Special Considerations in the Healthcare Industry

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I. [20.1] INTRODUCTION

The history of the National Labor Relations Act (NLRA), 29 U.S.C. §151, et seq., and its impact on the healthcare industry have been dynamic. Nonprofit hospitals were covered by the Wagner-Connery Labor Relations Act, ch. 372, 49 Stat. 449 (1935), the original federal management-labor relations statute that governed employers, employees, and labor unions. But in 1947, Congress exempted nonprofit hospitals in passage of the Labor-Management Relations Act, 1947 (also known as the Taft-Hartley Act), 29 U.S.C. §141, et seq. Congress perceived that healthcare institutions did not provide services in interstate commerce, reasoning, moreover, that nonprofit hospitals were primarily charitable in nature and that hospital employees were not primarily interested in wages, hours, and conditions of employment. Over time, however, things changed. The advent of Medicare and Medicaid payment programs in 1965, the growth of for-profit hospitals, and the developing business nature of the healthcare industry led Congress in July 1974 to enact Pub.L. No. 93-360, 88 Stat. 395 (1974) (commonly known as the “Health Care Amendments”), which amended the NLRA to extend coverage to employees of nonprofit hospitals. The Health Care Amendments also recognized the special characteristics of the healthcare industry that make labor relations issues unique (i.e., the type of services rendered, the impact on critically ill patients who are served, and the role of employees in delivering healthcare services). As a result of the Health Care Amendments, the NLRA applies to any “health care institution,” which includes “any 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 person[s].” 29 U.S.C. §152(14).

The Health Care Amendments also imposed more stringent notice requirements on healthcare organizations relating to termination and modification of collective-bargaining agreements and on labor organizations engaging in strike or picketing activity at healthcare institutions. Specifically, the amendments provided:

a. A party seeking to modify or terminate a collective-bargaining agreement must give the other party at least 90 days’ notice of the proposed termination or modification (compared to a 60-days’ notice requirement applicable in other industries).

b. Parties are required to notify the Federal Mediation and Conciliation Service and any analogous state agency within 60 days of any proposed termination or modification of a collective-bargaining agreement.

c. A labor organization is prohibited from engaging in a strike or picketing activity at a healthcare institution without giving the institution ten days’ prior written notice. 29 U.S.C. §§158(d), 158(g).

The National Labor Relations Board (NLRB) and federal courts have also recognized the unique characteristics of the healthcare industry in their development of industry-specific standards and applications. No other industry has a separate and special rule for determining how employees will be grouped for purposes of organizing and collective bargaining. There are different standards applied for evaluation of confidentiality and solicitation policies at healthcare institutions.
institutions. Such standards arise out of concern for the provision of uninterrupted patient care and protection of patient confidentiality in healthcare. The purpose of this chapter is to address the special labor relations issues that arise in the healthcare industry.

II. [20.2] APPROPRIATE BARGAINING UNITS IN THE HEALTHCARE INDUSTRY

Appropriate bargaining units in the healthcare industry were originally determined on a case-by-case basis, as unit composition is decided for other industries. Section 9(b) of the NLRA provides:

The Board shall decide in each case whether . . . the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof. [Emphasis added.] 29 U.S.C. §159(b).

Cognizant of the negative impact that the proliferation of bargaining units could have on the delivery of patient care in the healthcare industry, the Joint Senate and House Committee Report that accompanied the 1974 Health Care Amendments stated: “Due consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry.” S.Rep. No. 766, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 3946, 3950. Despite this congressional admonition, the NLRB continued to apply its traditional “community-of-interest” standard in determining healthcare bargaining units. Because this standard largely ignored the special needs of the healthcare industry, NLRB determinations of healthcare bargaining units were frequently challenged in federal courts of appeal from 1975 to 1984. This led to instability and unpredictability in labor relations in the healthcare industry. Appellate courts often denied enforcement of NLRB unit determinations, holding that the units constituted “undue proliferation.”

