

---

To be published in *The Law of Medical Practice in Illinois* (3d ed. 2007)

## **Collective Bargaining Under the NLRA in the Health Care Industry**

Mark A. Spognardi, Esq.\*

**ARNSTEIN & LEHR LLP**

---

---

\* Mr. Spognardi is a partner in the Chicago office of Arnstein & Lehr LLP. His practice is devoted to representing management in traditional and non-traditional labor and employment matters.

## 1.1 INTRODUCTION

**T**HIS CHAPTER PROVIDES the practitioner with an primer of the various special rules that apply to the health care industry under the National Labor Relations Act (“Act” or “NLRA”).<sup>1</sup> It provides an overview of the law concerning union representation elections and appropriate bargaining units, unit eligibility, good faith bargaining, and strikes and picketing, and employee participation committees. Since this treatise is limited to the issues impacting health care practice, this chapter does not seek to provide an overall review of labor relations law and procedure under the Act. Rather, it is limited to the special labor relations rules governing health care. For a complete treatment of law and procedure under the NLRA, see Higgins, *The Developing Labor Law* (5<sup>th</sup> Ed. 2006).

## 1.2 A BRIEF OVERVIEW OF THE ACT

The NLRA was enacted for two general purposes: (1) to foster the unionization of private sector employees and (2) to encourage the practice of collective bargaining in order to minimize disruptions to commerce caused by strikes and picketing.<sup>2</sup> The Act accomplishes this by providing procedures in which employees may file a petition with the National Labor Relations Board (“Board”), the agency charged with administering the Act, for a secret ballot election. The purpose of this secret ballot election is to determine whether the employees desire to be represented by a union for the purpose of collective bargaining with their employer over wages, hours, and other terms and conditions of employment.

The Board generally has two monetary standards for asserting jurisdiction over “health care institutions,” including those administered by religious organizations. A “healthcare institution” is defined as a hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility or other institution devoted to the care of sick, infirm, or aged persons. The Board will assert jurisdiction over nursing homes, visiting nursing associations, and doctor’s offices where the entity generates \$100,000 in gross revenue. Jurisdiction has been asserted over hospitals and other health care institutions where the entity generates \$250,000 in gross revenue.<sup>3</sup>

## 1.3 THE REPRESENTATION ELECTION PROCESS AND APPROPRIATE UNIT

Before a secret ballot election takes place, the Board must make a determination as to what the appropriate bargaining unit is for purposes of collective bargaining. Section 9(b) of the Act provides:

The Board shall decide in each case whether . . . the unit appropriate for purposes of collective bargaining shall be in the employer unit, craft unit, plant unit, or subdivision thereof.<sup>4</sup>

In accordance with the Act, the Board decided unit placement issues on a case by case basis, using traditional community of interest standards. The considerations influencing whether there is a community of interest among employees include, *inter alia*, (1) the degree of functional integration among employees; (2) common supervision; (3) employee skills and functions; (4) interchangeability among employees; (5) contact among employees; (6) the work site; (7) general working conditions;

---

<sup>1</sup> 29 U.S.C. § 151, et seq.

<sup>2</sup> 29 U.S.C. § 151, et seq.

<sup>3</sup> *East Oakland Health Alliance*, 218 NLRB 1270.

<sup>4</sup> 29 U.S.C. § 159.

(8) fringe benefits.<sup>5</sup> The Board did not have to find the most appropriate unit, but rather, only an appropriate unit.<sup>6</sup>

Over the years, this approach resulted in eight (8) basic units that would be found presumptively appropriate if petitioned for by a labor organization. These units were: (1) physicians; (2) registered nurses; (3) other professional employees; (4) technical employees; (5) business office clerical employees; (6) skilled and maintenance employees; (7) all other nonprofessional employees; and (8) guards.<sup>7</sup> These unit placement decisions were often challenged in the Circuits, leading to unpredictability as to enforcement and instability in the health care industry. The decisions were also criticized by Congress and employers, as leading to a proliferation of bargaining units in the health care industry.<sup>8</sup>

#### 1.4 ST. FRANCIS (II) AND THE DISPARITY OF INTEREST STANDARD

Because of these criticisms, in 1984, the Board abandoned its traditional community of interest test to determine the appropriate unit placement, and adopted a “disparity of interest” test.<sup>9</sup> As articulated by the Board, separate groups of employees would be allowed separate representation from overall groups of professional and nonprofessional employees only when sharper than usual differences existed between their wages, hours, and working conditions. On appeal, the Circuit Court of Appeals for the District of Columbia Circuit denied enforcement and remanded the case back to the Board.<sup>10</sup> Upon further consideration, the Board reaffirmed its disparity of interest standard.

