

SPECIAL ISSUE

# brief



## How to Preempt and Effectively Counteract Union Organizing Activities

American  
Seniors  
Housing  
Association



HansonBridgett

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# HOW TO PREEMPT AND EFFECTIVELY COUNTERACT UNION ORGANIZING ACTIVITIES

## I. OVERVIEW

Since the initial introduction of the Employee Free Choice Act (EFCA) in March 2007, which threatens to facilitate dramatically union organizing, many employers have been galvanized to consider the prospect of union organizing. Due to a number of factors, however, EFCA has not moved forward with the verve that pundits and unions expected. Indeed, after two years, EFCA continues to languish in the U.S. Senate; Senate Republicans remain solidly opposed to it, and even centrist Democrats have backed off support for the bill.

In Fall 2007, ASHA published a Special Issue Brief entitled *Straight Talk on Avoiding Union Organizing* by Allison Woodall. It describes the strategies and tactics employed by union organizers, the signs that organizing efforts are underway in your communities, and the steps that employers can take proactively to preempt and effectively counteract organizing efforts. This Special Issue Brief will focus on the internal mechanisms that senior living owners and managers should have in place in their communities to, in effect, make a union irrelevant to their employee workforces.

## II. UNION ORGANIZING AND THE SENIOR LIVING INDUSTRY

### A. Is Union Membership on the Rise?

We reported two years ago, that the percentage of private sector workers represented by unions had steadily declined. In 1983, about one in six private sector workers were represented by a union. In 2006, that number dropped to about one in 14. (U.S. Dept. of Labor Bureau of Labor Statistics, Union Members Summary (January 25, 2007).) Currently, only 7.4 percent of private sectors worker are represented by a union. In fact, from 2005 to 2006, unions lost over 200,000 private sector workers. (*Id.*)

However, two years later, in March 2009, the Chicago Public Radio was reporting that “Illinois union ranks in 2008 grew by 97,000 workers. [...] The federal Bureau of Labor Statistics reports that membership in Illinois unions totaled 939,000 last year. That’s 16.6 percent of the state’s workforce, up 2.1 percent from 2007. Nationwide, according to the bureau, union ranks edged up in 2007 and 2008—their first expansions in decades.”

Overall, the Bureau of Labor Statistics reported in January 2009, that, in 2008, union members accounted for 12.4 percent of employed wage and salary workers, up from 12.1 percent a year earlier. The number of workers belonging to a union rose by 428,000 to 16.1 million.

Similarly, a UCLA Institute for Research on Labor and Employment study entitled “The State Of The Unions In 2009: A Profile Of Union Membership In Los Angeles, California And The Nation” reports that the unionization rate in the nation has risen almost one-half of a percentage point in the two years since 2006–2007, from 12.0 percent to the current rate of 12.4 percent.<sup>1</sup>

What these studies tell us is that, despite the failure of EFCA to pass; union membership is on the rise.

Earlier we reported that, in May 2007, the Service Employees International Union (SEIU) launched the “Campaign to Improve Assisted Living.” It created a website and engaged in targeted, insistent organizing activities against another large senior living provider designed to pressure the organization to recognize the union. As part of the launch of its campaign, SEIU activists appeared at different assisted living communities handing out flowers to residents with literature describing the Campaign’s intention to improve the quality of care provided to residents and the quality of jobs for caregivers.

The Campaign to Improve Assisted Living website is now defunct, as the SEIU has growing competition from rival unions. That competition has forced the SEIU to alter its tactics.

## B. Is the Senior Living Industry Still a Target?

The health care industries, overall, and the senior living industry in particular, are growth industries, and as such, will continue to be prime targets for union activity. Moreover, with senior living providers predominantly non-union, they are and will continue to be particularly ripe targets for union organizers.

### 1. *The SEIU and the California Nurses Association/National Nurses Organizing Committee (CNA/NNOC) Combine Forces*

Shortly after the reintroduction of EFCA in March 2009, the SEIU and the California Nurses Association/National Nurses Organizing Committee (CNA/NNOC) (previously rival unions) announced the signing of a cooperation agreement in an effort to combine forces to accelerate the passage of the EFCA and to promote unionization in the healthcare sector, which includes the senior living industry.

