Have You Reviewed Your Solicitation & Distribution Policy Lately? It May Be Time To Take A Second Look: D.C. Circuit Finds Hospital Policy Violates NLRA To The Extent It Bars Solicitation Of Non-Employees Anywhere In The Facility Or Fellow Employees In Hallways And Lounges Adjacent To Patient Care Areas

Solicitation and distribution policies, key components of any union avoidance strategy, generate frequent legal challenges during organizing campaigns. That is particularly true in health care facilities, where a specialized and often confusing set of rules has developed over time. If, like most employers, you have a policy that was drafted years ago, it may be time to blow the dust off and to take a second look, both at the language of your policy and how it is being enforced. Not convinced? Then check out the D.C. Circuit’s April 18, 2003 decision in Stanford Hosp. and Clinic v. NLRB, which held that a hospital’s solicitation and distribution policy violated the National Labor Relations Act (NLRA) to the extent that it purported to bar any solicitation of non-employees anywhere on hospital grounds. The Court also found that the hospital’s policy was impermissibly overbroad in banning employee solicitations of other employees in hallways and lounges adjacent to, but outside of, patient units.

Before turning to the specifics of the Stanford Hospital case, it is worth recapping the general legal standards applicable to solicitation and distribution policies. The NLRA prohibits employers from interfering with, restraining, or coercing employees in the exercise of rights protected by the NLRA, one of which is the right to effectively communicate with other employees regarding self-organization at the jobsite. The right to “self-organization” is not unlimited, however, and must be balanced against employer’s property rights and managerial interests. In order to effectuate that balance, the National Labor Relations Board (Board) has, with court approval, adopted a series of presumptions regarding restrictions on solicitation and distribution activities. Specifically:

- Rules prohibiting employee solicitation on working time (either the working time of the employee doing the soliciting or the employee being solicited) are presumptively lawful.

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1 325 F.3d 334 (D.C. Cir. Apr. 18, 2003).
2 NLRA Section 7 guarantees employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157. Section 8(a)(1) makes it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [section 7].” 29 U.S.C. § 158(a). The Supreme Court has repeatedly recognized that Section 7 rights “necessarily encompass the right effectively to communicate with one another regarding self-organization at the jobsite.” Beth Israel Hosp. v. NLRB, 437 U.S. 483, 491 (1978).
3 See Republic Aviation Corp. v. NLRB, 324 U.S. 793, 797-98 (1945).
4 Id. at 804-05 (explaining that a Board presumption is like “a statutory presumption or one established by regulation”).
5 See, e.g., St. John’s Hosp. & School of Nursing, Inc., 222 NLRB 1150 (1976), enfd. in part, 557 F.2d 1368 (10th Cir. 1977).
Rules prohibiting employee distribution of literature on working time and in working areas at any time are presumptively lawful. The Board differentiates between solicitations, which are oral in nature and impinge on employer interests only to the extent they occur on working time, and the distribution of literature, which, because of the potential for littering of the employer’s premises, raises a hazard to production whether it occurs on working or non-working time. Thus, while a no-solicitation rule generally must be limited to working time, a no-distribution rule may properly extend to working areas even on non-working time.

Conversely, restrictions on employee solicitation during non-working time, and on distribution during non-working time in non-working areas are presumptively invalid and violative of the NLRA unless the employer justifies them by a showing of special circumstances which make the rule necessary to maintain production or discipline.

An employer’s non-discriminatory ban on non-employee access to the employer’s premises for the purpose of solicitation and distribution is presumptively lawful unless the union demonstrates that employees are not otherwise accessible to union.

Notwithstanding the above, an employer may not promulgate an otherwise valid rule for a discriminatory purpose or enforce such a rule in a discriminatory fashion.

In the context of hospitals and health care facilities, which require an atmosphere of tranquility to ensure proper patient care, the NLRB has adopted modified presumptions that permit more stringent prohibitions on solicitation than in other settings. Hospitals may ban employee solicitation and distribution activities even during non-work time in “immediate patient care areas.” “Immediate patient care areas” have been defined to include patients’ rooms, operating and treatment rooms, and corridors and sitting rooms adjoining or accessible to patient rooms. A NLRB General Counsel Advice memorandum adds to that list elevators and stairways frequently used to transport patients. The same memorandum identifies areas that should be deemed outside “immediate patient care areas,” including: elevators and stairs not

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6 See, e.g., Albert Einstein Medical Center, 245 NLRB 140, 142 (1979).
9 Beth Israel Hosp., 437 U.S. at 492-93.
12 See St. John’s Hospital, 222 NLRB at 1150-51.
13 Id.; see also Beth Israel Hosp., 437 U.S. at 500.
15 NLRB General Counsel Memorandum No. 79-76 (October 5, 1979).
frequently used to transport patients, areas in which employees mingle with patients and visitors, working areas accessible only to employees (such as the hospital kitchen or laundry), and non-working areas accessible only to employees.\textsuperscript{16} A hospital can overcome the presumption that its no-solicitation and distribution rule is invalid as it applies to non-patient care areas only by showing that the rule is necessary to avoid disruption of healthcare operations or the disturbance of patients.\textsuperscript{17}

