

Health Care Workers and Labor Unions: The COVID “Bump” and the New Administration’s Efforts to Unionize More Workers

Labor & Employment Law Update

By Beverly Alfon and Michael Hughes on April 28, 2021



COVID-19 Pandemic Allows Unions to Make Inroads with Health Care Workers

For health care workers, the issues of staffing, *wages and benefits* are typically what unions have focused on in their organizing campaigns. Against the backdrop of the COVID-19 pandemic, these

issues are heightened with the added urgency of worker safety. The realities created by the pandemic have and will likely continue to make their impact on health care workers – even prompting some who never may have considered union representation – to reconsider their position. For example, in September 2020, nurses at a hospital in Asheville, North Carolina, voted to become unionized. Yes! North Carolina, a traditionally red, anti-union state. The union won 70% of the vote. The nurses cited issues related to PPE, testing and exposure notification inconsistencies.

Unions have certainly taken notice of this opportunity to organize and are seizing it. After all, according to the Bureau of Labor Statistics, by 2028 some 3.4 million new jobs will be added in health care and social assistance. The sector will account for about a third of all new employment in the U.S. by that time. In August 2020, a Colorado state inspection revealed that understaffing led to a patient death at a Denver area hospital. The Service Employees International Union (SEIU) local union – which does not represent the employees at the hospital – nonetheless engaged in an aggressive campaign alleging unsafe practices by the hospital’s parent company.

Health care workers who are already unionized – who in the past may have been complacent about union objectives and work issues – also appear to have become galvanized and willing to take action, including voting to strike. At the end of 2020, health workers in multiple states went on strike over staffing issues and pay.

- In Chicago, about 6,000 certified nursing assistants and food service and housekeeping employees at 64 nursing home facilities called off a planned strike after reaching a tentative agreement with employers for higher base pay, hazard pay, adequate personal protective equipment and paid sick days related to COVID-19.
- In Providence, Rhode Island, about 100 nursing assistants and maintenance workers and other staff at a nursing home began a strike over demands for mandatory minimum staffing levels and pay increases. The strike followed a series of protests following outbreaks of coronavirus in nursing homes in Rhode Island and across country exposed staffing shortages.
- Near Philadelphia, nurses went on strike at a hospital. A month later, the owner of the hospital announced a labor agreement with the nurses' union that gave nurses "a voice in discussions on staffing" while preserving the hospital's right and authority to make all staffing decisions.
- In Chicago, nearly 700 caregivers walked off the job at 11 nursing homes, apparently triggered by the company's discontinuance of hazard pay during the pandemic. A tentative agreement was reached after a 12-day strike, including significant wage increases, pandemic pay increase, additional five days of COVID-19 related sick time, and significant PPE guarantees and protections.
- In Albany, New York, hundreds of nurses went on strike, citing issues wages and benefits, understaffing, and the hospital's handling of the pandemic.
- In Connecticut, nursing home workers continue to inch towards a major strike with initial union votes at 33 facilities overwhelmingly favoring a strike.

Clearly, COVID-19 is strengthening organized labor's appeal and lengthening its reach. Couple that with a pro-labor agenda in the Biden administration and in Congress, and we are staring at a galvanized labor movement.

The Pro-Union Agenda at the Biden Administration and the National Labor Relations Board

On the eve of the presidential election in 2020, nominee Joe Biden vowed to be "the most pro-union president you've ever seen." Upon being sworn in, President Biden wasted no time in making headway toward that promise. On his very first day in office, President Biden fired the National Labor Relations Board's General Counsel, Peter Robb. The NLRB GC determines which cases are prosecuted at the

Health Care
Workers
and Labor
Unions: The
COVID
"Bump" and
the New
Administra-
tion's
Efforts to
Unionize
More Workers

labor board, and in so doing, sets policy initiatives and labor law enforcement guidance. Robb's term was not set to expire until November 2021, and his firing marked the first time in history that an incoming President fired the sitting NLRB GC without letting him serve out his term. (The next day President Biden also fired the NLRB's Deputy GC). Union leaders had called for Biden to sack Robb over their disagreement with Robb's policy prerogatives and what they perceived as an anti-union agenda. Within days, the acting NLRB GC appointed by President Biden issued memorandums reversing many of Robb's policy directives—unsurprisingly all of those reversals favored labor unions (but not necessarily workers). Among the policy provisions established by the acting GC's newly issued guidance memos are provisions giving unions wider protection against accountability when they fail to properly represent workers' rights; allowing unions to hide certain dues information from workers; and allowing unions to limit the time frame for workers to rescind a dues authorization.