Under the pact, the SEIU and CNA/NNOC, the largest unions in the nation representing healthcare workers and registered nurses, are seeking to bring union representation to all non-union RNs and other healthcare employees.

<sup>1</sup> The Study, which can be found at <http://irle.ucla.edu/research/unionmembership.html>, is an interesting insight into how groups break down in unions. For example, the study includes charts showing unionization by age, education, industry, gender, ethnicity, place of birth, etc. The Center for Economic Policy and Research in Washington, DC has also published a November 2009 similar study entitled “The Changing Face of Labor, 1983-2008.”

## 2. *The National Union of Healthcare Workers (NUHW)*

On January 27, 2009, the SEIU placed the UHW in trusteeship, prompting then-UHW representatives to form a rival union, National Union of Healthcare Workers (NUHW). NUHW is a union formed by Executive Board members and disgruntled stewards of SEIU United Healthcare Workers-West (SEIU-UHW). According to its website, it was formed because the founders were forced from office by SEIU President Andy Stern for insisting that frontline healthcare workers have the right to vote on who should represent them and the right to participate fully in bargaining contracts with their employers. NUHW's website is dedicated as much to criticizing the SEIU as it is to criticizing employers.

Since January 2009, NUHW has had success in the senior and assisted living industry. Caregivers at The Sequoias Assisted Living Facility in Portola Valley, California, recently voted to join NUHW.

A long campaign at the Santa Rosa Memorial Hospital in Santa Rosa, California, the largest and only non-union hospital in Santa Rosa, has shown, in public, the struggle between the two unions in their bid for increased membership. NUHW won out (due in large part to the SEIU's internal turmoil) and a December NUHW election is planned.

Finally, many healthcare workers — mostly current members of SEIU — have petitioned for elections to join NUHW. Thus, employers have the “perfect storm” breeding ground for unionization — vying unions, potential passage of the EFCA and a bad economy.

## C. What are Unions Doing on the State Level?

Understandably frustrated by the slow progress of the EFCA, unions are turning to state legislatures in a “back door” attempt, if you will, to seek advantages of EFCA's provisions. In June of this year, the Oregon legislature passed the Worker Freedom Act (WFA). The WFA, which goes into effect in January 2010, prohibits employers from holding mandatory employee meetings where the topic is, among other prohibited topics, union organizing. Up until now, the NLRB has routinely upheld, as lawful exercises of an employer's free speech right, these meetings, informally referred to as “captive audience speeches or meetings.”

The Oregon law, while admittedly not a state version of the EFCA — is viewed as a variation of “card check” because, on the one hand, card check makes it impossible for an employer to know if the union is talking to its employees; and the Oregon law — on the other hand — prohibits an employer from talking to its employees about unions.

Specifically, the Oregon law prohibits employers from discharging or otherwise negatively affecting any employee's employment who refuses to participate in an employer meeting where political matters are discussed. It provides, in relevant part:

An employer or the employer's agent, representative or designee may not discharge, discipline or otherwise penalize or threaten to discharge, discipline or otherwise penalize or take any adverse employment action against an employee:

- (a) Who declines to attend or participate in an employer-sponsored meeting or communication with the employer or the agent, representative or designee of the employer if the primary purpose of the meeting or communication is to communicate the opinion of the employer about religious or political matters;

According to the Oregon statute: “Political matters’ includes political party affiliation, campaigns for legislation or candidates for political office and **the decision to join, not join, support or not support any lawful political or constituent group or activity.**”

Any aggrieved employee can bring a civil action against the employer.

Similar bills prohibiting mandatory workplace meetings about union organizing, patterned after the AFL-CIO's model legislation, have stalled in various state legislatures.<sup>2</sup> In the past, the New Hampshire (HB 254- 2007 Session) legislature unsuccessfully introduced a WFA and the Colorado legislature passed a bill in 2006 (HB 1314) that its governor vetoed. According to union websites following this WFA trend, Washington's state legislature held hearings on a measure earlier this year. WFA legislation also has been introduced unsuccessfully in several other states, including Connecticut and West Virginia. On July 17, 2007, the Michigan House of Representatives also passed a Worker Freedom Act bill — nearly identical to the later Oregon law. However, it failed to pass in the Michigan Senate. The House Legislative Analysis Section for the Michigan bill noted at the time that Colorado, Connecticut, New Hampshire and Oregon had bills pending.<sup>3</sup>

