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# ASHHRA 48th ANNUAL CONFERENCE & EXPOSITION

## Health Care HR Hot Topic Panel

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# What's "Hot" (and What's Not)

**Health Care Reform**

- ↑ HRs Leadership Role in Achieving and Maintaining Exceptional Quality While Managing Labor Costs

**Labor**

- ↑ NLRB's Continued Pro Labor Activism in Decisions, Rulemaking
- ↑ NLRB Acting General Counsel Aggressive Enforcement Against Employers Rights
- ↔ Employee Free Choice Act

**DOL**

- ↑ DOL Most Active in Issuing New Rules and Regulations Favoring Unions and Expanding Compliance
- ↑ LMRDA Reporting Requirements Restricting Legal Counsel/Consultant Activities
- ↑ Wage and Hour targeted Health Care Industry Investigations
- ↑ OFCCP aggressive enforcement of AAP plan requirements

**DOJ**

- ↑ Department of Justice New Barrier – Free Health Care Initiative and Enforcement of ADA in Healthcare Industry

**EEOC**

- ↑ EEOC New Guidelines on Using Arrest and Conviction Records

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# HEALTH CARE REFORM FRONT AND CENTER

- H.R. Leaders' Role in Health Reform and Value Based Purchasing
- Quality Takes Center Stage
- Impact of Value Based Purchasing
- HR Role in Patient Satisfaction/Patient Experience
- Financial Impact of VBP Impacts Entire Workforce
- HR Creativity in Tying Patient Satisfaction Positive Outcomes to Compensation Rewards

***The complete up-to-date Value Based Purchasing PowerPoint can be accessed on-line on ASHHRA's Strategic Health Care Reform Workshop (P3)***

# What the National Labor Relations Board Has Been Up To In the Past 12 months

***NLRB Finds Hospital's Off-Duty Access Policy Is Too Broad**

Many hospitals have policies that restrict access by off-duty employees. The NLRB views such policies as an unlawful limitation on employees' rights to engaging in union organizing and other protected concerted activity.

In a recent decision, *Sodexo America LLC*, 353 NLRB No. 79 (2012), the Board took issue with the hospital's policy itself. The policy stated: "Off-duty employees are not allowed to enter or re-enter the interior of the Hospital or any other work area outside the Hospital except to visit a patient, receive medical treatment or to conduct hospital-related business." The policy defined "hospital-related business" as "the pursuit of the employee's normal duties or duties as specifically directed by management." The Board overturned the Administrative Law Judge's decision and found that the "hospital-related business" exception to the no-access policy provides management with unfettered discretion to permit off-duty employees to enter its facility "as specifically directed by management." Such "unfettered discretion" violates the National Labor Relations Act (Act), the Board held.

# What the National Labor Relations Board Has Been Up To In the Past 12 months

**What HR Leaders Should Do**: Review your existing access policy. If the policy gives management discretion to decide under what circumstances off-duty employees can enter the hospital or it contains specific exceptions that are not limited to receiving medical care or visiting a patient, the policy may need to be revised. In addition, an audit should be done to learn what is the "real world" access to the hospital by off-duty employees. All too often, the policy and the actual practices are not consistent.

# What the National Labor Relations Board Has Been Up To In the Past 12 months

***NLRB Provides More Guidance On Social Media Policies**

For the third time in less than one year, the NLRB's Acting General Counsel (AGC) has issued a report on social media cases. The AGC's Operations Management Memo discussed seven different cases and explained why employers' social media policies and enforcement practices were, or were not, in violation of the Act. In addition to reiterating his views in previous reports, in this edition the AGC identified one employer's social media policy as being in compliance with the Act. However, some aspects of the approved policy were very similar to social media policies that were ruled unlawful elsewhere in the report.

***The most recent issue of ASHHRA's HR Pulse has a thorough analysis of the Board's reports on social media policies and related disciplinary action.***

# What the National Labor Relations Board Has Been Up To In the Past 12 months

**What HR Leaders Should Do:** Reevaluate your existing social media policy, if you have one. If your organization does not have one, engage expert labor counsel to assist in creating one ASAP. In addition, ensure that leaders and all involved HR staff understand what is and is not protected concerted activity so that disciplinary action for social media activity does not violate the Act.