#### 1.5 RULEMAKING AND A RETURN TO EIGHT BASIC UNITS

Weary of appellate court and employer criticism of its bargaining unit decisions, the Board, in 1989, decided to exercise its rulemaking authority as to what would constitute an appropriate unit in acute care hospitals (excluding psychiatric hospitals and nursing homes).<sup>11</sup> In *American Hospital Assn’ v. NLRB*, the U.S. Supreme Court upheld the Board’s authority to issue the Final Rule and its provisions.<sup>12</sup>

Under the Board’s Final Rule, an acute care facility was defined as a “short term hospital in which the average length of patient stay is less than 30 days, or a short term care hospital in which over 50 percent of all patients are admitted to units where the average patient stay is less than 30 days.”<sup>13</sup> Under the Final Rule, absent extraordinary circumstances, eight units are presumptively appropriate in an acute care hospital: (1) all registered nurses; (2) all physicians; (3) all other professionals except for registered nurses and physicians; (4) all technical employees; (5) all skilled maintenance employees;<sup>14</sup> (6) all business office clerical employees; (7) all guards; and (8) all other non-professional employees except for technical employees, skilled maintenance employees,

---

<sup>5</sup> *An Outline of Law and Procedure in Representation Cases*, pp. 126-27 (July, 2005).

<sup>6</sup> *An Outline of Law and Procedure in Representation Cases*, at p.123.

<sup>7</sup> *The Developing Labor Law* at p. 673.

<sup>8</sup> *The Developing Labor Law* at pp. 671-73.

<sup>9</sup> *St. Francis Hospital (II)*, 271 NLRB 948 (1984).

<sup>10</sup> *Electrical Workers (IBEW) Local 474 vs. NLRB (St. Francis Hospital II)*, 814 F.2d 697; 124 LRRM 2993 (D.C. Cir. 1987).

<sup>11</sup> *Final Rule on Collective Bargaining Units in the Health Care Industry*, 29 C.F.R. § 103.30 (1989); 284 NLRB 1515 (1984).

<sup>12</sup> 499 U.S. 606, 137 LRRM 2001(1991).

<sup>13</sup> 29 C.F.R. § 103.30 (f.)(2).

<sup>14</sup> Skilled maintenance employees generally include employees involved in maintenance, repair, and operation of the hospitals’ physical plant systems, as well as carpenters, electricians, mechanics, chief engineers, firemen/boiler operators, locksmiths, etc. 284 NLRB at 1561-62.

business office clerical employees, and guards.<sup>15</sup> Under the Final Rule, all other bargaining units are deemed presumably inappropriate, unless extraordinary circumstance can be established.

## 1.6 EXTRAORDINARY CIRCUMSTANCES

Where extraordinary circumstances exist, the Board shall determine the appropriateness of the unit by adjudication, to avoid “accidental or unjust” application of the Rule.<sup>16</sup> Under the Rule, the Board considers a unit of five or fewer employees automatically to be an extraordinary circumstance.<sup>17</sup> The Rule provides that extraordinary circumstances are to be narrowly defined. Moreover, the Board will reject arguments that were presented during the rulemaking process as being extraordinary circumstances, including: (1) diversity in the industry, e.g., size of hospital or variety of services offered; (2) functional integration of employees because of cross training; (3) nationwide health care chains; (4) increased specialization of professionals; (5) effects of cost-containment measures; and (6) single institutions occupying more than one building.<sup>18</sup> A party urging extraordinary circumstances bears a heavy burden to demonstrate that its arguments are substantially different from those which were considered in rulemaking.<sup>19</sup>

## 1.7 COMBINED UNITS; EXISTING UNITS; RESIDUAL UNITS

A petitioning union (but not employers) may seek to have various combinations of the eight units found to be appropriate, so long as there is no statutory prohibition, such as combining guard and non-guard units.<sup>20</sup> Where a unit already exists, and it conforms with the Rule, a new petition for an election must be in conformity with the Rule. Where the existing unit does not conform with the Rule, the case will be decided by adjudication, and the Board will find appropriate only those units that comport as far as practicable with the Rule.<sup>21</sup> The Board has held that a non-incumbent, petitioning union may represent a separate residual unit in an acute health care hospital where the unit is residual to a non-conforming unit.<sup>22</sup>

## 1.8 OTHER HOSPITALS AND HEALTH CARE FACILITIES

The Board made clear that its Final Rule did not apply to other, non-acute care facilities, such as psychiatric hospitals or nursing homes. The determination as to what is the appropriate unit in these facilities is left to adjudication on a case by case basis using traditional community of interest standards and pre-rule precedent.<sup>23</sup> The Board has used the community of interest test to determine the appropriateness of a unit of paramedics<sup>24</sup>, a residential school for the developmentally disabled<sup>25</sup>, and hospice care.<sup>26</sup>

## 1.9 ADDITIONAL ISSUES

The Rule does not determine the placement of specific employees in specific units. That issue is still subject to adjudication on a case by case basis. The Rule allows for the parties to

---

<sup>15</sup> 29 C.F.R. § 103.30.

<sup>16</sup> *Gen. Couns. Mem.*, 91-3 (May 9, 1991), 1991 WL 144446 (NLRBGC).

<sup>17</sup> *Gen. Couns. Mem.*, 1991 WL 144446, \*1.

<sup>18</sup> *Gen. Couns. Mem.*, 1991 WL 144446, \*2.