In counterpoint to the unions' seeking a state EFCA run-around — there is a concerted effort underway in a number of states to head-off the potential impact of the federal EFCA, by establishing, in state constitutions, a fundamental worker's right to a secret-ballot vote.<sup>4</sup>

It is unclear whether such efforts on both the union and employer side will succeed. Some

<sup>2</sup> According to a 2006 National Workrights Institute (NWI) Newsletter, the WRA was a brainchild of the NWI. It boasts: “WFA is an exciting new approach. Previously, each form of captive audience was considered separately. By tying them together into a single bill, WFA brings together many constituencies that had previously worked separately. This greatly increases our prospects for enacting legislation. It also addresses captive audience meetings in the union context without writing state labor specific legislation, which is prohibited by the National Labor Relations Act. WFA is a completely new type of legislation. Drafting it presented a number of challenges, for which there is no existing legal language. The Institute helped meet these challenges by forming a small team of experts, including former National Labor Relations Board general counsel Fred Feinstein, to work with the AFL-CIO legal department. The Institute is also playing an important role in securing the support of non-labor groups for WFA. Because it protects workers from all forms of coerced speech, the WFA furthers the goals of many human rights groups. The Institute, with its deep roots in the human rights community and close relationships with many of its leaders, is in an ideal situation to introduce WFA to other human rights groups and obtain their support.”

<sup>3</sup> A year before Michigan, New Jersey successfully passed the Worker Freedom From Employer Intimidation Act (“the Act”). On July 26, 2006, Governor Jon Corzine signed the Act, which prohibits employers from requiring employees “to attend” or “participate in any communications... about religious or political matters.”

Under the Act, employers may discuss religious or political matters with an employee if the employer notifies the employee that participation is voluntary and the employer will not penalize non-participants. However, the New Jersey law does not contain the phrase “labor organizations” from the Act's definition of “political matters.” As a result, employers may hold mandatory captive-audience meetings to communicate with employees about unions.

<sup>4</sup> See, generally, Save Our Secret Ballot, <http://www.sosballot.org/>, for a list of states.

legal commentators believe the Oregon law and the state anti-EFCA bills will not withstand legal challenges as the National Labor Relations Act likely preempts them and the WFA may violate the First Amendment of the United States Constitution.

### III. PREPARING FOR UNION ORGANIZING

The key to defeating an organizing effort before it gets underway is to have supervisors and managers who can effectively communicate the reasons why the community wants to remain union-free and why it believes being union-free is in the best interest of employees. Supervisors should understand that their jobs are not just about community operations, but also about labor relations.

#### A. Why Are Employees Still Joining Unions?

A common misperception is that employees join unions to earn more money or obtain better benefits. However, most union-organizing campaigns are not driven by the desire to increase wages, but rather feelings of mistreatment or frustration at the perception that employers are simply out to get employees. Thus, employees join unions for reasons of security and protection from unfair or incompetent supervisors, or from unwarranted termination, or lay off.

#### B. Assessing Vulnerability to Union Infiltration

##### 1. *Conduct Union Vulnerability Assessments*

By assessing its vulnerability to union infiltration — through identifying such issues as weaknesses in management-employee communication and levels of workplace satisfaction among employees, an employer can begin to fix problems before employees turn to a union to fix them. The vulnerability assessment goal is to create an “issue-free” workplace where management makes clear that its business desire is to maintain an environment that the employees choose to be union free.

Review areas of compensation, fringe benefits, amenities and staff training. If you are paying less than other communities in your area, this can breed resentment and make your community an even more attractive target for unionization. Do market assessments of wages and benefits, review opportunities for career advancement within the organization, and evaluate employment practices and whether policies are consistently being followed. Develop systematic methods to validate employees and recognize their efforts in making the company successful. Employees should be given constructive feedback to allow them to be successful.

##### 2. *Conduct Management Training*

Managers should be versed on effective employee relations. Employers should commit to selecting, training and rewarding supervisors and managers who provide effective positive leadership. Spend the resources to provide formal management training to your supervisors.

