The Election, the SEIU, and Beyond: Labor’s Future in the Health Care Industry

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The health care workplace has witnessed constant evolution: in technology, in regulation, in demographics, in economics, and in labor relations. The Service Employees International Union has been an active player in this evolution, in its collective bargaining role. The Union has positioned itself to step beyond the traditional labor-management structure, now becoming a major political player seeking to affect the workplace in ways it never could before.

The SEIU and other unions support a wide range of legislation on the federal and state levels, some which would be dramatic in their impact. The SEIU is undertaking a whole new approach to organizing workers in health care and other fields – one which some employers view as “partnering” while other employers continue to reject as unwelcome.

The world is changing. The coming election could be an accelerant to this change. Regardless of the outcome in November, the healthcare workplace will face significant changes. The AHCA and its affiliates are well situated to educate their members so they may make the business and political decisions that are right for them.

The New SEIU Paradigm – Card Check

The SEIU is the largest labor union in the United States. It is arguably the most aggressive union in terms of organizing strategies and in creating leverage in collective bargaining. It has a history of employing confrontational strategies and has pioneered non-traditional, outside-the-box tactics to achieve its aims. The most prominent of these tactics is the card check.

Under the National Labor Relations Act, union organization of employees can be accomplished in two ways: (1) a vote by a majority of eligible employees in a government-supervised secret ballot election or (2) by securing signed authorizations from a majority of eligible employees within a particular unit, and then obtaining voluntary recognition of the union by their employer. The latter is often referred to as a “card check” or “card count.”

Unions frequently lose elections because the process provides ample opportunity for employees to learn the potential disadvantages of union representation, and thus permits employees to make an informed decision on the subject. Thus, the SEIU much prefers the second alternative. In fact, an official of a prominent SEIU local recently told the press “we don’t do elections.” Unlike an election, authorization card signing is not private. It is often rushed, pressured, or even secured through intimidation;

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employees are often induced to sign cards through baseless promises and misinformation. Indeed, employees often do not know what they are signing. This is another reason employees often change their mind if given the opportunity to vote. In addition, the Union generally seeks the employer’s agreement to avoid educating employees about the disadvantages of union representation. This is euphemistically called “neutrality.” Often, the Union also seeks permissive access to employees to solicit signatures on working time. Like a card check agreement, these terms also are purely voluntary by an employer.

Although the SEIU wants a card check, employers are under no obligation to agree to such terms. Generally, they resist adopting a card check. In recent years, the SEIU has adopted a strategy of offering attractive collective bargaining agreement terms to employers in return for a card check. These initial terms are of course subject to change in subsequent contracts. Alternatively (or if the employer declines to agree), the Union may initiate a corporate campaign against a targeted employer to coerce it to agree to card check recognition of its employees.

In a typical corporate campaign, the Union will seek leverage against the employer in any way possible. This may include picketing, handbilling, rallies, print and electronic advertising, news coverage, filing charges with government agencies (alleging discrimination, safety violations, wage-hour claims, and more), and to obstruct government approvals on building permits, zoning variances, and so forth. These latter pressure points are typically called “regulatory harassment.” A union may also seek to influence shareholder meetings or even negatively affect the company’s stock price. Like a strike, the corporate campaign is intended to inflict harm (or the fear of harm) on the corporate entity to pressure it into submitting to a card check agreement.

The SEIU and other unions have been attempting to expand the card check concept – indeed, to change the very law so that it (and not a protected secret ballot election) is the legal standard for all employers.

The 2008 SEIU Convention – An Ambitious Agenda

In late May, the SEIU conducted its quadrennial convention in San Juan, Puerto Rico. At the convention, the Union presented delegates with its expansive plans for the future of organizing in its various divisions, including health care. Key to these plans are the centralization of union power and the commitment to an election and legislative agenda.

The Union announced several initiatives for its Healthcare Division. One, called “strategic unity,” calls for a continuation of the Union’s trend over the previous few years to consolidate local SEIU unions representing healthcare employees into a smaller number of locals. This will help enable the Union to minimize differing contract standards within the same region. Ideally, long-term care employees will be represented by one SEIU local per state.
The invigorated healthcare locals will be directed by a National Bargaining Council to coordinate negotiations with multi-state employers, and to otherwise maintain minimum standards for contracts. The Council will also assist locals in dealing with large employers by providing campaign support (rallies, picketing, etc. at other of the employer’s facilities, for instance).

The primary goal of “strategic unity” will be the pooling of resources to organize the 90% of health care workers who remain unorganized. Toward that end, the SEIU plans to “convene a Health Care Summit of major healthcare unions” to agree on a coordinated organizing strategy. An objective of the Summit will be to eliminate “jurisdictional and other disputes between and among competing unions.” Many commentators see this as an effort to drive other unions from long term care, leaving the field for the SEIU alone.

