STATEMENT OF NANCY MCKEAGUE, SHRM-SCP, SPHR
SENIOR VICE PRESIDENT & CHIEF OF STAFF
MICHIGAN HEALTH & HOSPITAL ASSOCIATION
OKEMOS, MI

ON BEHALF OF THE
SOCIETY FOR HUMAN RESOURCE MANAGEMENT

SUBMITTED TO
U.S. HOUSE COMMITTEE ON EDUCATION AND THE WORKFORCE,
SUBCOMMITTEE ON HEALTH, EDUCATION, LABOR & PENSIONS

HEARING ON
"LEGISLATIVE REFORMS TO THE NATIONAL LABOR RELATIONS ACT: H.R. 2776, WORKFORCE DEMOCRACY AND FAIRNESS ACT; H.R. 2775, EMPLOYEE PRIVACY PROTECTION ACT; AND H.R. 2723, EMPLOYEE RIGHTS ACT"

JUNE 14, 2017

Introduction

Chairman Walberg, Ranking Member Sablan and distinguished members of the Committee, my name is Nancy McKeague. I am the Senior Vice President and Chief of Staff at the Michigan Health & Hospital Association, based near Lansing, Michigan. I am honored to be here today to discuss legislative reforms to the National Labor Relations Act (NLRA), specifically H.R. 2776, Workforce Democracy and Fairness Act, and H.R. 2775, Employee Privacy Protection Act.

I appear before you today on behalf of the Society for Human Resource Management (SHRM), of which I am a member. SHRM is the world's largest human resource (HR) professional society, and for nearly seven decades the Society has been the leading provider of resources serving the needs of HR professionals and advancing the practice of human resource management. SHRM represents 285,000 members that are affiliated with more than 575 chapters in the United States and subsidiary offices in China, India and United Arab Emirates.

The Michigan Health & Hospital Association (MHA), founded in 1919 as a nonprofit association, works to advance the health of individuals and communities. Through our leadership and support of hospitals, health systems and the full care continuum, we are committed to achieving better care for individuals, better health for populations and lower per-capita costs. Our membership includes all community hospitals in the state, which are available to assist each of Michigan's nearly 10 million residents 24 hours a day, seven days a week. Michigan hospitals consist of various types of health care facilities, including public hospitals—owned by city, county, state or federal government—nonpublic hospitals, which are individually incorporated or owned and operated by a larger health system. In total, MHA has 110 employees, including 82 exempt employees and 28 nonexempt employees. MHA has employees in a variety of occupations including lawyers, physicians, allied health professionals, and computer and information technology professionals.

As you know, the National Labor Relations Board (NLRB) implemented the "ambush" election rule in 2015, which fundamentally and needlessly altered the delicate balance between the rights of employees, employers and labor organizations in the pre-election period—a balance that, prior to the rule, provided employees the opportunity to make an educated and informed decision to form, join or refrain from joining a labor organization. Moreover, the regulation severely hampers an employer's right to exercise free speech during union-organizing campaigns and cripples the ability of employees to learn the employer's perspective on the impact of collective bargaining on the workplace. Equally troubling is the rule's requirement that employers provide unions with additional employee information that was not previously required, such as personal phone numbers and e-mail addresses, home addresses, work locations, shifts, and job classifications. Thank you, Mr. Chairman, for convening today's hearing to examine these issues and legislative solutions to address the negative effects of the rule.

In my testimony, I will outline SHRM's views on employee rights under federal labor law; discuss the impact the rule has had on hospitals across the state of Michigan; highlight

employee privacy issues associated with the excelsior list; explain how micro-unions pose a unique challenge to the health care industry; and discuss legislative solutions to address challenges under the NLRA.

SHRM Views on Employee Representation

Enacted in 1935, the NLRA is the principal statute governing collective bargaining activities in the private sector. The NLRA was enacted to ensure the right of employees to assemble and collectively bargain with employers on matters of workplace welfare, including wages, hours, working conditions and benefits.

SHRM supports balanced labor-management relations and recognizes the inherent rights of employees to form, join, assist or refrain from joining a labor organization. Employee rights under the NLRA to form, join, assist or refrain from joining a union without threats, interrogation, promises of benefits or coercion by employers or unions must be protected. SHRM believes an employee's decision on unionization should be based on relevant and timely information and free choice, and that representation without a valid majority of employee interest is fundamentally wrong.

Ultimately, SHRM believes that HR professionals have a responsibility to understand, support and champion employment-related actions that are in the best interests of their organizations and their employees regarding third-party representation by labor unions.

The Need for H.R. 2775 and H.R. 2776

As you know, the ambush election rule substantially shortens the period of time between when a representation petition is filed with the NLRB and when an election is held. SHRM is concerned that this does not allow adequate time for employees to develop an educated and informed decision to form, join or refrain from joining a labor organization.