In response to federal court decisions, the NLRB in 1984 reevaluated its standard for healthcare bargaining unit determinations. In St. Francis Hospital, 271 N.L.R.B. 948, 953, 116 L.R.R.M. (BNA) 1465 (1984), the NLRB announced that for hospital bargaining units it would require “sharper than usual differences (or ‘disparities’) between the wages, hours, and working conditions, etc., of the requested employees and those in an overall professional or nonprofessional unit.” The NLRB also stated that healthcare bargaining units would be determined by “a stricter standard than its traditional community-of-interest analysis.” 271 N.L.R.B. at 951. The NLRB warned that “no unit is per se appropriate and that separate representation must be justified upon each factual record in light of the disparity-of-interests test as we have refined it.” 271 N.L.R.B. at 954. Under the NLRB’s disparity-of-interests standard, all-professional, all-nonprofessional, and all-technical units were appropriate. The NLRB rejected smaller units that did not demonstrate a sufficient disparity of interest.

Despite the NLRB’s efforts to appease federal courts, the Court of Appeals for the District of Columbia in 1986 rejected the NLRB’s St. Francis II disparity-of-interest standard and remanded the case to the NLRB for further consideration. International Brotherhood of Electrical Workers, Local Union No. 474 v. NLRB, 814 F.2d 697 (D.C.Cir. 1986). Frustrated by the constant criticism
from federal courts, the NLRB sought to end the controversy over its case-by-case analysis and announced that it would propose concrete rules for determining healthcare bargaining units. On April 21, 1989, the NLRB singled out the healthcare industry for assertion of its statutory rulemaking authority, with publication of its Final Rule Regarding Bargaining Units in the Health Care Industry (Final Rule), 29 C.F.R. §103.30. This represented the first time that the NLRB promulgated bargaining unit rules for a single industry.

The NLRB’s Final Rule applies only to an “acute care hospital,” which is defined as

a short term care hospital in which the average length of patient stay is less than thirty days, or a short term care hospital in which over 50% of all patients are admitted to units where the average length of patient stay is less than thirty days. 29 C.F.R. §103.30(f)(2). 

The Final Rule does not apply to healthcare facilities that are primarily nursing homes, psychiatric hospitals, or rehabilitative institutes, although the same general principles articulated by the NLRB’s Final Rule are equally applicable in determining bargaining units in other non-acute care facilities. See §20.12 below.

Pursuant to the Final Rule, only eight bargaining units are presumptively appropriate in acute care hospitals:

a. registered nurses (RNs);

b. physicians;

c. all other professionals except RNs and physicians (e.g., social workers, physical therapists, pharmacists);

d. technical employees;

e. business office clerical employees;

f. skilled maintenance employees;

g. all other nonprofessional employees; and

h. security guards. 29 C.F.R. §103.30(a).

Only when a party claims “extraordinary circumstances” (such as when a petition seeks representation of a bargaining unit consisting of five or fewer employees) will the NLRB approve a nonconforming bargaining unit. Id. The NLRB has indicated it will reject the following exceptions as “extraordinary circumstances”:

a. diversity of the industry, e.g., size of the institution or variety of services offered;
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b. functional integration of and a higher degree of work contact among employees such as team care or cross training;

c. nationwide hospital chains;

d. changes within traditional employee groupings, such as increased specialization among RNs;

e. governmental and private cost-containment measures; and


The NLRB will, however, approve bargaining units sought by labor organizations (not employers) that combine portions of the eight recognized units. The propriety of such units is determined by adjudication, although the NLRB has stated that some combinations (e.g., “all professionals”) would “obviously be appropriate.” 53 Fed.Reg. 33,900, 33,932 (Sept. 1, 1998). When previously recognized nonconforming bargaining units result in disenfranchisement of particular job classifications, the NLRB will find appropriate a residual bargaining unit consisting of all remaining positions that would otherwise be included in one of the eight recognized units. St. Mary’s Duluth Clinic Health System, 332 N.L.R.B. 1419, 166 L.R.R.M. (BNA) 1057 (2000); Kaiser Foundation Health Plan of Colorado, 333 N.L.R.B. 557, 166 L.R.R.M. (BNA) 1284 (2001). Finally, the NLRB will allow its regional directors to approve stipulations between the parties of units that are not among the units decreed but are mutually agreed on by the parties.

