shift employee worked ten hours or more, the short-shift differential was not paid for any hours worked by the employee. The goal of the differential was to equalize pay among the shifts, to the extent possible. The Hospital did not include the short-shift differential payment in employee's regular rate of pay for purposes of calculating overtime pay.

The employees in the lawsuit argued that because the differential was paid to all twelve-hour shift employees for all hours worked on a non-overtime shift, the differential should have been counted in the employees' regular rate of pay for purposes of calculating overtime. The court agreed and concluded that failing to count the short-shift differential in the regular rate of pay violated state wage and hour laws and constituted an unfair business practice. The judge ordered the Hospital to pay employees \$32 million to compensate for underpayment of both regular and overtime pay.

Lessons Learned

Overtime lawsuits are on the rise across the country. Studies show that collective action lawsuits are up approximately 70% since 2000. Many involve healthcare employers, but no industry's wage and hour practices are exempt from scrutiny. The Department of Labor's Wage and Hour Division reported that in 2007 it collected more than \$220 million in back pay and assessed over \$10.3 million in penalties. Of that total, nearly 1500 cases involved 17,000 health care workers, recovering nearly \$10 million in back wages.

In January 2006, the Department of Labor announced it had settled an overtime lawsuit with 13 health care companies who operate nursing homes. As recently as February 2008, a class action was filed against Sutter Health Corporation by nurses alleging, in part, the employer failed to pay overtime pay as required.

The recent judgment against Huntington Memorial Hospital and the foregoing statistics demonstrate that employers must be vigilant to wage and hour laws in their respective states regarding *all* aspects of pay. Noncompliance can lead to lawsuits and provides fodder for unions attempting to organize a facility.

For help in reviewing your company's overtime practices and payment of shift differentials to ensure compliance with federal and state laws contact your local Fisher & Phillips attorney.

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