## C. Evaluate Workplace Conditions Through The Union's Eyes

### 1. *Research Information on Union Activity, Strategy, Trends and Tactics*

The old adage “Knowledge is Power” is true in the labor relations arena. Review documents used by unions, such as union contracts from similar communities. Chances are that union representatives could be showing those contracts to your employees or talking with your employees about the benefits that the union has “won” for employees in similar communities. Be prepared to provide similar benefits or discuss with your employees why you cannot.

### 2. *Be Aware of the Latest in Legal News, Especially National Labor Relations Board Decisions*

Becoming aware of an employer's rights is an important tool for employers. Some employers think that they are not permitted to say anything negative about unions. That is not true. In fact, an employer has a right to tell its employees what it thinks of unions. Section 8(c) of the National Labor Relations Act (NLRA) provides that “The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice.” Talk to your employees. Tell employees about your stance on unions, and why you would not want to go there. Educate your employees now why you don't feel organized labor is good or effective for your residents and how it puts up communication barriers between you and your employees.

## D. Take the Time to Communicate With Your Employees

Hold staff communication meetings and always include time for employee comments. Encourage employees to bring their concerns to their supervisors, managers and others. If there are things you can improve, then work to improve them; fixing problems shows that you are willing to listen. If employees don't feel they are being heard, they will go to whoever does listen. Follow-up to make sure concerns have been addressed.

## E. Review Payroll And Recordkeeping Practices

Make sure your payroll and recordkeeping practices comply with applicable laws. A union will exploit any errors by employers to the union's advantage. For example in California, all non-exempt employees must record the time that they start work, the time they stop for a meal break, the time they return from a meal break, and the time that they finish their shift.

## F. Look at Alternatives to Layoffs if you Need to Reduce Your Workforce

It is no secret that employers are finding it necessary to lay off workers and, in the abstract, when asked most employees understand that the current economy necessitates layoffs. However, when it comes to their own jobs, they may have a different approach. It is important to convey to your employees that lay off is an option reached only after all other options have been tried and failed. To that end, there are a number of cost-saving — employee-related options that could be pursued first. These options have the dual effect of showing your employees that you are trying to preserve their jobs, and for the employer — preventing the loss of seasoned, trained and, perhaps loyal employees. These job arrangements induce less anxiety than layoffs because employees retain their jobs, and thus, give employees less reason to feel the need to go to a union.

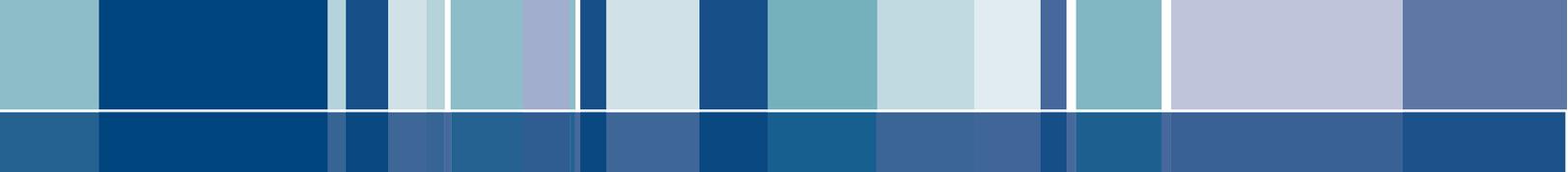
- Furloughs
- Job sharing
- Reduced schedules
- Hiring freezes
- Attrition
- Restricting overtime
- Transferring/retraining workers

## G. Conduct Employee Satisfaction Surveys

Because employees who do not feel valued or immune from termination are more likely to seek out union representation, a key factor in preventing a successful organizing effort is to ensure that employees feel appreciated and treated fairly. Thus, before a union organizing effort begins, companies should regularly evaluate their employment practices with a view towards providing a satisfying work place.

Stay a step ahead of employees' concerns. Rather than wait for a union to present your employees with solutions, become aware of problems. Employee satisfaction surveys help an employer identify areas of employee satisfaction and dissatisfaction. These surveys are valuable tools but should not be taken lightly because they have a double edged sword. Do not participate in this endeavor if you are not prepared to fix identified problems (real or perceived) or explain to your employees why you will not be doing so.

