Statement

Of

Governor Mark Parkinson

President and Chief Executive Officer

of

The
AMERICAN HEALTH CARE ASSOCIATION AND

NATIONAL CENTER FOR ASSISTED LIVING

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Hearing On

Emerging Trends at the National Labor Relations Board

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The American Health Care Association (AHCA) and National Center for Assisted Living (NCAL) represent more than 11,000 non-profit and proprietary facilities, including skilled nursing facilities, assisted living residences, post-acute rehabilitation centers, and homes for people with developmental disabilities ranging from small, independently owned facilities to regional and multi-facility corporations. Since the majority of Americans – because of social needs, disability, trauma, or illness – will require long term care services at some point in their lives, we are proud to represent those who provide that kind of professional, compassionate care in virtually every community nationwide.

Since 1949, AHCA has been working to improve the standards of the long term and post-acute care profession and to promote a better understanding of what comprises a supportive, quality-focused care environment. That environment happens to be one of the most highly-regulated in the country because Medicare and Medicaid fund the care of nearly 80 percent of nursing facility patients and 13 percent of assisted living residents in the United States.

AHCA/NCAL remains at the forefront of quality improvement. In 2002, AHCA helped launch the profession-wide *Quality First* initiative. More recently, AHCA co-founded and continues to lead a coalition of health care providers, caregivers, medical and quality improvement experts, government leaders, consumers, and other stakeholders who are working to improve care quality through the voluntary *Advancing Excellence in America's Nursing Homes* initiative. NCAL's leadership focuses on quality improvement initiatives tailored to the assisted living profession. Its Advocating Care Excellence (ACE) program is designed around the five principles outlined in NCAL's ground-breaking *Guiding Principles for Quality in Assisted Living.*

AHCA/NCAL advocates for necessary and reasonable public policies that balance economic and regulatory principles to support quality of care and quality of life. Whether we are working with the Administration to enhance quality or with Congress to preserve much-needed funding for long term care services, AHCA/NCAL is mindful that our membership cares for some of our country's most vulnerable citizens. The average nursing home resident, for example, is an 85-year old grandmother with cognitive or functional impairments and multiple co-morbidities that typically require nine medications per day. The average assisted living resident is 87-years old and takes nearly 10 medications per day.

Americans are living longer and our nation's aging population is growing. Each year, more than 3 million Americans are cared for in one of the nearly 16,000 nursing facilities in the United States with nearly 80 percent relying on Medicare or Medicaid to pay for the care they need. Millions more of America's seniors depend upon care and services offered by assisted living communities or in their own homes. The demand for this kind of care is projected to more than double with as many as 9.3 million older Americans expected to rely on paid long term care services every year – either in a nursing facility or with paid home care – by 2040.

The long term care sector is a significant contributor to the economic health of communities nationwide, and its stability is vital to stimulate economic growth, especially as the demand for long term care services continues to grow.

Presently, long term care accounts for 1.3 percent of the nation's Gross Domestic Product (GDP) – $183.5 billion annually – with substantial economic impact in nearly every community across the country. With long term care facilities contributing to the employment of more than 5.4 million individuals, the long term care sector represents one of the few growth areas in the U.S. economy adding 63,000 jobs in 2010 alone. As a major driver of economic activity as the 10th largest employer nationwide and the 2nd largest in the health care sector, the long term care further supports more than $205.2 billion annually in labor income, and generated $60.9 billion in tax revenue in 2009 alone.

AHCA/NCAL is extremely concerned that the National Labor Relations Board (NLRB) is embarking on new ground without the proper authority or basis in law and that these changes will be detrimental to the safe, efficient operation of our members' businesses and not in the best interest of their employees. Following are a number of recent actions taken by the NLRB that support this contention.

As a result of its Notice and Invitation to Files Briefs, in *Specialty Healthcare*, the Labor Board may very well deviate from 75 years of history regarding the standard it will apply in determining appropriate bargaining units in long-term care facilities – the "community of interest" test. We anticipate a ruling which will proliferate bargaining units in nursing homes (and probably other industries as well). Indeed, we anticipate the Board deciding to allow single classification bargaining units. This will have a devastating impact on the quality of integrated care necessary for the elderly, the cost of health care, and unit labor costs, which will undoubtedly increase due to multiple collective bargaining contracts having to be negotiated. Single classification units also will increase the risk of strikes. Taken together, these factors will increase health care costs, reduce the quality of care and serve as a disincentive for job creation.

In *Specialty Healthcare*, the Labor Board is improperly engaging in rule making through an adjudicatory process.

AHCA/NCAL is also concerned about the Notice of Proposed Rulemaking published by the National Labor Relations Board in the Federal Register on December 22, 2010 entitled "Proposed Rules Governing Notification of Employee Rights under the National Labor Relations Act."