In the coming months, the makeup of the 5-member NLRB (the body that makes final determinations in cases of alleged unfair labor practices and union representation issues) will also swing from its current Republican majority, to a Democratic majority, as there currently is one vacant seat waiting to be filled, and another seat will expire on August 27, 2021. With these changes (at the GC and board levels) it is a certainty that the NLRB will begin a period where its policy and enforcement priorities make it easier for unions to organize unrepresented employees; give unions additional ammunition and leverage in organizing campaigns and at the bargaining table; and remove employer tools to resist or counter union organizing.

Congress Advances Union-Friendly Legislation

Not to be outdone by the Executive branch, Congress also is moving quickly to appease its labor union constituents, mainly through the re-introduction of the Union-friendly, "PRO Act." We recently wrote about the nuts and bolts of that pending legislation, which has passed the House of Representatives and awaits action by the Senate. Currently, 47 of the 50 Democratic senators support the PRO Act, and labor unions and other organizing groups have set out to bombard the remaining three Democratic senators with an onslaught of demonstrations, phone calls, and other pressure tactics, in order to bring them to heel. The PRO Act would nearly completely re-write labor law as we know it, with an aim to making it a near impossibility for any organization to resist a union organizing campaign. Among the many drastic changes to long-standing labor law, the PRO Act would:

- Outlaw Right-to-Work laws;
- Remove any and all restrictions on Union strike activities (including removal of restrictions against intermittent strikes, partial strikes, and slow-down strikes);
- Allow unions to strike and boycott directly against entities they have no labor dispute with, in order to pressure that entity to stop dealing with a company

Health Care
Workers
and Labor
Unions: The
COVID
"Bump" and
the New
Administra-
tion's
Efforts to
Unionize
More Workers

the Union does have a dispute with;

- Impose penalties against employers who commit unfair labor practices (up to \$50,000 for a first offense);
- Erode the sanctity of secret ballot elections, allowing the Union alone to name the means and manner of election (mail ballot, off-site election, electronic election) and providing for a second-chance “card-check” election, if the Union loses and alleges an unfair labor practice;
- Ban an employer’s ability to withdraw recognition from a union, even if 100% of all employees sign a petition saying they no longer want the union; and
- Many more pro-union provisions.

While the PRO Act is not yet law (and likely will not be enacted wholesale, unless the Senate scuttles the filibuster), it is increasingly likely that certain portions of the PRO Act will find their way in to other legislation in the upcoming legislative sessions. **Again, all of these developments are for one simple purpose: making it easier for unions to organize new groups of workers. As noted above, health care facilities, especially including long-term care facilities, have been a special focal point for many union organizing drives of late, with savvy union leaders leaning on the COVID-19 pandemic to make inroads with employees in the industry.** A union-friendly Administration, NLRB, and Congress will only aid and embolden the SEIU and other unions seeking to organize health care workers to redouble their efforts.

What to Do?

1. Get your union avoidance plan in place.
2. Identify who your “supervisors” are (as defined by the National Labor Relations Act) and get them trained on identifying and dealing with union organizing. A “supervisor” cannot be represented by a union. They are also agents of your company, so training is key. They should be directed on what their role should be in avoiding union organizing and what they can and cannot do and say in the event that union organizing begins.
3. Review policies for clarity, perceived unfairness, and employee relations. A union will often focus employees on (real or perceived) unfair policies or unequal implementation of work rules.
4. Benchmark wages and benefits. A union will often promise more money. So, it is best to be prepared with a response.
5. Identify employee relations problems now and deal with them before employees turn to a union. Get feedback from the group of employees who are vulnerable to union organization. Sometimes, it is as simple as tweaking a supervisor’s management-style.
6. Train management on positive employee relations. Your supervisors need to know about the importance of providing regular feedback to employees and maintaining open communication with them.

Health Care
Workers
and Labor
Unions: The
COVID
“Bump” and
the New
Administra-
tion's
Efforts to
Unionize
More Workers

7. Get a communications plan in place in the event that union organizing begins or has begun.
8. In light of current union tactics of staging demonstrations and strikes, even in support of organizing efforts, it also is advisable to have a comprehensive strike plan in place, especially once organizing efforts become known.

Being aware of the potential threat of union organizing at your workplace is not enough. Far too often employers are surprised when union organizing begins or a formal petition for recognition is filed. Assessment and planning are necessary now so that if the need arises, a response can be timely, effective, and within the parameters of the National Labor Relations Act.

Health Care
Workers
and Labor
Unions: The
COVID
“Bump” and
the New
Administra-
tion's
Efforts to
Unionize
More Workers