<sup>19</sup> *St. Margaret Memorial Hospital*, 303 NLRB 923 (1991); *Gen. Couns. Mem.* 1991 WL 144446, \*2; *Final Rule*, 284 NLRB at 1574.

<sup>20</sup> 284 NLRB at 1573.

<sup>21</sup> *Gen. Counsel Mem.*, 1991 WL 144446, \*1.

<sup>22</sup> *St. Mary's Duluth Clinic Health System*, 332 NLRB 1419 (2000).

<sup>23</sup> *Park Manor Care Center*, 305 NLRB 872 (1991).

<sup>24</sup> *Virtua Health, Inc.*, 344 NLRB No. 76 (2005).

<sup>25</sup> *Upstate Home for Children*, 309 NLRB 986 (1992).

<sup>26</sup> *Allen Health Care Servs.*, 332 NLRB 1308 (2000).

stipulate to units that do not conform to the eight units of the Rule, so long as the stipulation does not contravene the provisions of the Act, or well settled Board policies.<sup>27</sup>

### 1.10 SUPERVISORY STATUS OF NURSES

An issue that has continually occupied the Board's time is whether nurses, employed as charge or head nurses, or some similar title, are employees who should be included in the bargaining unit, or supervisors who are statutorily excluded from the bargaining unit by virtue of Section 2(11) of the Act. Section 2(11) of the Act defines a supervisor as:

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 responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.<sup>28</sup>

Because supervisors are not employees, they are statutorily excluded from being represented by a union. Adjudicating on a case by case basis, the Board has concluded that registered nurses are supervisors where there was evidence that they hired, fired, and disciplined employees, scheduled their time off, etc., or effectively recommended the same.<sup>29</sup> On the other hand, where they lacked the supervisory authority described in Section 2(11), or the authority to effectively recommend the same without independent investigation by superiors, they have been found not to be supervisors, but rather employees.<sup>30</sup>

A continually reoccurring issue has been whether alleged supervisory nurses who are exercising their professional judgment in directing other nurses are exercising independent judgment and responsibly directing employees, so as to be Section 2(11) statutory supervisors that are excluded from the unit.<sup>31</sup> In 2001, the Supreme Court addressed this issue squarely in *NLRB v. Kentucky River Community Care, Inc.*<sup>32</sup> The Supreme Court rejected the Board's interpretation of "independent judgment" which held that employees do not use independent judgment when they exercise ordinary professional or technical judgments to direct less skilled employees to deliver patient services according to specific standards. Referring to the Board's approach as a "startling categorical exclusion,"<sup>33</sup> the Court concluded that the nature of the judgment, whether professional, technical, or experimental, does not determine whether a judgment is "independent" in the sense used in Section 2(11).

The Board recently issued a trilogy of cases, two of which involved health care institutions, clarifying when an individual is considered a supervisor in light of the Court's admonishment in *Kentucky River*.<sup>34</sup> In *Oakwood HealthCare, Inc.*,<sup>35</sup> the Board examined the meaning of "independent judgment," "assign," and "responsibly direct" as those terms are used in the Section 2(11) statutory

<sup>27</sup> *Gen. Couns. Mem.*, 91-3, 1991 WL 144446, \*2.

<sup>28</sup> 29 U.S.C. § 152(11).

<sup>29</sup> *The Developing Labor Law*, at 691.

<sup>30</sup> *Riverchase Health Care Center*, 304 NLRB 861 (1991); *Misericordia Hosp. Med. Ctr.* 246 NLRB 351 (1979).

<sup>31</sup> See *Providence Hospital*, 320 NLRB 717 (1996); *NLRB v. Health Care & Retirement Corp of America*, 511 U.S. 571 (1994); *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001).

<sup>32</sup> *Kentucky River*, 532 U.S. 706 (2001).

<sup>33</sup> *Kentucky River*, 532 U.S. at 714.

<sup>34</sup> *Oakwood HealthCare, Inc.*, 348 NLRB No. 37 (Sept. 29, 2006); *Croft Metals, Inc.*, 348 NLRB No. 38 (Sept. 29, 2006); *Golden Crest Healthcare Center*, 348 NLRB No. 39 (Sept. 29, 2006).

<sup>35</sup> 348 NLRB No. 37 (Sept. 29, 2006).

definition. At issue was whether certain registered nurses, employed as charge nurses, were statutory supervisors that should be excluded from the unit.

The Board explained that to exercise “independent judgment,” a person must at a minimum act, or effectively recommend action, free of the control of others and for an opinion or evaluation by discerning and comparing data. Independent judgment does not exist if it is dictated or controlled by detailed instructions whether set forth in a company policy or rules, the verbal instructions of higher authority, or in the provisions of a collective bargaining agreement.<sup>36</sup> The Board explained that “assign” means the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as shift or overtime period), or giving significant overall duties, i.e., tasks to an employee. The decision or effective recommendation to affect the place, time, or overall tasks of an employee is a supervisory function. However, an *ad hoc* instruction to perform a discrete task does not constitute an assignment.<sup>37</sup>

Finally, the Board explained that “responsibly direct” means the employer has delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary, and that there is the prospect of adverse consequences for the putative supervisor if he/she does not take these steps.<sup>38</sup> In applying these concepts, the Board found that some of the nurses were supervisors based upon their authority to exercise independent judgment in assigning nursing personnel to patients. In the companion case, *Golden Crest Healthcare Center*,<sup>39</sup> the Board, applying the standards set forth in *Oakwood HealthCare*, found that the charge nurses were not Section 2(11) supervisors.