At the convention, the SEIU acknowledged the great success and impact of its corporate campaigns, and has pledged to increase use of this tool – especially in regard to healthcare. Corporate campaigns seek to advance the Union’s goals not by organizing employees, but by attempting to harm the employer through negative publicity, filing challenges with regulatory and/or tax agencies, and by seeking any other non-traditional source of leverage to use against the employer. Typically, the Union will cease a corporate campaign only with the employer’s agreement to recognize the Union through a card check and to remain “neutral” in communications with employees regarding the Union. In recent months, the SEIU has begun a new phase of corporate campaigning – applying pressure not to employers, but to the private equity firms with whom employers are associated.

The Union will also focus on issues relating to nurses. Specifically, the Union will increase funding for research into nursing practice issues (staffing, overtime, ergonomics, participation in operational decisions, etc.). It will create federal and state “nurse policy committees” to consult with legislators on Union-favored legislation. Most importantly, the SEIU authorized increased spending to supporting candidates who commit to passing legislation banning mandatory overtime and establishing nurse-patient ratios.

The Union understands that the more members it has, the more political power it can exercise. The are using their political strength to help them expand their base and to advance their collective bargaining objectives. The SEIU views its political agenda as the most vital of all its efforts. Through it, they hope to secure national health insurance, win reform of the union organizing process to simplify and accelerate SEIU growth, and to pass a variety of workplace mandates.

The following is a brief listing of recent bills which the SEIU (and other unions) have sponsored or are promoting. All of them are expected to be revitalized after the November elections, especially should Senator Obama be the next president.
**Employee Free Choice Act**

The “Employee Free Choice Act” is still the top legislative priority for organized labor. The House passed the bill by a vote of 241-185 on March 1, 2007. In the Senate, a filibuster has thus far been successful. The bill is not going away. Senator Obama has frequently stated his support for the bill.

The “Employee Free Choice Act” would require unions to be recognized if a majority of employees in a bargaining unit signed authorization cards. This would eliminate employees’ ability to cast their votes in a National Labor Relations Board-supervised secret ballot election.

Many employers find other aspects of the bill to be more onerous. EFCA mandates binding interest arbitration if the employer fails to collective bargaining terms within 120 days. It also would impose civil penalties (never before existing under the NLRA) for violations as simple as those arising from spirited employer discussion of unionization – penalties up to $20,000 per incident.

There are many other bills pending which can affect the healthcare workplace, and are supported by the SEIU.

**Challenging Nurses’ Supervisory Status**

A frequent issue arising in health care is the status of nurses: are the employees or supervisors? “Supervisors” are not protected by the labor law, and thus are not subject to unionization. In 2006, the NLRB issued decisions which included some long-needed clarification to the interpretation of the term “supervisor.” The Board very modestly enhanced the ability of nurses to be considered supervisory under the law. The reaction from organized labor was loud and sustained. In early 2007, “The Re-empowerment of Skilled and Professional Employees and Construction Tradesworkers Act” (RESPECT Act), was drafted.

The RESPECT Act would not only reverse the NLRB’s liberalization of the definition of “supervisor,” but would also amend the law to actually delete the concepts of assigning work and “responsible direction” of employees from the definition. This runs to the heart of the supervisory duties of nurses in a health care facility. The bill also would require that to be a supervisor, any nurse must engage in such supervisory duties a majority of her working time. These unrealistic mandates would only serve to minimize the health care employer’s ability to manage, and maximize the number of potential union members.

The bill remains pending.

**Patriot Employers Act**
In August 2007, the “Patriot Employers Act” was introduced. Under it, employers could be designated “patriot employers” and gain preferential tax treatment. To comply, an employer would “pay at least 60 percent of each employee’s health care premiums”; have a position of “neutrality in employee organizing drives”; pay a salary to each employee “not less than an amount equal to the federal poverty level”; and provide a pension plan, among other things. The bill is still pending. Senator Obama is a co-sponsor.

**Blacklisting Employers**

Several bills are pending which could be used as leverage by unions in gaining recognition, or in advancing bargaining demands.

“The Honest Leadership and Accountability in Contracting Act of 2007” remains pending; the bill would consider a federal contractor’s record unsatisfactory if the contractor has a pattern of failing to comply with tax, labor and employment, environmental, antitrust, and consumer protection laws.

The “Contractors and Federal Spending Accountability Act of 2007” also remains pending. This legislation would create a database that is required to include all civil, criminal, and administrative proceedings “concluded” by the Federal Government and State governments against federal contractors or grant recipients in the previous five years. The bill would also require that companies be issued a notice of proposed debarment if twice within any three year period, they receive a judgment or conviction for the same or similar offense. Similar bills are pending in both the House and Senate.

**Limitations on Overtime for Nurses**

The Safe Nursing and Patient Care Act, which has been pending for several years, would prohibit health care facilities (generally, hospitals, rehabilitation agencies, and home health agencies) from requiring nurses to work overtime except during declared emergencies. Specifically, the bill would amend the Social Security Act to limit the number of mandatory overtime hours nurses can be required to work by providers who receive payments under the Medicare program, and to impose penalties of up to $10,000 per violation with higher penalties for patterns of violation.

Labor strongly supports this bill, and state versions. New York recently passed a similar statute.

