Revisit Your Union Insignia Rules

*Law360, New York (July 08, 2014, 11:37 AM ET) --*

The National Labor Relations Board’s recent decision in Healthbridge Management,[1] in which the board found that a health care employer violated the National Labor Relations Act by removing flyers from union-designated bulletin boards and prohibiting employees from wearing union stickers, should motivate health care employers to analyze their current work rules pertaining to the wearing of insignia and serve as a reminder to all employers about the proper use of union-designated bulletin boards.

The Healthbridge Management Case

Healthbridge Management LLC is a company that manages nursing homes and health care facilities in multiple states. In 2011, the NLRB issued a complaint alleging that six of the health care facilities Healthbridge managed violated the NLRA in several respects. Not missing the opportunity to capitalize on the issuance of the complaint, the union representing employees in certain of Healthbridge’s facilities posted a flyer on each of the facility’s union-designated bulletin boards that said “BUSTED” and accused Healthbridge of scare tactics and fear-mongering, among other things. For example, the flyer made the following statements:

- “Healthbridge ... will do ANYTHING — even violate labor law — in their ruthless pursuit of more profit.”
- “They are trying to frighten residents and their families and divide us, the caregivers, from the people we care for.”
- “This is another case of greedy, national corporations exploiting the elderly and their caregivers by lying, cheating and even law-breaking.”

But the union did more than just post flyers — they also distributed stickers to employees that stated “BUSTED,” with “By National Labor Board For Violating Federal Labor Law” stated below.

That same day, Healthbridge’s Senior Vice President of Labor Relations instructed each facility to remove the “BUSTED” flyers from their bulletin boards and to inform employees they must remove the
“BUSTED” stickers when in patient care areas. Four of the six facilities followed these instructions exactly, but the other two categorically prohibited employees from wearing the stickers in all areas of the facilities. These actions precipitated the union’s filing of an unfair labor practice charge with the NLRB and, subsequently, the general counsel issued a complaint against Healthbridge concerning these actions.

**Unlawful Removal of Union Flyers**

Unions generally have no statutory right to utilize bulletin boards on an employer’s premises. However, when a labor contract (or even a past practice or policy) permits a union to use an employer’s bulletin board, the union’s use of it gains the NLRA’s protection and employers cannot regulate or remove such postings unless proscribed by the contract, policy or practice.

Healthbridge’s labor contract required it to furnish a bulletin board in each facility for the union to post “proper Union notices.” Proper was left undefined, and the labor contract otherwise failed to articulate what constitutes a “proper Union notice.”

Healthbridge argued that the labor contract authorized it to remove the “BUSTED” flyers because they were not “proper” insofar as they were inflammatory, derogatory, inaccurate and untruthful. In support, Healthbridge correctly pointed out that a complaint issued by the general counsel does not itself establish a violation of the law — the allegations must still be proven — and therefore the union’s statements asserting Healthbridge was found to have violated the law were inaccurate. The NLRB disagreed, finding that the statements in the flyers amounted to nothing more than permissible pro-union bias and that Healthbridge could easily correct any misconception by employees as to whether the board actually had found a violation of the law. Accordingly, the NLRB found that the flyers were “proper union notices” under the labor contract and were protected from Healthbridge’s unilateral removal.

**Unlawful Prohibition of Wearing Union Stickers**

The NLRB has long held, with U.S. Supreme Court affirmance, that the NLRA protects employees’ right to wear union insignia at work without retribution. But this right has never been absolute. Employers can proscribe such insignia if “special circumstances” are present. For example, the NLRB has found that maintaining production and discipline, ensuring safety and preventing the alienation of customers constitute “special circumstances.”

In addition to the “special circumstances” analysis applicable to all employers, when a health care employer is involved, the NLRB engages in a further “special circumstances” analysis to account for the possible disruption insignia might cause to patient care. In particular, rules that restrict employees from wearing insignia in nonpatient care areas are presumptively invalid and require that “special circumstances” be shown, but restrictions on wearing insignia in immediate patient care areas are presumptively valid and need not be supported by “special circumstances.” However, health care employers cannot selectively ban union insignia in immediate patient care areas while allowing nonunion insignia to be worn in those areas absent a showing of “special circumstances,” which requires the employer to demonstrate the rule was necessary to avoid disruption of health-care operations or disturbance of patients.

In Healthbridge Management, the NLRB first discussed whether the two facilities that prohibited employees from wearing the “BUSTED” stickers at all acted unlawfully. Because those facilities
prohibited the wearing of insignia anywhere in the workplace (not just in immediate patient care areas) and in the absence of any special circumstances, the NLRB easily concluded they acted unlawfully in doing so.