Immediately following the NLRB’s release of its Final Rule, the American Hospital Association (AHA) filed a complaint in the U.S. District Court for the Northern District of Illinois seeking to enjoin its enforcement. The AHA challenged the NLRB’s rulemaking authority and argued that the Final Rule unnecessarily resulted in undue proliferation of healthcare bargaining units. The district court initially agreed with the AHA and issued a permanent injunction preventing the NLRB’s Final Rule from taking effect. The Seventh Circuit Court of Appeals, however, vacated the injunction and upheld both the NLRB’s rulemaking authority and its determination of eight appropriate bargaining units for the healthcare industry. American Hospital Ass’n v. NLRB, 899 F.2d 651 (7th Cir. 1990). On April 23, 1991, the U.S. Supreme Court upheld the Seventh Circuit’s decision. American Hospital Ass’n v. NLRB, 499 U.S. 606, 113 L.Ed.2d 675, 111 S.Ct. 1539 (1991). The Final Rule remains in effect today.

A. [20.3] Past Precedent in Bargaining Unit Placement Determination

While the NLRB’s rulemaking removed the determination of appropriate bargaining units from case-by-case adjudication, placement of individual employees in job classifications within each unit is still litigated on a case-by-case basis.

The discussion in §§20.4 – 20.11 below summarizes past precedent in unit placement determinations in the healthcare industry. Most of the cases outlined below were decided before
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the NLRB engaged in rulemaking. However, the NLRB’s General Counsel has stated that past precedent will guide the NLRB in determining placement of disputed job classifications within the context of the eight bargaining units.

1. [20.4] Registered Nurses

The following classifications have previously been included in registered nurse units:

a. graduate nurses (see St. Elizabeth’s Hospital of Boston, 220 N.L.R.B. 325, 90 L.R.R.M. (BNA) 1420 (1975));

b. non-nursing department nurses (see Milwaukee Children’s Hospital Ass’n, 255 N.L.R.B. 1009, 107 L.R.R.M. (BNA) 1025 (1981) (holding emergency room, poison control, and employee health services nurses as within bargaining unit));

c. nurse anesthetists (see Trustees of Noble Hospital, 218 N.L.R.B. 1441, 1444, 89 L.R.R.M. (BNA) 1806 (1975); but see Long Island College Hospital, 256 N.L.R.B. 202, 207 n.21, 107 L.R.R.M. (BNA) 1205 (1981) (stipulation excluding nurse anesthetists from RN unit));

d. nurse instructors (see Newton-Wellesley Hospital, 250 N.L.R.B. 409, 414, 104 L.R.R.M. (BNA) 1384 (1980); but see Long Island College Hospital, supra (stipulation excluding instructors from RN unit)); and

e. nurse practitioners (see Rockridge Medical Care Center, 221 N.L.R.B. 560, 90 L.R.R.M. (BNA) 1721 (1975)).

Regarding utilization review coordinators, the NLRB has included these positions in RN units when employers require (or effectively require) RN licenses for incumbents in the positions. See Salem Hospital, 333 N.L.R.B. 560, 170 L.R.R.M. (BNA) 1354 (2001); Pocono Medical Center, 305 N.L.R.B. 398, 138 L.R.R.M. (BNA) 1261 (1991); Trustees of Noble Hospital, supra. However, in cases in which utilization review nurses are not required to hold RN licenses, the NLRB has chosen to exclude them. Charter Hospital of St. Louis, Inc., 313 N.L.R.B. 951, 146 L.R.R.M. (BNA) 1001 (1994); Ralph K. Davies Medical Center, 256 N.L.R.B. 1113, 107 L.R.R.M. (BNA) 1372 (1981); Addison-Gilbert Hospital, 253 N.L.R.B. 1010, 106 L.R.R.M. (BNA) 1059 (1981).

