

NLRB Finds Hospital's Solicitation and Distribution Policy Unlawful

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Recently, a 3-member panel of the National Labor Relations Board ("NLRB" or "Board") ruled that the University of Pittsburgh Medical Center ("UPMC") unlawfully prohibited off-duty employees from distributing literature in non-patient care areas of its hospitals.

Case Background

During a 2016 union organizing campaign at multiple UPMC facilities, hospital managers allegedly threatened off-duty employees with discipline for passing out union materials in cafeterias and outdoor areas of the facilities. In addition, a manager found union flyers in a break room. The manager warned employees not to leave materials there that were not directly related to hospital business, then threw the flyers in the garbage. The union subsequently filed unfair labor practice charges against UPMC, contending, among other things, that UPMC's Solicitation and Distribution Policy was unlawful.

UPMC's Solicitation and Distribution Policy

UPMC's Solicitation and Distribution Policy defined "off duty" as "any period during which a staff member is not scheduled to work" and "non-working time" as time during a "workday when a staff member is on duty but is not expected to be performing work tasks (i.e., meal periods or breaks)." The policy lawfully banned solicitation during working time anywhere in a facility, and at any time in patient-care areas.

Regarding off-duty employees, the policy stated that "off-duty staff members may not enter or re-enter the interior of their work areas or other work areas within their workplace facility aside from the cafeteria, exercise facility, Human Resources building, for any purpose (including solicitation or distribution) except to visit patients, receive medical treatment, or for other purposes such as are available to the general public."

The Board's Decision

The Board agreed with the Administrative Law Judge's determination that the Solicitation and Distribution Policy was unlawful because it prohibited off-duty employees, who were permissibly on

hospital property, from engaging in solicitation and distribution of union literature. The Board found that the policy “allowed off-duty employees to access the cafeteria but it prohibited them from soliciting (or being solicited by) employees on non-working time, both in the cafeteria and in other nonworking and non-patient care areas of the hospitals.” In addition, UPMC was unable to show that the ban on off-duty solicitation was necessary to avoid disruption of healthcare operations or disturbing patients, which could have justified the policy.

Moreover, the Board held that UPMC’s unwritten ban on union materials in non-working areas, such as break rooms, was unlawful, as was the collection and removal of the flyers.

Employer Takeaways

Hospital policies regarding distribution of literature and solicitation by employees require careful drafting, and consistent, non-discriminatory enforcement. Hospitals may, and should, maintain lawful restrictions on solicitation and distribution activity including: 1) when and where solicitation and distribution can, and cannot, occur; 2) the rights of on-duty and off-duty employees to solicit or distribute literature; and 3) a ban on solicitation and distribution by non-employees. Furthermore, Access to Premises policies should dovetail with Solicitation and Distribution policies to ensure limitations on off-duty employees and non-employees will pass NLRB muster. Employers with questions regarding implementing such policies – or that wish to review their current policies – would do well to consult with competent counsel.

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