The NLRB faced a more difficult question with respect to the four facilities that only banned the “BUSTED” stickers in patient care areas. This is because health care employers, like Healthbridge, have historically been allowed to ban insignia in patient care areas, and the NLRB will generally attach a presumption of validity to any such prohibition. However, in this case, the four facilities only banned from patient care areas one type of insignia — the “BUSTED” sticker — a decision the board found to be discriminatory. Because the ban only encompassed union insignia, the NLRB held that it was not entitled to a presumption of validity. Accordingly, the ban was unlawful absent a showing of “special circumstances.”

Healthbridge argued that special circumstances justified the ban because the stickers would upset their patients. But, the NLRB again disagreed because: (1) Healthbridge did not present any specific evidence that the stickers would upset their patients and (2) Healthbridge’s reasoning was solely based on the Senior Vice President of Labor Relations’ belief and conjecture.

The NLRB’s majority decision on this issue drew a dissent from Philip A. Miscimarra, who reasoned that the facilities’ prohibition was entitled to the presumption of validity that attaches to decisions prohibiting insignia in patient care areas regardless of whether the ban applied to all insignia or just one sticker.

So What’s an Employer to do?

All employers, not just those involved in the health care industry, can take lessons from the NLRB's decision in Healthbridge Management.

Employers should review each of their labor contracts to ascertain whether they grant the union a contractual right to use a bulletin board in the workplace and, if so, what parameters limit that right. Like with Healthbridge’s contract, the absence of language limiting what the union can post will be viewed by the NLRB as a broad grant of authority to the union to post an array of communications to its members. In addition, employers should keep this decision in mind when bargaining over a new contract so they can consider language that would limit the type and nature of the union’s bulletin board communications to, for example, union meeting notices, notices of the union’s social and recreational events, union appointments and union officer elections and results. Employers may also want to include a provision allowing the union to post other materials that the employer authorizes prior to posting. That said, if the employer uses this preauthorization procedure to prohibit anti-employer postings only, it could expect that the union may still allege an unfair labor practice for discriminatory treatment.

Employers should also use the Healthbridge decision as a catalyst to evaluate their work rules pertaining to the wearing of insignia. For most employers, lawful policies will not prohibit the wearing of insignia absent narrow “special circumstances.” However, the NLRB has found special circumstances in certain cases.

In Starwood Hotels and Resorts Worldwide Inc.,[2] the NLRB upheld the employer’s prohibition on wearing union buttons in public places because of potential interference with the employer’s public image and the special atmosphere the employer sought. In Albis Plastics,[3] the NLRB upheld a ban on union stickers placed on bump caps because those unauthorized stickers interfered with the employer's
strategy for promoting plant safety. And in Burger King Corp. v. NLRB,[4] Midstate Tel. Corp. v. NLRB[5] and Fabri-Tek Inc. v. NLRB,[6] the courts reversed board decisions finding a violation, determining that the unusual and large insignia distracted or tended to distract employees’ concentration. Employers should consider whether their policies and practices put them in the best position to assert similar special circumstances when faced with a union insignia issue.

Health care employers can go further and ban the wearing of all insignia in immediate patient care areas. But given the NLRB’s posture on this issue, health care employers should carefully evaluate whether they want to establish a policy banning all insignia in patient care areas. If they do so, they must ensure that such bans are uniformly enforced or the NLRB likely will find a violation when an employer only bans union-related stickers. Alternatively, if a health care employer only bans the wearing of insignia in special circumstances, the employer must be prepared to produce compelling evidence in each case demonstrating the requisite special circumstances. For example, in Evergreen Nursing Home and Rehabilitation Center Inc.,[7] the NLRB found special circumstances existed because the employer had a longstanding strict professional dress code and the insignia was large and conspicuous.

Now that the NLRB has a full panel of members whose appointments have not been legally challenged for the first time in years, employers can expect the board to closely examine their practices, particularly during the course of a union campaign. Before taking actions that the NLRB might view as chilling employees’ Section 7 rights, employers should consult with counsel.

—By Cynthia K. Springer and Matthew A. Brown, Faegre Baker Daniels LLP

Cynthia Springer is a partner and Matthew Brown is an associate in Faegre Baker Daniels’ Indianapolis office.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] 360 NLRB No. 118 (May 22, 2014)
[3] 335 NLRB 923, 925 (2001),
[5] 706 F.2d 401, 403-04 (2nd Cir. 1983)
[6] 352 F.2d 577 (8th Cir. 1965),

All Content © 2003-2014, Portfolio Media, Inc.