2. [20.5] Physicians

Physicians have been represented by labor organizations since 1970. However, substantial efforts to unionize physicians have been slow in inception. This is due, in part, to the fact that the majority of the nation’s physicians perform services at healthcare facilities as independent contractors. Independent contractors are excluded from coverage under the NLRA, and federal antitrust laws prevent collective bargaining by self-employed physicians.

**Employed physicians.** A resurgence of physician organizing occurred in 1999, when the American Medical Association (AMA) formed its Physicians for Responsible Negotiating (PRN)
and began targeting doctors employed by hospitals. PRN also began accepting memberships from self-employed doctors interested in providing financial support, pending a change in federal antitrust laws. Organizing of employed physicians, however, again stagnated in 2000 following NLRB decisions drawing into question the supervisory status of employed physicians. The AMA severed ties with the PRN in 2004, and the union then forged an affiliation with the Service Employees International Union’s Doctors Council.

Medical interns, residents, and fellows. In 1999, the NLRB ruled that medical interns, residents, and fellows are “employees” within the purview of the NLRA, overturning more than two decades of precedent. Boston Medical Center Corp., 330 N.L.R.B. 152, 162 L.R.R.M. (BNA) 1329 (1999). These groups now have the same rights and obligations as other employees to join unions, engage in collective bargaining, and strike. Prior to Boston Medical Center, interns, residents, and clinical fellows working at hospitals were not considered employees within the meaning of the NLRA because collective bargaining did not apply to relationships that are fundamentally educational. See Cedars-Sinai Medical Center, 223 N.L.R.B. 251, 91 L.R.R.M. (BNA) 1398 (1976); St. Clare’s Hospital & Health Center, 229 N.L.R.B. 1000, 95 L.R.R.M. (BNA) 1180 (1977). While recognizing that interns and residents are students, the NLRB majority nevertheless found that they squarely fit within the dictionary definition of “employee” as a person who works for another for compensation. 330 N.L.R.B. at 160. The NLRB, however, declined to define the boundaries between permissive and mandatory subjects of bargaining concerning interns and residents, instead choosing to take up disputes on a case-by-case basis.

3. [20.6] All Professionals Except Registered Nurses and Physicians

The following classifications have been determined to be within the group of all professionals except registered nurses and physicians:

a. audiolists (see Sutter Community Hospitals of Sacramento, Inc., 227 N.L.R.B. 181, 185, 94 L.R.R.M. (BNA) 1450 (1976));

b. dieticians (see Mason Clinic, 221 N.L.R.B. 374, 376, 90 L.R.R.M. (BNA) 1502 (1975); Sutter Community Hospitals, supra, 227 N.L.R.B. at 188);


d. social workers (see Mount Airy Foundation, supra; Gnaden Huetten Memorial Hospital, Inc., 219 N.L.R.B. 235 n.1, 89 L.R.R.M. (BNA) 1761 (1975));

e. technologists (medical lab; cardiopulmonary) (see St. Barnabas Hospital, 283 N.L.R.B. 472, 124 L.R.R.M. (BNA) 1388 (1987); but see Middlesex General Hospital, 239 N.L.R.B. 837, 100 L.R.R.M. (BNA) 1024 (1978); Norton Community Hospital, Inc., 291 N.L.R.B. 1174, 1175 n.10, 130 L.R.R.M. (BNA) 1218 (1988) (technologists found not to be professionals); but see also Group Health Ass’n, 317 N.L.R.B. 238, 244, 149L.R.R.M. (BNA) 1129 (1995) (finding that medical technologists generally are “professional
The “technical employees” category includes employees who use independent judgment on the job and who have specialized training in major healthcare occupational groups such as laboratory, respiratory, or medical records. Most healthcare technical employees are also certified, licensed, or registered with state authorities. The following classifications previously have been included in technical units:


b. operating room and surgical technicians (see Nathan & Miriam Barnert Memorial Hospital Ass’n, 217 N.L.R.B. 775, 780, 89 L.R.R.M. (BNA) 1083 (1975); Trinity Memorial Hospital of Cudahy, supra; William W. Backus Hospital, 220 N.L.R.B. 414, 418, 90 L.R.R.M. (BNA) 1696 (1975); Meriter Hospital, Inc., 306 N.L.R.B. 598, 600, 140 L.R.R.M. (BNA) 1148 (1992); but see St. Elizabeth’s Hospital of Boston, 220 N.L.R.B. 325, 329, 90 L.R.R.M. (BNA) 1420 (1975) (operating room technicians included in service and maintenance unit));

