

## LEGAL

### *Are Unions Really An Option For Physicians?*

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To physicians in private practice who see themselves at the mercy of the insurance companies and HMOs, unionizing may seem pretty appealing. Truck drivers, auto workers, ball players and airline pilots all have unions which vigorously and often aggressively represent their members' interests. At times, through sometimes bare-knuckle labor tactics, these unions have brought employers to their knees. In the quest to level the health care playing field, is unionizing just a fantasy or an option to be considered seriously by independent physicians?

Over the past several months, two instances of union activities have made the headlines. First, podiatrists have formed a national union--the First National Guild for Health Care Providers of the Lower Extremities--which is part of the Office and Professional Employees International Union and is affiliated with the powerful AFL-CIO. Second, physicians employed at a large Tucson, Arizona clinic are seeking to unionize and are engaged in a battle with their employer who is challenging their right to do so.

The motivations and expected pay-offs in the two examples of union activity are different. By joining the ranks of organized labor, podiatrists are looking for political clout and, maybe more importantly, the business opportunity to participate as providers in union health benefits programs. As discussed later, the union's ability to negotiate contracts on behalf of its members in private practice will be limited. Podiatrists traditionally have not had the political access and influence of physicians and believe themselves to be in the unfortu-

nate position of being squeezed both by managed care organizations and by the referral patterns of primary care physicians.

Physicians employed at Tucson's Thomas-Davis Medical Center are seeking to unionize to regain control over patient care. These physicians, who two years earlier sold their interests in the medical center and in an affiliated HMO for \$3.2 million each, rose in revolt when the center tried to ram through cost-cutting measures, including terminating physicians and increasing patient loads, and to impose restrictions which were seen as eroding the physicians' ability to control care. The employer has opposed the formation of the union on the grounds that the physicians are managers or supervisors and, thus, are not entitled to collectively bargain.

Unionization of employed physicians is not a new phenomenon. Physicians employed by hospitals, governmental agencies and other health care institutions have long been represented by unions which have collectively bargained on their behalf. Subject to certain advance notice and other requirements under the National Labor Relations Act ("NLRA"), these unions have the right to strike and to exercise other rights that labor unions are afforded under the NLRA.

Unionization of physicians in private practice, however, is a new concept whose usefulness and effectiveness is questionable. Because these physicians are not employees of the payors with whom they wish to negotiate, they are deemed "competitors" under the antitrust laws and thus are subject to

the same limitations that are imposed on other physician joint ventures such as IPAs and POs. Unions comprised of independent physicians cannot, for example, negotiate fees unless the physicians share financial risk or have achieved clinical integration. Likewise, they cannot engage in concerted action--such as refusing to participate in a health plan unless certain demands are met--or to exercise the muscle traditionally exercised by unions in the context of collective bargaining activities.

Although for the political and business opportunity reasons discussed earlier joining a union may be worth considering in areas whose managed care and union penetration are high, locally it probably does not make sense. First, between the AMA and MSSNY, the political interests of physicians are well represented in Washington, D.C. and Albany. Second, the development of local physician organizations and integrated delivery systems will provide physicians with the opportunity to negotiate meaningfully with payors. Finally, and perhaps most importantly, it is questionable whether the political and economic desires of physicians mesh with those of organized labor.