### 1.11 PHYSICIANS AND RESIDENTS

Many physicians are self-employed and/or independent contractors. In this status, they are prohibited by federal antitrust laws from engaging in collective bargaining. Additionally, as independent contractors, they are statutorily excluded from coverage under the Act.<sup>40</sup> However, physicians who are employed by a health care institution have a right to organize under the Act, provided that they are not denied coverage by some other statutory exclusion such as supervisory or managerial status.

In 1999, the American Medical Association (“AMA”) adopted a new policy regarding collective bargaining, and created Physicians for Responsible Negotiating (“PRN”), in an effort to organize the tens of thousands of employee physicians employed in health care institutions. PRN members agree not to strike or to withhold essential medical services. In July 2004, the AMA and PRN agreed that PRN would separate and that PRN would operate completely independently from the AMA.

Additionally, in 1999, the Board overruled longstanding precedent, and found that residents and interns were “employees” within the meaning of the Act.<sup>41</sup> At issue was whether the residents and the health care institution had a relationship that was fundamentally educational, i.e., students, or whether it was employee-employer based. The Board found that there was sufficient evidence to conclude that they were employees; they received compensation and were taxed, they spent the vast majority of their time treating patients without an attending physician, and were subject to other employment laws.

---

<sup>36</sup> 348 NLRB No. 37, Slip Op. at 8.

<sup>37</sup> 348 NLRB No. 37, Slip Op. at 4.

<sup>38</sup> 348 NLRB No. 37, Slip Op. at 7.

<sup>39</sup> 348 NLRB No. 39 (Sept. 29, 2006).

<sup>40</sup> 29 U.S.C. § 152(3); *Amerihealth Inc./Amerihealth HMO*, 329 NLRB 870 (1999).

<sup>41</sup> *Boston Medical Center Corp.*, 330 NLRB 152 (1999), overruling *Cedars-Sinai Medical Center*, 223 NLRB 251 (1976).

## 1.12 SPECIAL BARGAINING OBLIGATIONS AND NOTICE PROVISIONS FOR STRIKING IN THE HEALTH CARE INDUSTRY

The Act provides for increased notice obligations—extended “cooling off” periods—before a labor organization may engage in strikes or picketing, or other concerted activity, at a health care institution. The purpose of the extended notices are to allow the employer to arrange for proper patient care. Section 8(d) of the Act, which details the obligations of employers and unions to bargain collectively in good faith, reads in relevant part:

. . . Provided, that where there is in effect a collective bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification:

(1) [S]erves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

\* \* \*

(3) [N]otifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously there with notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) [C]ontinues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

\* \* \*

. . . Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of the paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days’ notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the propose of aiding in a settlement of the dispute.<sup>42</sup>

---

<sup>42</sup> 29 U.S.C. § 158(d).

The Act goes on further to provide, at Section 8(g), that:

(g) Notification of intention to strike or picket at any health care institution

A labor organization before engaging in any strike, picketing, or other concerted refusal to work at a health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of subsection (d) of this section. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.<sup>43</sup>

These special statutory requirements have three main effects on parties desiring to terminate or modify a collective bargaining agreement in the health care industry. Section 8(d)(A) requires that a party provide 90 days' notice (rather than the general 60 days' notice) to the other party of its desire to terminate or modify the contract.<sup>44</sup> The party is also required to provide the Federal Mediation and Conciliation Service ("FMCS") with 60 days' notice prior to the contract's expiration, rather than the typical 30 day notice required in the rest of the private sector.<sup>45</sup> Finally, a party is required to continue the contract's terms and condition in effect, without strike or lockout, for 90 days, rather than 60 days, from the date the notice is given or the expiration date of the contract, whichever occurs later.<sup>46</sup>

Additionally, before a labor organization may strike or picket the health care institution, Section 8(g) requires that it give the health care employer ten (10) days' notice to the FMCS and the employer of its intent to do so. The notice requirements in Section 8(g) are to be strictly construed.<sup>47</sup> This means the notice must be in writing, and inform the employer and FMCS of the date and the time.<sup>48</sup> Moreover, under the clear language of the statute, once the notice is given, it can only be extended by a written agreement by both parties. If no written agreement is reached, the union must give a new 10 day notice.<sup>49</sup>

Where the parties are bargaining for an initial collective bargaining agreement, Section 8(d)(B) requires that at least 30 days' notice be given to the FMCS and corresponding state agency.<sup>50</sup> The Act requires that the FMCS contact the parties in an attempt to mediate or conciliate the dispute. Additionally, the same Section 8(g) principles apply during the negotiation of an initial agreement.