# What the National Labor Relations Board Has Been Up To In the Past 12 months

*__NLRB Rules HR Cannot Tell Employees To Keep Investigatory Interviews Confidential__

A hospital's human resource consultant was conducting an investigation and she asked the employees that she interviewed not to discuss the matter with their coworkers while the investigation was ongoing. The NLRB ruled her confidentiality request was unlawful. *Banner Estrella Medical Center,* 358 NLRB No. 93 (2012). An instruction to employees to keep confidential their discussions with management about an ongoing investigation violates the Act. It is not enough, the Board said, for management to have a "generalized concern with protecting the integrity of its investigations."

An employer may prohibit employees from talking with other employees about investigations only when: 1) one or more witnesses needs protection; 2) evidence is in danger of being destroyed; 3) testimony is likely to be fabricated, 4) or there is a need to prevent a cover-up." According to the Board, an instruction to employees not to talk about their interview in an ongoing investigation has " a reasonable tendency to coerce employees" and thereby violates the Act.

# What the National Labor Relations Board Has Been Up To In the Past 12 months

**What HR Leaders Should Do:** This decision requires employers to reassess the process they use when interviewing employees as part of an investigation of possible wrongdoing. Statements to employees about what they can and cannot discuss with others must be carefully structured to comply with the Board's ruling in this case.

# What the National Labor Relations Board Has Been Up To In the Past 12 months

***Your Employment-At-Will Statements May Be Illegal, According to NLRB**

In *American Red Cross Arizona Blood Services Division*, 28-CA-23443 (2012),an NLRB Administrative Law Judge (ALJ) ruled that the employer's employment at-will statement violated the National Labor Relations Act. Like many employers, the Red Cross required its employees to sign, as a condition of employment, a document entitled "Agreement and Acknowledgement of Receipt of Employee Handbook." That document stated that the employment relationship is at-will and that "the at-will employment relationship cannot be amended, modified or altered in any way." The NLRB's Acting General Counsel claimed, and the ALJ agreed, that the statement that at-will employment cannot be changed was a violation of the rights of employees under Section 7 of the National Labor Relations Act ("NLRA").

# What the National Labor Relations Board Has Been Up To In the Past 12 months

**What HR Leaders Should Do:** If your organization requires employees to sign an at-will employment statement, evaluate your statement in light of the ALJ's decision. It is likely that the Acting General Counsel will continue to challenge these statements across the country.

# What the National Labor Relations Board Has Been Up To In the Past 12 months

******Specialty Healthcare*—Beware of Micro-Bargaining Units**

A little less than a year ago, the NLRB issued a decision in *Specialty Healthcare* that has sobering implications for health care employers as well as employers in other industries. In this case, the union filed a petition to represent a unit consisting of only the nursing assistants at the nursing home employer. The nursing home objected and argued that the nursing assistants should be included in a unit of all other nonprofessional employees such as housekeeping, food service, clerical and care aides. A nonprofessional unit such as this was the typical unit approved by the Board for decades.

But the Obama Board articulated a brand new standard for determining bargaining units. Henceforth, the Board announced it would approve the bargaining unit sought by the union unless the employer could show an "overwhelming community of interest" between the employees in the unit sought by the union and other employees. This new standard has resulted in much smaller units than were previously permitted.

# What the National Labor Relations Board Has Been Up To In the Past 12 months

**What HR Leaders Should Do:** The good news is that *Specialty Healthcare* does not apply to acute care hospitals because the Board's Bargaining Unit Rule applies. For other health care facilities, it is important to assess your union vulnerability on a unit-by-unit basis and act quickly to reduce that vulnerability.

# What the National Labor Relations Board Has Been Up To In the Past 12 months

***The Labor Board Bans Mandatory Arbitration Agreements**

Many employers, including health care employers, have adopted mandatory arbitration agreements which require employees to use arbitration to settle all work-related disputes instead of courts or governmental agencies. The NLRB ruled in *D.R. Horton*, 357 NLRB No. 184 (2012), that arbitration agreements that prevent employees from filing class and collective actions against the employer violate employees' rights to engage in protected concerted activity under the National Labor Relations Act. However, federal courts have rejected the Board's position and the case in on appeal to the U.S. Court of Appeals for the 5th Circuit.