Once an employer has determined the topics of the questions to ask, develop questions. It is a good idea to think about using a professional consultant as the employer's survey; they will have an unbiased view in the eyes of the employees. Employee satisfaction surveys should be developed by professionals who understand how to put questions together that obtain unbiased information. Administer the survey with care and consideration for the organization's culture. The results should be analyzed by people who understand survey research and can provide effective analysis.



Topics employers should cover in an employee satisfaction survey include:

- Communication
- Compensation
- Respect for employees
- Workplace
- Resources
- Work/life balance
- Stress in the work place
- Teamwork
- Feedback
- Opportunities for growth and advancement
- Complaint resolution

## H. Evaluate Supervisory Positions Before Union Organizing Begins

The term “supervisor” in the NLRA means any individual having authority, in the interest of the employer, “to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the foregoing, exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.”

Supervisors do not have the right to organize under the NLRA. The Re-empowerment of Skilled and Professional Employees and Construction Tradesworkers Act (RESPECT Act) sought to amend the definition of “supervisor” in the NLRA by (1) requiring that the individual have authority over employees for a majority of the individual’s work time; and (2) removing the authority to assign other employees and to responsibly direct employees as conditions for being considered a supervisor.

The bill died and so, for now, employers do not have to worry about having to consider the possibility of an entire new classification of employees who can organize and form a union.

Nonetheless, employers should continue to review the authority and responsibility accorded each employee whom you currently consider to be a supervisor.

## IV. PREVENTATIVE POLICIES AND PROCEDURES AN EMPLOYER SHOULD HAVE IN PLACE BEFORE A UNION SEEKS TO ORGANIZE

There are policies or procedures that an employer should have in place so that it may rely upon them if a union is seeking to organize its workforce. The policies and procedures must pre-date any union organizing effort and they must be consistently enforced in all situations. If, for example, management allows workers to sell candy, books, cosmetics, Tupperware, etc., to one another during work time, then it may be unlawful to enforce no-solicitation rules, in place but not enforced, during a union campaign.

Two continuing issues are union access to an employer's property — be it through the union's physical presence on the property — or through the employer's electronic communications.

### A. Require All Visitors to Sign In

Employers are free to prohibit non-employees from entering onto its premises to solicit. Uniformity is the key, however, because an employer cannot allow some forms of non-employee access to employees by non-employees while prohibiting access when it involves the union. Protocols should be in place to control access to the community. Whenever possible, all visitors should be required to sign in at the front office/reception area before conducting any business at the community. And, that includes everyone. If you don't make the other third parties do it, don't expect the union to do it either. Post no trespassing signs, or at a minimum, "No access" signs should be posted in non-public areas. Think about using visitor name tags.

### B. Restrict the use of Email

We previously discussed the different manners of communication in the workplace. Perhaps the most prevalent is email. Policies restricting personal use of e-mail are very difficult to enforce and routinely ignored by employees and employers.

We reported in 2007 about the unresolved question surrounding the nature of e-mail. In the last two years, there has been both NLRB and case law regarding union information disseminated over email and an employer's legal right to restrict such communication.

In *Guard Publishing Co.*, decided Dec. 21, 2007, (*The Guard Publishing Co., d/b/a The Register Guard*, 351 NLRB 1110 (2007), enf. denied in part No. 07-1528 (D.C.Cir. July 7, 2009)), the NLRB explained the circumstances under which employers may limit pro-union emails. The Board held that employees had no statutory right to use employer provided email systems for Section 7 organizing matters.

The Board held that employers own their email systems, and thus, there is no inherent right protecting employees' pro-union email communications. As a result, the Board held employers may ban email communications for non-business related solicitations. The Board noted that Register Guard had permitted a variety of personal, non-work-related e-mails, but had not permitted e-mails to solicit support for any group or organization. Thus, Register Guard's enforcement of its policy regarding an employee's e-mails that solicited support for the union did not discriminate against the union.

Under the Board's interpretation, if the employer prohibits solicitations on behalf of third-party organizations (unions, political groups, insurance salespersons, etc.), then the employer may prohibit union solicitation as well, even if the employer tolerates personal emails that do not contain solicitations.

The Board went further and recognized that an employer may make other distinctions, so long as the lines are not drawn to disfavor unions over other similar groups. For example, the employer may allow solicitations by charitable organizations and ban solicitations by everyone else. In that way, the employer would not "discriminate" against solicitations protected by Section 7, but rather would "discriminate" (lawfully) against all solicitations.