### 1.13 FMCS CONCILIATION IN THE HEALTH CARE INDUSTRY

The Act provides an additional way for the FMCS to attempt to resolve health care industry labor disputes and reach a negotiated settlement. The Act, at Section 213, authorizes the director of the FMCS to appoint a board of inquiry to investigate the issues in the dispute and to make a written

---

<sup>43</sup> 29 U.S.C. § 158(g).

<sup>44</sup> 29 U.S.C. § 158(d)(A).

<sup>45</sup> 29 U.S.C. § 158(d)(A).

<sup>46</sup> 29 U.S.C. § 158(d)(A).

<sup>47</sup> *Alexandra Clinic, P.A.*, 339 NLRB 1262 (2003); *West Lawrence Care Center*, 308 NLRB 1011 (1992).

<sup>48</sup> *Retail Clerks Union Local 727*, 244 NLRB 586 (1979).

<sup>49</sup> *Alexandria Clinic*, 339 NLRB at 1267.

<sup>50</sup> 29 U.S.C. § 8(d)(B).

report.<sup>51</sup> The report is to contain findings of fact and the Board's recommendations for settling the dispute.<sup>52</sup> The report is to be presented to the parties within 15 days, and for 15 days after the issuance of the report, the parties are required to maintain the status quo.<sup>53</sup>

#### 1.14 EXCLUSIONS FROM NOTICE REQUIREMENTS

The Board has ruled that the notification requirements of Section 8(g) only apply to employees who are represented by a union; they do not apply to unorganized employees.<sup>54</sup> Thus, there is no requirement that employees who are unrepresented comply with Section 8(g) prior to engaging in a work stoppage. Moreover, the notification requirements of Section 8(g) only apply to concerted activity taken by a union towards a health care institution and its employees. It does not apply to strikes or picketing directed by a union towards the hospital's vendors, or construction contractors present at the hospital.<sup>55</sup>

#### 1.15 LOSS OF PROTECTED STATUS

The consequences for employees of a union's failure to comply with Section 8(d) or (g) are dire; the employees may be disciplined or terminated for engaging in unprotected, concerted activities.<sup>56</sup> The compliance with the notice provisions is not required when the strike is an unfair labor practice strike.<sup>57</sup> The employer may also seek an injunction to enjoin the unlawful picketing or strike.

#### 1.16 EMPLOYER PROPERTY ACCESS RESTRICTIONS AGAINST EMPLOYEES

Prudent labor and employment relations strategies lead employers to adopt and implement rules governing off-duty employee access, and non-employee access, before the onset of union organizing activity. The purpose of an off-duty employee access rule is to restrict solicitation and distribution by off-duty employees in interior and exterior work areas and interior non-work areas of a company. In *Tri-County Medical Center*<sup>58</sup>, the Board concluded that such rules were lawful so long as they were disseminated to all employees and applied uniformly to all off-duty employees seeking access to the employer's premises for any purpose. However, the Board also ruled that an employer may not lawfully restrict off-duty employees from external non-working areas such as parking lots except when justified by business reasons. A lawful off-duty employee no-access rule would read, "ABC Hospital employees are prohibited from accessing the interior of ABC Hospital, or ABC Hospital's outside work areas, during their off-duty hours when they are not scheduled to work." However, where a access rule is enforced in a discriminatory manner, or to external non-working areas without a legitimate business purpose, the rule will be found an unlawful violation of Section 8(a)(1) of the Act.<sup>59</sup>

---

<sup>51</sup> 29 U.S.C. § 183. Where the director chooses to establish a board of inquiry, he or she shall do so within 30 days after statutory notice for modifying a successor agreement, or within 10 days after notice for of negotiations for an initial agreement.

<sup>52</sup> 29 U.S.C. § 183(a).

<sup>53</sup> 29 U.S.C. § 183(c).

<sup>54</sup> *Bethany Med. Ctr.*, 328 NLRB 1094 (1999); *Walker Methodist Residence & Health Care Center*, 227 NLRB 1630 (1977).

<sup>55</sup> *Bricklayers Local 40 (Lake Shore Hosp.)*, 252 NLRB 252 (1980).

<sup>56</sup> 29 U.S.C. § 158.

<sup>57</sup> *Park Inn Home*, 293 NLRB 1082 (1989).

<sup>58</sup> 222 NLRB 1089 (1976).

<sup>59</sup> *Saint Joseph Medical Center*, 276 NLRB 456,460 (1985). Section 8(a)(1) of the Act makes it an unfair labor practice to interfere with, restrain, or coerce employees in the exercise of rights guaranteed by Section 7 of the Act. 29 U.S.C. § 8(a)(1). Section 7 of the Act, in turn, guarantees employees the right to form unions and engage in collective bargaining, or to refrain from those activities. 29 U.S.C. § 7.