# What the National Labor Relations Board Has Been Up To In the Past 12 months

**What HR Leaders Should Do:** In most cases, sit tight and wait for the 5th Circuit to issue its decision. It is premature to consider abandoning an existing mandatory arbitration provision based on *D.R. Horton* alone.

# What the National Labor Relations Board Has Been Up To In the Past 12 months

***The Status of the Board's Ambush Election Rule**

At this time, the Board's rule designed to have elections held much quicker than ever before has been shelved. A federal district court ruled that the Board did not have the necessary quorum of members when it enacted the rule. The NLRB asked the court to reconsider its decision and it refused. The Board is expected to appeal the case to the U.S. Court of Appeals for the District of Columbia.

# What the Department of Labor Has Up Its Sleeve for Health Care Employers

***Revised Reporting Requirements For Using Consultants and Attorneys In Union Prevention/Organizing**

In June 2011, the Department of Labor announced plans to scrutinize the existing rules on disclosure of fees paid and received when employers engage consultants and attorneys to aid them during a union organizing campaign or to provide employees information about union representation. The proposed rules issued by DOL dramatically increased the number of situations in which employer and the consultant/attorney would be required to report fees paid/received for "persuader activity." The new regulations were expected to be issued this summer but sources have said that they are likely to be announced after the November elections.

**What Should HR Leaders Do:** Expect that the new rules will be out before the end of the year and they will require employers to disclose how much they pay consultants, and possibly attorneys, for advice and assistance with any activity related to remaining or becoming a union-free workplace. Organizations that are considering conducting preventive labor relations training, a union vulnerability assessment or similar initiative should think about doing those things NOW—and possibly avoid the onerous reporting requirements.

# What the Department of Labor Has Up Its Sleeve for Health Care Employers

*__Independent Contractors and Wage/hour Violations----the Battle Continues__

DOL, along with the IRS, state labor departments, employees and unions continue their assault on employers' alleged misclassification of employees as well as suspected failures to pay employees consistent with the Fair Labor Standards Act. DOL has partnership arrangements with many state agencies to share information and participate in joint enforcement initiatives.

**What HR Leaders Should Do:** Conduct an audit to determine your organization's level of compliance in properly identifying independent contractors and exempt employees. In addition, managers should be educated and re-educated on wage/hour matters, such as employees working off the clock, and missed or interrupted meal periods. Compliance in these areas should also be assessed.

# Department of Justice Announces (ADA) Barrier-Free Health Care Initiative (07/26/12)

DOJ Civil Rights Division and Offices of U.S. Attorney Aggressive Enforcement of ADA

- Deaf and hard of hearing individuals must have access to medical information and presentable in manner understandable to them, includes:
  - Qualified interpreters on site or through video remote services
  - Note takers
  - Real time computer – aided transcription
  - Written materials
  - Exchange of written notes
  - Telephone handset amplifiers
  - Assisted listening devices
  - Telephone compatible with hearing aids
  - Closed captioned decoders
  - Voice, text and video-based tele com. products/systems
  - Videophones
  - Video displays
  - Accessible electronic and IT
  - “Catch all” or other effective methods of making aurally delivered information available to persons who are deaf or hard of hearing

# What Has Been Keeping the EEOC Busy

*__EEOC Issues New Guidance on Using Arrest and Conviction Records__

The new standard urges employers to meet with an applicant and provide the opportunity to explain a report of past criminal misconduct before they are rejected outright. An applicant might say the report is inaccurate or point out that the conviction was expunged. If the conviction is nrelated to the job, it should not used to disqualify the applicant. Arrest records are not to be considered in hiring decisions, the EEOC states.

The guidance does not have the force of regulations, but it reveals how EEO will approach cases in which arrest or conviction records have been used against an applicant.

**What HR Leaders Should Do:** Ensure that arrest records are not used in the hiring process and that conviction record use is consistent with this guidance. In addition, states may have strict laws regarding the employment of individuals in certain health care positions if they have have a criminal record. These laws could conflict.