The alleged "need" for a notice is based on faulty premises. The Board claims "that many employees protected by the NLRA are unaware of their rights under the statute" and "the intended effects of [the proposed notice] are to increase knowledge of the NLRA among employees, to better enable the exercise of rights under the statute, and to promote statutory compliance by employers and unions."

The Board's premise that employees are unaware of their rights is faulty for a number of reasons.

- 77.3% of the U.S. population had internet access by 2010. The internet provides easy access to information regarding unions and the National Labor Relations Act. During the week of February 4, 2011, typing "organized union" into the Google search engine returned over 1.57 million hits. All major unions have significant websites, which are easy to access and contain many pages of information about how to form a union and exercise legal rights.

- That 6.9% of the private sector workforce is represented by unions is irrelevant. Unions once represented 35% of the workforce; there was no posting requirement at that time. Clearly, the lack of posting has not contributed to the decline in union representation in the private sector.

- Unions communicate political messages and influence political dialogue by assisting in the election of federal, state and local candidates, including a President who unabashedly supports unionism. These same unions can be just as effective in educating workers about the National Labor Relations Act and unions.

- The Board itself has a robust website (www.nlrb.gov), which according to the Board's Fiscal Year 2010 Performance and Accountability Report, attracted "2.8 million visitors with 9.3 million page views." The Board also has its own Twitter account and a Facebook page with almost 3,000 followers, as well as its own YouTube site.

- The Board lacks the statutory authority to impose the proposed posting.

- It is up to Congress, not the Board, to impose a notice posting requirement, and Congress has not done so. Congress and/or the Board have decided that the notice postings only should take place in connection with a representation election (three full 24 hour periods prior to the day on which the election begins) and as a remedy for the commission of unfair labor practices.

Section 6 allows the Board to make such rules and regulations "as may be necessary to carry out the provisions of the Act." Seventy-five years have passed since the Act was passed and the Board has utilized its rulemaking powers on substantive matters only once, over 20 years ago. The Board cannot show that a rule requiring notice posting requirements suddenly is "necessary" as required under Section 6.

The proposed remedies are punitive and exceed the Board's authority. The Labor Board clearly does not have the authority to create a new unfair labor practice for failure to post. Only Congress can do this.

The Board also does not have the authority to toll the statute of limitations in the National Labor Relations Act for failure to post, as it proposes. In fact, this provision is contrary to the Board's own precedent. Section 10(b) of the NLRA provides "no complaint shall issue based upon any unfair labor practice charge occurring more than six months prior to the filing of the charge with the Board . . ." 29 U.S.C. 160(b). Congress provided only one statutory exception to the six month limitations period – for persons serving in the armed forces during the limitation period. The Board itself has engrafted only one other exception, for "fraudulent concealment." To constitute "fraudulent concealment," the party claiming tolling should occur must show, among other factors, *deliberate* concealment. The Board's Notice of Proposed Rulemaking (NPRM) is inconsistent with its own precedent because, in the NPRM, the Board proposes to toll the limitations period for reasons other than fraudulent concealment, i.e., "where an employee . . . is excusably unaware that the conduct is unlawful." Tolling certainly is not justified where an employer simply has failed to post the proposed notice.

The Board also proposes to infer unlawful motive in a case where motive is an issue if the notice is not posted. This proposed remedy violates the Act's remedial scheme. Board remedies are designed to restore the *status quo*, not to take retribution against a guilty party. The proposed remedy of inferring unlawful motive is absolutely unrelated to an employer's failure – knowing

or otherwise – to post the proposed notice. It simply cannot be inferred, for example, that an employer who fails to post a notice would intentionally retaliate against an employee who engages in union or other protected activity. There is no correlation and no legitimate basis to make this inference. Thus, this is a punitive deterrent, not a reasoned action to restore the *status quo*, which is the purpose of Board remedies.

Though cloaked as rulemaking, the Labor Board is actually engaged in legislating.

The General Counsel's Memoranda GC 10-07 (Effective Section 10(j) Remedies for Unlawful Discharges in Organizing Campaigns) and Memorandum GC 11-01 (Effective Remedies in Organizing Campaigns) were issued without any Congressional oversight and without any basis in adjudicated cases. There is no showing why these are necessary.

All of the above follows a troubling pattern of behavior by the Labor Board over the last 12 months or so.

The Board has asked for and received *amicus* briefs in a case which will probably overturn the *Dana Corporation*, 356 NLRB No. 49 (Dec. 6, 2010) decision which gives employees a 45-day window to seek an NLRB conducted secret ballot election if the employer voluntarily recognized a union by card check. Typically, this only happens in the face of a union corporate campaign designed to destroy the targeted employer's reputation and is really "coerced voluntary" recognition. Just as EFCA sought to practically eliminate secret ballot elections, the Board's anticipated decision reversing *Dana Corporation* will do precisely the same thing.