SHRM is also particularly concerned about the rule's mandate that employers provide their employees' personal phone numbers and e-mail addresses to labor organizations. SHRM members tasked with protecting employee privacy and personal information have expressed grave concern throughout the rulemaking process about providing this information to organized labor and in the time frames required under the rule.

At MHA, we dedicate a significant amount of time and effort to communicating to our team members about important workplace decisions, such as employee benefits, compensation and health care. These are decisions that impact not only our team members but often the team members' families as well. For example, MHA communicates health care benefits changes to employees by sending letters to employees' homes to ensure that all employees are notified of the pending change. This is a relatively easy exercise for MHA given that we have only 110 employees and all are in Michigan. For SHRM members at larger, multi-state employers, a great deal of planning and preparation goes into this effort. In many situations, it requires multiple meetings over multiple days to make sure that those

employers can communicate with and educate their employees directly and answer any questions employees may have on crucial workplace issues.

At MHA, our employees value the amount of time they have to make critical decisions regarding benefits that not only affect them but their spouses and children as well. For example, MHA allows employees up to five weeks to complete their annual benefit open enrollment. This is a friendly, noncontroversial process that requires open dialogue between the employer and employee so that both understand their health care elections for the upcoming year. MHA offers employees the opportunity to talk with our providers so that they are fully educated on any potential changes and the impact those changes might have on them as an individual or collectively as a family.

Even though the five weeks is time consuming, our process provides assurances that everyone's best interests are served. Although MHA has never experienced an effort to organize the workplace, I suspect it would require a similar amount of time and focus from our management team to educate our supervisors, staff and employees about the rights, requirements and our perspectives on the organizing drive. Knowing this, I struggle to envision how we would possibly educate our team members about an organizing drive in 11 days, which is a permissible amount of time between a union petition filing and a union election under the ambush election rule.

Contrast an employer's experience with a union-organizing effort with that of a union preparing to organize. After all, unions can prepare their entire organizing campaign before making it public. Unless employers have adequate time to prepare their educational materials and to share this information with their employees, employees will not have adequate time to learn the employer's perspective on the impact of collective bargaining on the workplace. While the precise length of time for the election process varies under the ambush election rule, union organizers now can hold an election in as little as 11 days of a union petition being signed. This circumstance creates an imbalance between the rights of employees, employers and labor organizations in the pre-election period. At the same time, the ambush election rule severely impacts an employer's freedom of speech and ability to share its perspective with employees about the organizing drive, which creates a distinct disadvantage for employers in the organizing process.

Another major concern for SHRM is that the ambush election rule significantly impairs small employers' ability in responding to petitions in an accelerated manner and presents significant burdens for large employers with diverse and significant voting units. For example, small employers may not have an HR professional on staff or access to legal counsel that specializes in labor issues. A large employer, on the other hand, may have a geographically dispersed workforce and centralized operations where communicating with its employees in such an expedited manner is almost impossible.

Given these concerns, SHRM believes H.R. 2776, Workforce Democracy and Fairness Act, would help restore fairness to union elections by giving both employers and employees ample time to review a union petition. Importantly, this legislation ensures that no union elections could be held in less than 35 days.

SHRM is also deeply concerned that employers are now required to provide personal, confidential information about employees when a union petition has been filed. This requirement to provide so much confidential information about an employer's employees constitutes an invasion of privacy for employees and an unnecessary data collection burden on employers.

Mr. Chairman, one of an HR professional's greatest responsibilities is being trustworthy and keeping in confidence employees' personal information and circumstances. In fact, failing to do so is grounds for immediate termination at my organization. At MHA, our HR professionals collect not only our employees' full names and Social Security numbers but those of their spouses and children as well. In addition, MHA collects military records (including the D.D. 214), immigration records, medical records, divorce records, education transcripts, security or background check information, and occasionally credit reports.

If we begin to provide to a third party, without employees' consent, personal information such as home addresses, home telephone numbers, cell phone numbers, and shift schedules, how long do you think the employee will trust us with the rest of the employment information we keep?

This reality is abhorrent and goes against everything that HR professionals have been trained to do without providing any safeguards for the information being shared with union organizers. In addition, while MHA does collect extensive employee contact data, not every employer collects this type of information or can keep the data up-to-date and accurate. H.R. 2775 addresses these concerns and provides appropriate levels by allowing employees to choose how they would want to be contacted if a union petition was signed.

Equally challenging is the requirement for the voter eligibility list and employee contact information to be provided to the organizing union within two workdays of the Direction of Election. Previously, employers had seven workdays to provide this information. While we update our employee contact information frequently at MHA, I am positive there are instances where the information is outdated or incorrect. I suspect that is true for the bulk of employers in the United States. Additionally, for security reasons, employee information may be housed in different software programs or databases, meaning it is next to impossible in some circumstances to compile this information in two business days let alone guarantee its accuracy.

