

# DON'T LET UNIONS EXPLOIT YOUR PERSONNEL RULES

Publication  
May 1, 2009

*(Healthcare Update, No. 2, May 2009)*

Mistakes in drafting and enforcing employment policies can help a union to organize your institution. During union organizing drives, unions regularly look for legal violations by the targeted employer, including employment policies and practices that may violate the National Labor Relations Act (NLRA). Unions pursue and publicize such violations to undermine employee confidence in management and taint employer defenses to other charges that the union may file during the organizing drive.

Some common areas of union scrutiny (and employer mistakes) include policies relating to confidentiality, no-solicitation, and no-distribution. In this article we'll take a look at each one.

## **Confidentiality Rules**

Because of such statutes as HIPAA, the Americans with Disabilities Act, and various common laws enforced by the courts, healthcare employers must work to protect confidential information relating to patients, employees, and the institution itself. But you must also be careful not to write confidentiality rules too broadly. Under the NLRA, employees are entitled to engage in "concerted activities" for their mutual aid or protection, regardless of whether a labor union is involved. That means, among other things, that employees have the right to discuss among themselves issues relating to their pay, benefits, and working conditions. Merely announcing an overbroad confidentiality rule can violate the NLRA, regardless of whether you actually enforce the rule.

## **No-Solicitation Rules**

Implementing a no-solicitation rule can not only reduce work distractions for employees but also make it harder for union supporters to use their paid working

time to campaign for the union. Unions most actively urge work-time solicitation where there is a large voting unit and employees disperse over a wide geographical area after work. In considering whether a no solicitation rule is lawful, the National Labor Relations Board (NLRB) considers the following factors:

*Language:* One common mistake is to ban employee solicitation during employees' "working hours." That term is illegally overbroad since it can be read to include break and meal periods; the more restricted term "working times" should be used instead.

*Timing:* If you wait to implement a no-solicitation rule until after union activity begins, the NLRB will usually find the rule unlawful because of the timing of its implementation in relation to union activity.

*Work status:* Employees can be required to limit solicitation to their non-working times (designated breaks, meal times, and before or after work). Such limits apply both to the employee soliciting and the employees being solicited. While it is not unlawful to enforce a rule against soliciting before and after work, enforcement of such a rule must be consistent to be lawful. Since hospitals operate around the clock, with employees coming in early and leaving late for a variety of reasons, maintaining such consistency is seldom possible in practice.

*Consistency:* If you allow employees to solicit during work time for other commercial organizations but bar union solicitation, the NLRB will likely find illegal discrimination. In a 2007 decision, the NLRB ruled that an employer may properly disregard "non-commercial solicitations" in determining whether an employer has enforced its rule discriminatorily against union solicitations. It remains to be seen whether the Democratic majority of the incoming NLRB will follow that decision or instead return to prior precedent that permitted only limited charitable exceptions in assessing the legality of a no-solicitation rule.

*Location:* Employers must usually allow employees on non-working time to solicit in various areas, such as lobbies, flower shop, cafeteria, employee break rooms, sidewalks, and parking lots.

But special NLRB rules give hospital employers the right to ban solicitation in "immediate patient care areas" even during nonworking time. While the definition of "immediate patient care areas" varies from hospital to hospital, it typically includes such areas as patient rooms, operating rooms, places where patients receive treatment such as X-rays and therapy, and adjacent elevators used by patients. Not all areas accessible to patients will qualify as patient care areas, however.

Implementing and enforcing a no-solicitation rule in a hospital setting requires both care and ongoing efforts at consistency, since disputes over such rules are a frequent source of NLRB charges in healthcare union campaigns. Some employers

take a more limited approach by focusing not on what employees say to each other during work time but instead on the principle that “Working time is for work.” That approach allows employees somewhat more room to discuss unionization during work but is easier to apply in practice.

### **No-Distribution Policies**

A hospital has broader rights to control distribution than solicitation. Unlike solicitation, where non-working employees may solicit other non-working employees even in work areas (except in immediate patient care areas), employees may be prohibited from distributing non-institutional materials in working areas at any time. Such materials include, for example, flyers, handbills, brochures, or other promotional materials. (There is one important exception: Because union authorization cards are considered to be an integral element of solicitation, handing out such cards is considered solicitation rather than distribution.)

One common area for distribution is in parking areas of the hospital. Such activity is generally lawful unless the employees are blocking ingress or egress, creating safety hazards, or leaving excessive litter in the area (as opposed to one handbill left under a windshield wiper of each car). Another issue that arises in union organizing is whether an employer is entitled to remove handbills posted or left on tables in the cafeteria or in other break areas. The answer can depend on what housekeeping rules have been enforced previously as to other non-hospital materials.

### **Conclusion**

To identify areas of risk, we recommend that you conduct an audit of all policies and procedures that might be over the legal lines discussed above. For example, many employers have more than one confidentiality policy, and other policies or practices limiting employee speech and activity may vary from department to department.

Even a lawfully worded rule can result in an unfair labor practice finding if it is overbroad, implemented after the onset of union activity, or applied inconsistently against union supporters. Moreover, particularly in healthcare, your rules must be crafted carefully and tailored to your institution, as in defining the “immediately patient care areas” where solicitation can be banned completely.

Enforcing lawful confidentiality, no-solicitation and no-distribution rules can be very helpful to the employer, but only if your institution is willing and able to enforce the rules consistently. In future editions of Healthcare Update we’ll discuss issues related to outsider access to the premises, bulletin board postings and employee uses of emails and the internet.