In another case, the Board is reconsidering the "successor bar doctrine" which, we suspect, will change the law in such a way to make it virtually impossible for a union to lose its majority status and representation rights when one employing entity changes control. See *UGL-UNICCO Services Company*, 355 NLRB No. 155 (Aug. 27, 2010).

One tactic sometimes used by unions to help organize a unit is called "salting." Here, the union official masks her true identity and deceives the employer into hiring her for employment. In a recent Board decision, the rights of unions to utilize this tactic have been enhanced. See *Ken Mor Electric Company, Inc.*, 355 NLRB No. 173 (Aug. 27, 2010).

When a party loses a Board supervised election, it has the right to ask for a rerun election based on "objectionable conduct" interfering with the Board's "laboratory conditions" standards. In several cases, the Board has given a union another election opportunity after being defeated by a secret ballot vote of the employees based on hyper-strict, overreaching standards showing an inherent union bias. See e.g., *First Student, Inc*., 355 NLRB No. 78 (Aug. 9, 2010).

"Bannering" is another popular union tactic often used in corporate campaigns. The Board has found "bannering" more like "handbills" instead of "picketing," giving unions greater opportunities to engage in their use. See *United Brotherhood of Carpenters and Joiners of America, Local 1506*, 355 NLRB No. 159 (Aug. 27, 2010). On February 3, 2011, in *Carpenters Southwest Regional Council, Locals 184 and 1498 (New Star General Contractors, Inc.)*, 356 N.L.R.B. No. 88 the Board extended that decision, holding that banner displays that read "labor

dispute" were not a prearranged or generally understood signal to any employees to cease work. Dissenting Member Hayes accused the majority of being "bent on undoing through administrative adjudication the restrictions imposed by Congress on unions' ability to involve neutral employers and employees in a labor dispute."

We anticipate the Board will soon expand the rights of union officials to enter the property of the employer for publicity and organizing purposes. See *Roundy's Inc*., 356 NLRB No. 27 (Nov. 12, 2010).

Union use of elected officials in employee representation cases was enhanced in a recent case. The Board found politicians who wrote to and encouraged private sector employees to vote for a union acceptable behavior which did not warrant the setting aside of an election. As a result, we can expect unions to seek such interference by politicians as a condition of obtaining or maintaining the union's endorsement for the public officials' election or re-election. See *Affiliated Computer Services, Inc.*, 355 NLRB No. 163 (Aug. 27, 2010).

In the case of *Independent Residences, Inc*., 355 NLRB No. 153 (Aug. 27, 2010), the Board upheld a union's election victory despite the fact the employer's free speech rights were infringed upon due to a state law likely preempted by United States Supreme Court precedent.

The Board is seeking to extend its jurisdiction over employers by expanding the interpretation of who actually is a "covered employer" under the Act. See *Catholic Social Services, Diocese of Bellville*, 355 NLRB No. 167 (August 27, 2010) (involving a religious institution's child care center); *New York University*, 356 NLRB No. 7 (Oct. 25, 2010) (involving graduate teaching assistants); *Chicago Mathematics & Sci. Acad. Charter Sch. Inc.*, NLRB No. 13-RM-1768 (Jan. 10, 2011) (requesting amicus briefs in a case impacting charter schools).

AHCA/NCAL hopes the Committee will ask the following questions of the Board. This unprecedented rulemaking proposal raises numerous questions that should be asked of the Board pursuant to Congressional oversight powers and responsibilities. These questions include the following:

- On what basis, if any, other than the outdated and partisan articles cited by the Board, has the Board concluded that employees are not aware of their rights under the Act?

- What current empirical studies exist, if any, supporting the Board's assumption of employee ignorance?

- In addition to any studies referenced in the first and second bullet points above, on what other basis, if any, has the Board concluded that employees are ignorant of their rights?

- To what extent, if any, does the Board rely upon the fact that only 6.9% of the private sector work force has chosen to be unionized to support the assumption that private sector employees are ignorant of their rights under the Act?

- To what extent, if any, does the Board rely on the number of unfair labor practices charges and representation petitions filed to support their assumption that employees are ignorant of their rights under the Act? If so, the documentary evidence supporting this assumption should be made public and explained.

- Based upon the more than 6 months of experience under Federal Contractor posting, does the Board have any evidence that the notice has produced the intended effect – i.e., greater utilization of the Act and Board processes by employees of Federal Contractors?

- Have the number of unfair labor practice charges filed against Federal Contractors since the effective date of the posting requirement increased over filings prior to the implementation of those posting requirements?

- Have the number of representation petitions filed by unions to represent employees of Federal Contractors increased subsequent to the implementation of those posting requirements?

- Have the number of contacts with the Agency by employees of Federal Contractors increased subsequent to the implementation of those posting requirements?

AHCA/NCAL appreciates the opportunity to submit testimony on these important issues. We strongly believe that the NLRB must follow the rule of law and avoid legislating, whose responsibility lies entirely with Congress.