

What's Your Preference? NLRB Adopts Federal Court's Ruling Permitting Hospital's Nonunion Hiring Preference Policy

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The National Labor Relations Board (NLRB) recently was forced to accept a [First Circuit Court of Appeals' ruling](#) earlier this year that a [hospital's hiring preference policy](#) applicable to its nonunion employees was lawful. The board originally had ruled the policy violated the National Labor Relations Act. The hospital system at issue had both union and nonunion sites. At a union site, there was a collective bargaining agreement (CBA) that contained a provision giving preference to bargaining unit members for hiring or transferring into positions covered by the CBA. That is, union-represented employees at that hospital received preference over nonunion employees for open positions at that facility. In light of the fact that union members received preferential treatment at the unionized hospital pursuant to that CBA clause, the employer instituted a policy for its nonunion sites that gave nonunion employees preference over "external applicants" for hiring or transferring into open positions at its nonunion facilities. The company considered employees from the unionized site to be external applicants. The union challenged the hiring preference policy and argued that it unlawfully discriminated against union employees based on union affiliation. The hospital system countered that it merely was leveling the playing field in light of the fact union employees received a preference at the unionized facility over its nonunion employees. The NLRB initially sided with the union, but the First Circuit disagreed and overturned the NLRB. The court found that the employer's desire to treat its union and nonunion employees "even-handedly" negated an inference that the policy was motivated by union animus. The NLRB now has adopted the First Circuit's decision as the "law of the case" (meaning the NLRB won't necessarily follow the rationale of this decision in future cases but is doing so for this matter pursuant to the court's ruling). This is a very interesting case, but employers should be cautious when implementing a hiring preference policy similar to the one at issue here. In order to withstand legal challenges to such a policy, facts similar to those in this case likely need to be present.

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