Employers hailed the December 2007 ruling. However, the victory has been rather short lived or at least reined in somewhat. While the Board's holdings in its *Register Guard* decision were not renounced outright, the Washington D.C. Circuit of Appeals, in July 2009, denied enforcement, in part, of the Board's decision. Relying more on the facts of the particular case, the court reasoned that, regardless of the propriety of drawing a line barring access based on organization status, the actual evidence indicated that the line the Board drew was a "post-hoc invention." Thus, apparently *Register Guard* never invoked the distinction relied upon by the Board until the union complained. The court further noted that the company's policy did not make the distinction; and the company's disciplinary warning did not invoke the organization-versus individual line upon which the Board relied.

Thus, the court's decision made clear that an employer must not only have a policy in place, but have evidence that it is followed, if it expects to be able to bar union-related communications.

Subsequent to the D.C. Circuit decision, an interesting August 6, 2009 Advice Memorandum to the NLRB Northern California Region 32 Director, (*Kaiser Permanente Case 32-CA-24388*), involved the question of whether Kaiser Permanente discriminatorily enforced its email policy by disciplining an employee for sending emails soliciting support for a rival union where Kaiser Permanente had permitted employees affiliated with the incumbent union to send emails related to contract administration and grievance processing. An NLRB Associate General Counsel found that Kaiser Permanente had not engaged in discriminatory enforcement when it refused to allow the rival union access to its email system. He found that the incumbent union's use was a "business" use but the rival union's use — for organizing purposes — was "non-business."

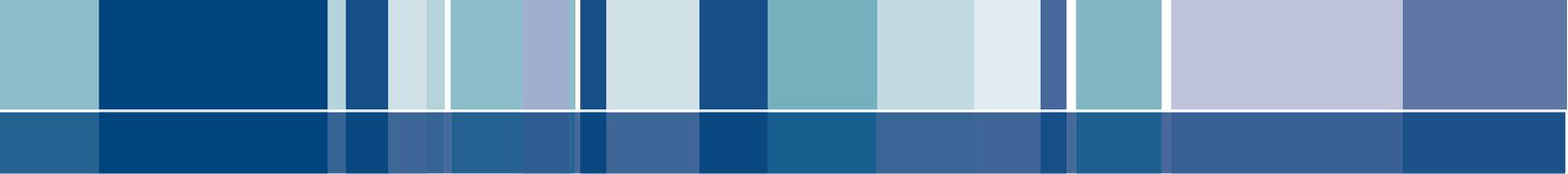
Kaiser Permanente had allowed incumbent UHW representatives to use its email system for contract administration purposes; to schedule grievance meetings and to communicate with employees concerning contract administration and grievance handling matters. Kaiser Permanente argued that the use of the email system for contract administration and grievance processing constituted a business purpose use and convinced, at least, an Associate General Counsel at the Regional Board level.



What is the lesson to be learned from these decisions regarding employee communications through the employer-owned email system? Employers should determine if and how they want their employees to communicate. They should implement policies and rules that effectively restrict employees' ability to engage in activities at work that would allow a union later to argue that a ban on union-related emails is discriminatory. Given the D.C. Circuit's limitation of the Board's decision in *Register Guard*, the more restrictive the policy, the better. These policies must be in place before any union organizing activity begins. At a minimum, policies should clearly state that these email systems are the employer's property and are intended for business use, while acknowledging the reality that these systems are available for occasional personal use.

## CONCLUSION

While passage of EFCA has been thwarted for now, the unions will continue to vigorously pursue passage of EFCA, or at least some compromise version of EFCA. In addition, union membership, and thus union activity, is on the rise. Regardless of the outcome of EFCA, the most effective way of making the union irrelevant to your employees is thorough and consistent preparation that takes place well before any union organizing activity begins.



# American Seniors Housing Association

*Leadership. Vision. Excellence.*

## **STATEMENT OF PURPOSE**

*The American Seniors  
Housing Association  
provides leadership for  
the seniors housing industry  
on legislative and regulatory matters,  
advances research, education  
and the exchange  
of strategic business information,  
and promotes the merits  
of seniors housing.*

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