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Obamacare Repeal: Will You Have To Bargain With Your Union Over Changes?

June 28, 2017 | | National Labor Relations Board,Labor And Employment

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Senate Republicans continue to work on legislation to repeal the Affordable Care Act (commonly referred to as Obamacare). As Politico reported on June 27, "Republicans plan to re-write their health bill over the Fourth of July recess and get a new analysis from the Congressional Budget Office before bringing legislation to the floor." The legislative process will continue to unfold and specifics of what will change are yet to be determined. However, changes to Obamacare in some form and fashion seem to be on the horizon. One question unionized employers should consider asking is whether they will have to bargain with their union over changes to Obamacare. Several years ago, in anticipation of Obamacare's original implementation, some employers bargained for the inclusion of language in their collective bargaining agreements that gave the employer the unilateral right to implement changes required by Obamacare. Will such language cover Obamacare's repeal? And what if the new legislation (Senate Republicans are calling their legislation the Better Care Reconciliation Act) offers discretion to employers on how to implement certain changes? A recent decision by the NLRB may offer helpful insight. In *Western Cab Company*, the NLRB considered whether the employer had a duty to bargain over changes the employer claimed were mandated by Obamacare. The company's insurance agent notified them that under certain Obamacare provisions effective January 2014, employees would be eligible to sign up for healthcare insurance after 60 days on the job. Previously, the company had a one-year waiting period to enroll. The company notified employees of the change and admitted during the hearing that they implemented this change without first notifying and bargaining with the union. The employer argued its unilateral change was lawful because it was required by the new Obamacare provisions that were effective Jan. 1, 2014. Ultimately, the NLRB found the employer engaged in an unfair labor practice by not bargaining with the union prior to implementing this change. The board held as follows, "It is well established that when an employer is compelled to make changes in terms and condition of employment in order to comply with the mandates of another statute, it must provide the collective-bargaining representative of its employees with notice and an opportunity to bargain over the **discretionary aspects** of such changes." (Emphasis added.) The NLRB noted that Obamacare actually imposed a maximum 90-day waiting period, not 60 as believed by the employer. "However, while the ACA establishes a maximum waiting period of 90 days, it does not prohibit employers or insurers from implementing a shorter waiting period. The Respondent does not contend that it was compelled, either by the ACA or by its insurer, to adopt a 60-day waiting period rather than a 30- or 90-day waiting period, or even no

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waiting period at all." The NLRB also found that the employer had discretion with respect to how it would notify and enroll recent hires into the health plan. The board expressed concern that such unilaterally implemented notice and enrollment procedure might not afford employees a sufficient opportunity to enroll in the plan. The NLRB further found that Obamacare "appears to offer flexibility as to how an employer can satisfy minimum criteria" for a large employer to avoid potential penalties under the statute. It is interesting to note that the decision specifically cites the fact that NLRB Chair Philip Miscimarra, who was recently appointed as chair by President Trump, agreed that the employer failed to show it was required to implement the health plan in the manner it did in order to meet Obamacare's requirements.