From the outset, the ambush election rule appeared to be a solution in search of a problem. Union density has been declining for decades in America. According to the Bureau of Labor Statistics, only 10.7 percent of wage and salary workers in the public and private sectors were members of a union in 2016, compared to 20.1 percent in 1983.[1] In 2016, union membership declined by 240,000 from 2015 bringing the total number of employees belonging to unions to 14.6 million. Even though labor organization leaders have long argued that previous laws on union representation favored management and hindered

[1] Bureau of Labor Statistics, U.S. Department of Labor (2017). https://www.bls.gov/news.release/union2.nr0.htm

employees' ability to organize a union, this data suggests otherwise. The median number of days from petition to election decreased from 33 in fiscal year 2015 to 23 in fiscal year 2016.[2] It is clear that other factors have influenced union membership over the last 34 years. In an attempt to protect union membership, the ambush election rule has severely impacted employers' First Amendment rights while limiting the ability of employees to make an informed decision as to whether or not to join a union. H.R. 2776 would restore fairness to union elections allowing both employers and employees ample time to review a union petition – under the proposed legislation no union elections could be held in less than 35 days.

Micro-Bargaining Units and MWH

SHRM believes it is important to raise a serious concern over the interplay between the NLRB's decision in *NLRB v. Specialty Healthcare and Rehabilitation Center of Mobile (Specialty)* of Aug. 26, 2011 and the ambush election rule. In *Specialty*, the Board established a new standard that allows it to deem a unit appropriate unless the employer demonstrates that employees in a larger unit share an "overwhelming community of interest" with those in the petitioned-for unit. In practice, the *Specialty* decision allows labor organizations to form "micro-bargaining units" and "fragmented units" by permitting them to target only subsets of employees who are most likely to support the union. This combination of the ambush election rule with the latitude of the *Specialty* decision provides labor organizations the ability to effectively target any industry with a union petition.

In response to this, MHA is advising hospitals and health care systems thoughout the state of Michigan to be prepared for mirco-union organizing activity. Specifically, MHA recommends that hospitals identify positions that are "similar and constitute a readily identifiable group" as well as consider how those positions are "sufficiently distinct" from other positions, as prescribed under the *Specialty* decision. Micro-unions are of particular concern to MHA because health care is the ultimate team endeavor, where the needs of the patient must come first. If, for example, the nurse practitioners in the cardiac intensive care unit are organized but the physician assistants are not (or vice versa) and two of each respond to a code blue, it is likely that the physician or charge nurse will violate the collective bargaining agreement in some manner during the emergency. This can happen when supervisory roles overlap or change, when a medical staff member moves into mandatory overtime, or when a medical staff member is called in from another unit, for example. Any of these scenerios could result in a deviation from standard work rules under the collective bargaining agreement.

Historically the NLRB has preferred larger "wall-to-wall" bargaining units as a way to rationalize the bargaining process and preserve labor peace. The *Specialty Healthcare* decision allows unions to sub-divide a workforce into small bargaining units represented

[2] National Labor Relations Board (2017). Median Days to Elections Graph, Fiscal Year 2007-2016, http://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections/median-days-petition-election

by different unions, each driven by their own self-interest instead of the interest of the whole organization. This decision discourages teamwork rather than offering solutions that balance the needs of an individual department with the needs of the whole operation. This sub-divided situation is terrible for any employer, but is a matter of life or death in a health care setting.

The success of any hospital is dependant on the ability of its staff members to work as a cohesive unit with mutal respect. The *Specialty* decision threatens this vital component and empowers union organizers to create division and discord among professional employees. In addition to the previous examples, problems may arise where a hospital employee who performs cross-functional roles across multiple departments (sub-specialty groups) particularly if one such unit has a collective bargaining agreement. In this scenario, it becomes inherently difficult for HR professionals to determine how best to classify that employee and determine whether he or she has protections under the agreement. In the end, HR professionals' attention would be diverted from improving patient care and streamlining efficiency. In my opinion, the "overwhelming community of interest" language in *Specialty* is likely why there has been little micro-union activity in the hospital setting following the decision.

Conclusion

Mr. Chairman, thank you again for holding this hearing to examine needed NLRA reforms to address both the ambush election rule and the impact of the *Specialty* decision.

SHRM welcomes the introduction of H.R. 2775, Employee Privacy Protection Act and H.R. 2776, Workforce Democracy and Fairness Act. H.R. 2775 would modernize the election process while providing employees the privacy they desire in the 21st century workplace. H.R. 2776 would restore the balance between the rights of employees, employers and labor organizations in the pre-election period—hopefully resetting the median time from a representation petition to an election back to 38 days.[3]

SHRM looks forward to working with this Committee as these bills advance through the U.S. House of Representatives. I welcome your questions.

[3] National Labor Relations Board (2017). Median Days to Elections Graph, Fiscal Year 2007-2016, http://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections/median-days-petition-election