The \textit{Stanford Hospital} policy reviewed by the D.C. Circuit prohibited: (1) solicitation of employees on hospital premises during work time and in “patient care areas at any time”; (2) literature distribution on hospital premises during work time, and in work areas at any time; and (3) solicitation of non-employees or distribution of literature to them at all times throughout the entire facility.\textsuperscript{18} The policy defined patient care areas as including “patient rooms, patient treatment and procedure rooms or areas, patient admitting or registration areas, patient waiting rooms, lounges used by patients and their families or visitors, and the hallways immediately adjacent to such areas.”\textsuperscript{19} In this particular facility, there were “patient units” that were reached by walking down a hallway and passing through a set of double doors. Within the patient units were patient rooms, treatment rooms for radiology, surgery and other medical purposes, and lounges or sitting areas for use by patients, families and visitors.\textsuperscript{20} In addition, outside of the patient units, but covered by the no-solicitation and distribution rule, were a separate set of lounges and waiting areas that patients, families and visitors also used.\textsuperscript{21}

The first issue the \textit{Stanford Hospital} Court considered was whether the Hospital could, to protect patients from disturbance, prohibit solicitation and distribution activities in the hallways and lounges outside, but adjacent to, the patient units. To establish the validity of the rule as applied to such areas, the Court noted that the Hospital needed only to establish “a likelihood of, not actual, . . . [patient] disturbance.”\textsuperscript{22} Relying upon the findings of the Administrative Law Judge (ALJ) below, the Court concluded that the Hospital had failed to meet even this minimal threshold. The Court noted that the Hospital’s witnesses had testified that all employee non-patient care activities (such as eating, sleeping and conversations on controversial subjects) in lounges and waiting areas would disturb patients, yet the Hospital had never sought to prevent such activities, and had itself posted anti-union materials in the lounge areas.\textsuperscript{23} Second, the Hospital had failed to present evidence to show that the waiting areas and hallways outside the units were regularly frequented by patients and their families. It is not enough, the Court said, to establish the mere occasional presence of patients in areas covered by a solicitation and distribution ban. Rather, to satisfy the patient disturbance test, hospitals “must establish both that patients will witness employee solicitation and that they will likely be disturbed by it,” a showing the Hospital had failed to make.\textsuperscript{24} Finally, the Court concluded that the complete

\begin{itemize}
\item\textsuperscript{16} \textit{Id.}
\item\textsuperscript{17} \textit{Brockton Hosp. v. NLRB}, 294 F.3d 100, 103 (D.C. Cir. 2002).
\item\textsuperscript{18} \textit{Stanford Hosp.}, 325 F.3d at 336.
\item\textsuperscript{19} \textit{Id.}
\item\textsuperscript{20} \textit{Id.}
\item\textsuperscript{21} \textit{Id.}
\item\textsuperscript{22} \textit{Id.} at 339 (quoting \textit{Brockton Hosp.}, 294 F.3d at 104).
\item\textsuperscript{23} \textit{Id.}
\item\textsuperscript{24} \textit{Id.} at 339-40.
\end{itemize}
absence of any patient or family complaints about employee solicitation activities during the entire 11-month union organizing campaign undermined the Hospital’s argument that permitting union activity would create a likelihood of disturbance.\(^{25}\)

Having found the no-solicitation policy overbroad as applied to employee activities outside patient units, the Court turned to the question of whether the Hospital could ban the solicitation of non-employees anywhere on hospital property. The Court first rejected the Hospital’s argument that NLRA Section 7 only protects employee solicitation of fellow employees, noting that the Board and courts have long held that Section 7 encompasses the right to seek support and sympathy from customers and the general public.\(^{26}\) Accordingly, the sole remaining question under the Supreme Court’s decision in *Eastex, Inc. v. NLRB* -- which established the legal standard applicable in cases where an employer is charged with interfering with Section 7 activity by prohibiting employees from engaging in union activity on its property -- was whether the Hospital had established a compelling interest in patient privacy and well-being that outweighed the employees’ Section 7 right to solicit non-employees.\(^{27}\) The Court disposed of that issue by adopting the ALJ’s finding that the Hospital had failed to present any persuasive evidence that such a broad ban on distribution was necessary to protect patients. Indeed, the Hospital had produced no evidence that the union’s regular leafleting at entrances to the facility in the months prior to the adoption of the distribution ban ever had any adverse impact on patient care. Consequently, the Hospital failed to demonstrate that patient care concerns outweighed its employees’ right to solicit non-employees.\(^{28}\)