### 1.17 EMPLOYER PROPERTY ACCESS RESTRICTIONS AGAINST NON-EMPLOYEES

The purpose of a non-employee no-access rule is to prohibit non-employee union organizers and agents from having access to the employer's premises in order to solicit and distribute union literature and union authorization cards to employees.<sup>60</sup> In order for the rule to be lawful, two conditions must be met. First, access may only be prohibited if the employer uniformly enforces the rule against non-employees in all circumstances, and does not discriminatorily enforce the rule by allowing other non-employees access for reasons other than company business. Additionally, the union must be able to reach employees through other reasonable efforts of communication that are available. This includes the possibility of home visits, telephone calls, off-premises meetings, letters, etc.<sup>61</sup> Thus, the Board will find a absolute ban on solicitation by union agents to be unlawful, where it permits other employee groups to access the hospital premises for the purposes of solicitation.<sup>62</sup> An example of a lawful non-employee no-access rule is "[n]on-employees are prohibited from soliciting or distributing literature for any reason, at any time, on company property."

### 1.18 EMPLOYEE NO-SOLICITATION/NO-DISTRIBUTION RULES

Employers generally adopt and implement lawful no-solicitation/no-distribution rules in an effort to keep workplaces union free. Under a valid rule, the employer may lawfully prohibit oral solicitation (including solicitation of authorization cards) during "working time."<sup>63</sup> Additionally, an employer may lawfully prohibit distribution of literature by employees during working time *and* in working areas where work is performed.<sup>64</sup> The Board has made clear, however, that it is presumptively unlawful for an employer to prohibit solicitation and distribution during "working hours," because the term connotes periods of time which employees are free to use as their own. Thus, employees are free to engage in solicitation and distribution during breaks, lunches, and other non-working periods while on an employer's property.<sup>65</sup>

In health care institutions, the Supreme Court has permitted the employer to prohibit employee solicitation and distribution in patient care areas, such as patient rooms and lounges, as well as patient corridors, and corridors housing medical treatment rooms, but ruled that the prohibition was unlawful when applied to the public lobbies, cafeteria, and gift shop, where there was no evidence that patient care would be adversely affected.<sup>66</sup> The employer bears the burden of showing that the no-solicitation rule/no-distribution rule is justified by patient care considerations.<sup>67</sup> The following is a example of a lawful no-solicitation/no-distribution policy:

ABC Hospital employees are not permitted to solicit other employees during working time for any purpose. Additionally, ABC Hospital employees are prohibited from distributing literature or material of any kind during working time, or at any time in working areas or patient care areas.

<sup>60</sup> A union authorization card is a document which the employee executes which authorizes a union to represent the employee for purposes of collective bargaining with the employer. In order to petition for a representation election conducted by the Board, at least 30% of the employees in a collective bargaining unit must sign the authorization cards. Typically, a union will seek to have a much higher percentage of the employees in the unit sign the cards. For a full discussion of union organizing and the representation election process, see *The Developing Labor Law* at Chs. 9-12.

<sup>61</sup> *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956); *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

<sup>62</sup> *Lucile Salter Packard Children's Hospital*, 318 NLRB 433 (1995), *enfd.* 97 F. 3d 583 (1996).

<sup>63</sup> *Our Way, Inc.*, 268 NLRB 394 (1983).

<sup>64</sup> *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962).

<sup>65</sup> *Our Way, Inc.* at 395.

<sup>66</sup> *NLRB v. Baptist Hosp.*, 442 U.S. 773 (1979).

<sup>67</sup> *NLRB Gen. Couns. Guidelines for Handling No-Solicitation, No-Distribution Rules In Health-Care Facilities*, 79-76 (Oct. 5, 1979).

A no-solicitation/no-distribution rule must be adopted and implemented prior to the onset of union activity, and employees should be periodically reminded of the rule both before and after the union drive begins. Where a no-solicitation/no-distribution rule is not adopted and implemented until after organizational activity begins, its legality will be questioned and its implementation maybe found to be unlawful.<sup>68</sup>

Once a valid no-solicitation/no-distribution rule is adopted, it must be enforced by the employer in an consistent, nondiscriminatory fashion. Where an employer fails to enforce the rule against other, non-union solicitation and distribution, the Board will find that its enforcement unlawfully interferes with employees' Section 7 rights to engage in union activity. Facially lawful no-solicitation/no-distribution rules have been found to have been unlawfully enforced where an employer has allowed solicitation for social events such as church functions, political events, sports pools, and employee recreational activities. Additionally, employers have been found to have unlawfully enforced an otherwise valid no-solicitation rule where the employer has allowed commercial or charitable solicitation such as Avon products, Girl Scout cookies, or flowers for bereavement.<sup>69</sup>

The Board has allowed for a very limited exception to the uniform enforcement requirement where an employer has only allowed "beneficent" solicitations that are infrequent and isolated. For example, where an employer only allowed one annual charitable drive, the Board concluded that there was no discriminatory enforcement of the employer's rule.<sup>70</sup> The difficulty arises in trying to predict what the Board means by "infrequent and isolated."<sup>71</sup> Accordingly, it is strongly recommended that an employer strictly enforce its no-solicitation/no-distribution rule, and confine all solicitations, including charitable solicitations, to non-working time.