**Ergonomics**

The Nurse and Patient Safety and Protection Act would apply to all health care facilities. It would direct OSHA to develop a new ergonomics regulation concerning nurses and medical lifting, mandating the use of mechanical lifts for patients. The bill
would also create a right of private action allowing employees to sue their employer if they have been “discharged, discriminated, or retaliated against” for asserting rights described in the bill. In addition, the bill would allow an employee to refuse an assignment if they believe that the employer has not complied with the standard required in the bill.

Amending the Transparency Act of 2006

Organized labor often publicizes executive compensation during organizing drives or corporate campaigns. Currently pending is the Government Funding Transparency Act of 2008. It would require that the names and total compensation of the five most highly compensated officers of any entity receiving 80 percent of its revenues from federal sources (amounting to at least $25 million annually). The bill has passed the House.

A panoply of other labor bills are pending which would affect all industries. It is fair to say they are supported by the SEIU and other labor organizations. Here is an abridged listing:

• **Civil Rights Act of 2008**

  Would, among other things, overturn or modify several Supreme Court decisions, extend backpay awards under the NLRA to undocumented immigrants, give state employees the right to sue for alleged age discrimination or overtime pay violations, would eliminate the damages cap under Title VII of the 1964 Civil Rights Act, and restrict application of mandatory arbitration clauses in individual employment contracts (other bills also seek to restrict mandatory arbitration in employment).

• **Worker Adjustment and Retraining Notification (WARN) Act Expansion**

  Senator Obama is a co-sponsor of the “FOREWARN Act of 2007.” The bill would amend the WARN Act by lowering the threshold so that more small businesses are covered, changing the definition of “mass layoff” and “plant closing” to incorporate many more personnel actions, increasing the notice period from 60 to 90 days, doubling existing damages, and providing for government enforcement.

• **Expansion of FMLA and Leave Mandates**

  “The Family and Medical Leave Expansion Act,” which among other things would: create a grant program for states providing income replacement to new
parents for not less than six weeks during any 12 month period; lower the threshold for size of companies covered from 50 or more employees to 25 or more employees; add domestic violence as a cause for taking leave under the FMLA; and create employee (private sector or federal) entitlement to a total of 24 hours of leave during any 12 month period under FMLA for a parent to “participate in an academic activity of son or daughter...”

The Balancing Act of 2007 would provide wage replacement for eligible individuals responding to family care giving needs, especially those related to the birth or adoption of a child; amend the FMLA to allow employees to take specified additional leave for parental involvement in their children or grandchildren’s education and extracurricular activities, and routine family medical care needs; and make part-time employees eligible for leave, among other things.

The Family Leave Insurance Act of 2007 would create a federal insurance fund to provide eight weeks of paid family and medical leave to private and federal employees who take time off for reasons permitted by the FMLA.

The Healthy Families Act would require: employers with 15 or more employees who work 30 or more hours a week to provide seven paid sick days to care for themselves and their family’s medical needs, with pro-rated coverage for part time employees. It also provides a right of private action for employees (or their representatives) to sue employers.

• Working Families Flexibility Act

This legislation would provide that whenever an employer denies an employee request for a change in working conditions, the employee may pursue a series of meetings, Department of Labor inquiries, Administrative Law Judge hearings, and ultimately, federal court challenges. Senator Obama is a co-sponsor.

• Civil Rights Pay Fairness Act

The bill would extend the period for filing EEOC charges from 180 days to 360 days, and from 300 days to 480 days in those states that have a fair employment agency. The bill would impose a “paycheck rule” so that the statute of limitations could be reset each time a paycheck were received based on past compensation decisions that are intentionally discriminatory. Only a successful Senate filibuster prevented passage of this bill.

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This information is provided to illustrate the ambitious plans the SEIU has for expanding their membership and for affecting the healthcare workplace. The Union
has set their plan into action. Understanding their goals and their strategies is important to all healthcare employers, so they can determine their own appropriate response.

The AHCA and its affiliates are uniquely situated to raise the awareness of healthcare employers. The organization should encourage state affiliates to mount an educational campaign among their members, explaining the goals and activities of organized labor and how they will affect employers. Informed of labor’s political goals, healthcare employers can make their own decisions how (if at all) to participate in the political process to protect their interests. Informed employers will also be better situated to proactively address any issues which might be exploited in a corporate campaign.

When confronted with union organizing, most employers provide employees with honest and accurate information allowing them to make an informed decision regarding unionization. Legislative proposals such as EFCA would greatly reduce employers’ ability to timely and effectively communicate with employees regarding unions. A growing number of employers (in many industries) are developing union awareness educational programs to implement before any change in the law occurs. The AHCA could assist members and affiliates in preparing such instructional material, geared to assist healthcare employees in making a knowledgeable choice.

A fundamental part of the AHCA’s mission is to adopt and promote programs of education, legislation, better understanding and mutual cooperation. Significant changes are coming to the industry. The AHCA has a present opportunity to demonstrate its leadership once again by promoting better understanding through education.