The final issue addressed in *Stanford Hospital* was whether the Board had erred in concluding that the Hospital committed an unfair labor practice by evicting a union organizer from its premises. The organizer had been sitting on a bench waiting for a ride from a hospital employee. A security guard recognized the organizer both from earlier conversations and from having previously kicked him out of the cafeteria and other parts of the hospital for violating the Hospital’s solicitation and distribution policy. Although the organizer claimed he had only been waiting for a ride, like others standing nearby, the guard escorted him off the premises, telling him never to return. The ALJ found that the eviction constituted discrimination on the basis of protected activity because the Hospital had not evicted persons unaffiliated with the union who were also waiting for rides.\(^{29}\) The D.C. Circuit rejected the ALJ’s determination, agreeing with the Hospital’s argument that the Board should have compared the organizer not to the other persons waiting for rides, but to other persons who, like the organizer, had been previously asked to leave the hospital for violations of its solicitation and distribution policy. Since there

\(^{25}\) *Id.* at 340.

\(^{26}\) *Id.* at 341-42 (citing *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1177 (D.C. Cir. 1993), and *Santa Fe Hotel & Casino*, 331 NLRB 723, 730 (2000)).

\(^{27}\) In *Eastex*, the Supreme Court explained that two questions arise when an employer is charged with interfering with Section 7 rights by prohibiting employees from engaging on union activity on its property:

The first is whether, apart from the location of the activity, [the restricted activity] is the kind of concerted activity that is protected from employer interference by §§ 7 and 8(a)(1) of the National Labor Relations Act. If it is, then the second question is whether the fact that the activity takes place on [the employer’s] property gives rise to a countervailing interest that outweighs the exercise of § 7 rights in that location.

437 U.S. at 563.

\(^{28}\) 325 F.2d at 344-45.

\(^{29}\) *Id.* at 344.
was no evidence that the organizer had been treated any differently from others who had violated the policy, the eviction did not constitute unlawful discrimination.\(^{30}\)

The Stanford Hospital decision serves as an important reminder on several key points. First, hospitals (and other employers) have the right to restrict union organizing activity on their property, but that right is not unlimited. Solicitation and distribution policies are perfectly lawful and integral components of any effective union avoidance strategy, but they must be tailored to comport with the guidelines and presumptions established for health care facilities. Overreaching in the drafting of such policies can lead to violations of the NLRA. Second, in determining which areas of the hospital qualify as “immediate patient care areas,” health care facilities should identify those locations where patients actually congregate and where medical concerns dictate the need for quiet and order. In particular, before extending solicitation policies to areas other than traditionally recognized “immediate patient care areas,” some effort should be made to determine how frequently and at what hour patients tend to use the areas, and the typical severity of those patients’ medical conditions. Limiting policies to the time periods during which non-patient care areas are actually frequented by patients and their families (e.g. visiting hours), and focusing the policies on activities that are actually likely to impact patients or patient care, will significantly enhance one’s ability to defend such a policy.\(^{31}\) Third, employers must understand that how solicitation and distribution policies are enforced is just as important as how they are drafted. If raucous behavior is tolerated in visiting rooms and lounges, it is difficult to successfully argue that solicitations and distribution of organizing material in those areas will jeopardize patients’ health.

Stanford Hospital also reaffirms that non-employee union organizers, in contrast to employees, enjoy no Section 7 rights of access to an employer’s property. The two recognized exceptions to this rule are quite limited. First, non-employee union organizers are entitled to access where the location of the facility and the living quarters of employees places the employees beyond the reach of reasonable union efforts to communicate with them (e.g., remote logging camps and mountain resorts). Second, an employer engages in discrimination as defined by NLRA section 8(a)(1) if it denies union access to its premises while allowing similar distribution or solicitation by non-employee entities other than the union. As the Stanford Hospital decision illustrates, the second exception requires proof of differential treatment of non-employee union organizers and similarly situated non-union solicitors and distributors. Absent evidence of differential treatment of union and non-union solicitors, there can be no finding of discrimination.

For more information concerning the topics discussed in this article, please contact Terence F. Flynn (202) 624-2924.

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\(^{30}\) Id. at 344-45.

\(^{31}\) Compare NLRB v. Southern Maryland Hosp. Center, 916 F.2d 932 (4th Cir. 1990) (no-solicitation/distribution policy invalid where it prohibited distribution of literature at hospital entrance, but there was no showing of how many patients came and went through the entrance during the early morning hours in which the distribution occurred) with Baylor Univ. Med. Ctr. v. NLRB, 578 F.2d 351 (D.C. Cir. 1978) (upholding a solicitation/distribution ban that applied to a hospital corridor where there was significant evidence that corridors were extremely congested and chaotic, and that any additional sources of potential disruption could adversely impact patient care).