A health care institution should also pay careful attention to the way in which employees use the employer's electronic communications systems such as e-mail and the Internet. While employers find this technology extremely useful in conducting business, many employers also allow or knowingly overlook employees' use of e-mail, the Internet, and other technologies for nonbusiness purposes. Unions and employees are increasingly using electronic communications for organizing or for other protected, concerted activities. In order to restrict the use of the employer's electronic communications technology, employers must adopt and strictly enforce an electronic communications policy which prohibits employees from using Internet, e-mail, and other electronic communications systems for personal, nonbusiness communications.<sup>72</sup>

## 1.19 BULLETIN BOARDS

Employees have no statutory right to post on a workplace bulletin board. However, to the extent that hospital management uses bulletin boards to communicate with employees, and allows employees or other organizations to post messages on them, it cannot prohibit employees from posting messages urging unionization. Nor can management maintain a policy requiring prior management approval before posting messages. Accordingly, many organizations restrict the bulletin board usage to management only, and do not allow employees to post messages for any reason or purpose.<sup>73</sup>

<sup>68</sup> *Gallup, Inc.*, 334 NLRB 336 (2001); *Friendly Ice Cream*, 254 NLRB 1206 (1982).

<sup>69</sup> *BRC Injected Rubber Products*, 311 NLRB 66 (1993); *Montgomery Ward & Co.*, 202 NLRB 978 (1973); *Professional Air Traffic Controllers*, 261 NLRB 922 (1982).

<sup>70</sup> *Hammary Mfg. Corp.*, 265 NLRB 57 (1982).

<sup>71</sup> *Serv-Air, Inc.*, 175 NLRB 801 (1969) (three incidents of charitable solicitation permitted).

<sup>72</sup> M. A. Spognardi, "Organizing Through Cyberspace: Electronic Communications and the National Labor Relations Act," *Emp.Rel.L.J.* (Spring 1998).

<sup>73</sup> *Fairfax Hospital*, 310 NLRB 299 (1993); *St. Anthony's Hospital*, 292 NLRB 1304 (1989).

## 1.20 UNION INSIGNIA, BUTTONS, AND STICKERS

The Supreme Court has ruled that the employees generally have a right to wear buttons, t-shirts, etc., that solicit or express union support.<sup>74</sup> However, this right under Section 7 right of the Act must be balanced against the employer's right to manage its business and operations in a safe and efficient fashion. Thus, a rule prohibiting the wearing of union insignia in immediate patient areas has been found to be presumptively valid.<sup>75</sup> Employees have a right to wear union insignia outside immediate areas of patient care or other areas where the employer cannot demonstrate an adverse impact on patient care.<sup>76</sup> Moreover, the Board has found special circumstances justifying an employer rule which prohibited non-removable insignia from being worn on uniforms, because it was not practicable to have employees change into a different uniform every time they were in patient care areas.<sup>77</sup> However, no special circumstances existed where the insignia were small and inconspicuous.<sup>78</sup> Like no solicitation/no distribution policies, hospital management must ensure that any promulgated rule is enforced in a nondiscriminatory manner.

## 1.21 EMPLOYEE PARTICIPATION COMMITTEES

In general, Employee Participation Committees are designed to enhance employee job satisfaction, and improve patient care, by allowing the employees to participate—to varying degrees—in decisions about their jobs and working conditions, workplace problems, and patient care. Employee participation programs take many forms and go by many names—“house staff committees,” “house staff work groups,” “work teams,” “grievance committees,” “quality of worklife committees,” and “employee councils.” However, the Board has found in many instances that employee participation programs violate Section 8(a)(2) of the National Labor Relations Act, by constituting an employer dominated or assisted labor organization.

The legal problems surrounding employee participation programs stem from two separate, but related, provisions of the Act:

Section 2(5) broadly defines the term “labor organization” as “any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.”<sup>79</sup>

Section 8(a)(2) makes it unlawful for an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . .<sup>80</sup>

Given this statutory framework, the legality of any house staff participation program depends on: (1) whether it satisfies the definition of a “labor organization” in Section 2(5), and if so, (2) whether the employer's conduct in relation to the program is proscribed by Section 8(a)(2). If both these questions are answered in the affirmative, the employer will have committed an unfair labor practice. The remedies for violation of Section 8(a)(2) include an Board order requiring the employer to cease and desist its unlawful domination, interference or support of the employee participation program and, possibly, to disestablish the program altogether, as well as the posting of a notice.

<sup>74</sup> *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

<sup>75</sup> *George J. London Memorial Hosp.*, 238 NLRB 704 (1978).

<sup>76</sup> *Vista Hill Foundation*, 280 NLRB 298 (1986).

<sup>77</sup> *Casa San Miguel*, 320 NLRB 534 (1995).

<sup>78</sup> *Ohio Masonic Home*, 205 NLRB 357 (1973).

<sup>79</sup> 29 U.S.C. § 152(5).

<sup>80</sup> 29 U.S.C. § 158(a)(2).

Lead cases in this area, *Electromation, Inc.*,<sup>81</sup> and *E.I. du Pont de Nemours & Co.*,<sup>82</sup> establish several basic principles relevant to determining the legality of employee participation programs. First, a house staff participation committee or employee participation program will be a “labor organization” under Section 2(5) if: (1) employees participate; (2) it exists, at least in part, for the purpose of “dealing with employers”; and (3) the dealings concern grievances, labor disputes, wages, rates of pay, hours of employment, or other working conditions. Additionally, there generally must be some evidence that the house staff committee serves a representational function—*i.e.*, that it “deals” with the employer in some way as a representative, advocate, or agent of the employees. Second, any group can meet the statutory definition of a “labor organization” even if it lacks a formal structure, has no elected officers, bylaws or constitution, does not require the payment of initiation fees or dues, does not meet regularly, and has no formal framework for conducting meetings or eliciting the employees’ views.

Third, the concept of “dealing with” an employer within the meaning of Section 2(5) of the Act is not the same as traditional “collective bargaining.” “Dealing with” encompasses a wide range of employer-employee interaction that does not rise to the level of contract negotiation. It does not require that the two sides seek to compromise their differences. Rather, the concept of “dealing with” involves a “bilateral mechanism,” in which a group of employees, over time, make proposals to management and management responds to these proposals by acceptance or rejection by word or deed. The “dealing” can occur between the employees and representatives of management outside the committees or between the employees and management representatives who themselves are full participating members of the committees. If management representatives “can reject employee proposals, it makes no real difference whether they do so from inside or outside the committee.”

Although the concept of “dealing with” is broad, to fall within the definition of a labor organization, the dealings must concern working conditions or one of the other subjects listed in Section 2(5). Safety, safety awards, and benefits such as exercise rooms or club memberships fall within the scope of Section 2(5). However, where the committee’s purpose is to deal exclusively with non-mandatory subjects not listed in Section 2(5), such as patient care, product quality, productivity improvement, or customer service, a violation will probably not be found.

The presence of an anti-union motive is not critical to finding a violation of Section 8(a)(2). It is not required that the employee committee have been created or fostered in order to avoid unionization. The “purpose” of the committee is relevant because Section 2(5) requires that it exist “for the purpose” of dealing with employers concerning conditions of work or the other statutory subjects. But “purpose” is not the same as “motive.” When Section 2(5) talks about “purpose,” it means what the committee is set up to do, which may be shown by what the committee actually does. A committee can therefore come within the meaning of Section 2(5) even where there is no indication of employer hostility to unions.

Finally, a finding of unlawful domination is appropriate when the impetus behind the formation of the committee emanates from the employer and the committee has no effective existence independent of the employer’s active involvement. However, when the employees determine the formulation and structure of the committee, employer domination is not established, even if the employer has the *potential* ability to influence the committee’s structure or effectiveness.

In *Crown Cork & Seal Co.*,<sup>83</sup> the Board found that employee committees which dealt with production, quality, training, attendance, etc., were not dealing with the employer, and therefore were not labor organizations under the Act. The committees made decisions by consensus, and were subject to review by higher management. The Board found that the authority exercised by the committees was

---

<sup>81</sup> 309 NLRB 990 (1992).

<sup>82</sup> 311 NLRB 893 (1993).

<sup>83</sup> 334 NLRB 699 (2001).

essentially managerial, comparable to a supervisor in any traditional plant setting, and was not made unlawful simply because the decisions were subject to review by higher management. The Board noted that most managers have their decisions reviewed by someone with higher authority.

In *Mercy-Memorial Hospital Corp.*,<sup>84</sup> the Board found that an employee grievance committee was not a labor organization because it did not deal with the hospital. Rather, employees had their grievances reviewed by the committee which only had one management member on it, and the committee sustained or denied the grievances based upon a majority vote.

Health care employers may take several steps to maximize the likelihood that its employee participation program does not violate the Act. Do not unnecessarily formalize employee programs through such things as bylaws, constitutions, elected officers, and the payment of membership dues. Do not discuss mandatory subjects of bargaining, such as compensation, benefits or other working conditions; rather, focus on such issues as patient care, patient service, quality, productivity, and communication. In addition, specifically advise the employees that mandatory subjects of bargaining are “off limits” and appoint a management representative to ensure that the employee program, in fact, does not discuss wages, hours, and working conditions subjects.

Avoid establishing a pattern or practice of ongoing group meetings at which employees make proposals for consideration by management. Limit the purpose of employee participation program to general brain storming sessions in which employees make individualized suggestions, as opposed to group proposals. Do not appoint or establish “representatives” of other employees. Employees should be informed specifically that they are not acting in a representative capacity and that, instead, their participation on the program is sought for their own individual knowledge, perspectives, experiences and abilities. Employees selected for a participation program should not be told that they are being selected to represent a cross-section of employees, should not be encouraged to solicit the views of non-committee members or to undertake employee opinion polls, and should not be encouraged to relay any employee’s recommendations other than their own.

Limit the decisional authority of management representatives in the program. Management representatives should clearly understand that they have no authority to adopt suggestions or proposals, or grant requests. Where possible, participation on the program should be voluntary. Avoid the impression that management is bargaining or dealing with the employees on a group basis. For example, the employee and management representatives in the program should not engage in separate caucuses or engage in any kind of voting on issues facing the committee, unless it is clear that employees could out vote management representatives by a majority vote.

---

<sup>84</sup> 231 NLRB 1108 (1977).