c. laboratory technicians (see Children’s Hospital of Pittsburgh, 222 N.L.R.B. 588, 591, 91 L.R.R.M. (BNA) 1440 (1976); American Hospital Management Corp., 219 N.L.R.B. 25, 89 L.R.R.M. (BNA) 1499 (1975); but see Children’s Hospital of Pittsburgh, supra (certified laboratory technologists found to be professionals));

d. physical therapy assistant (see Trinity Memorial Hospital of Cudahy, supra);

e. respiratory therapy technicians (see Alexian Brothers of Elizabeth, supra, 219 N.L.R.B. at 1123 n.5; Children’s Hospital of Pittsburgh, supra, 222 N.L.R.B. at 593);

f. X-ray/radiology technicians/technologists (see American Hospital Management Corp., supra; Clarion Osteopathic Community Hospital, 219 N.L.R.B. 248, 249, 90 L.R.R.M. (BNA) 1122 (1975); Pontiac Osteopathic Hospital, 227 N.L.R.B. 1706, 1707, 94 L.R.R.M. (BNA) 1417 (1977)); and
g. paramedics (see Virtua Health, Inc., 344 N.L.R.B. 604, 177 L.R.R.M. (BNA) 1158 (2005)).

The following job classifications have been found not to be technical employees and typically are excluded from a technical bargaining unit:

a. EEG technicians (see Trinity Memorial Hospital of Cudahy, supra, 219 N.L.R.B. at 218; William W. Backus Hospital, supra, 220 N.L.R.B. at 417; but see Southern Maryland Hospital Center, Inc., 274 N.L.R.B. 1470, 1476, 118 L.R.R.M. (BNA) 1599 (1985) (EEG technician included in technical unit)); and

b. EKG technicians (see Nathan & Miriam Barnert Memorial Hospital Ass’n, supra, 217 N.L.R.B. at 777; Pontiac Osteopathic Hospital, supra, 227 N.L.R.B. at 1707; Southern Maryland Hospital Center, supra, 274 N.L.R.B. at 1473).

5. [20.8] Business Office Clericals

Individuals included in the business office clericals bargaining unit are clerical employees who perform business office functions. These employees have minimal contact with patients and other nonprofessional employees and thus do not share a community of interest with other nonprofessionals. The following job classifications previously have been included in the business office clerical bargaining unit:


b. cashiers (see Southwest Community Hospital, 219 N.L.R.B. 351, 352, 90 L.R.R.M. (BNA) 1116 (1975); St. Catherine’s Hospital of Dominican Sisters of Kenosha, Wisconsin, supra; Seton Medical Center, 221 N.L.R.B. 120, 90 L.R.R.M. (BNA) 1436 (1975));

c. computer operators and programmers (see Trumbull Memorial Hospital, 218 N.L.R.B. 796, 797, 89 L.R.R.M. (BNA) 1437 (1975); St. Francis Hospital, 219 N.L.R.B. 963, 964, 90 L.R.R.M. (BNA) 1083 (1975));

d. data processors, key punch operators, and data control clerks (see Trumbull Memorial Hospital, supra; St. Francis Hospital, supra, 219 N.L.R.B. at 964);

f. switchboard, telephone, and PBX operators (see Mendenco Hospitals of Louisiana, Inc., 219 N.L.R.B. 991, 89 L.R.R.M. (BNA) 1859 (1975); Medical Arts Hospital of Houston, Inc., 221 N.L.R.B. 1017, 1018, 91 L.R.R.M. (BNA) 1145 (1975); Baptist Memorial Hospital, 225 N.L.R.B. 1165, 1168 – 1169, 93 L.R.R.M. (BNA) 1454 (1976); Duke University, 226 N.L.R.B. 470, 471, 94 L.R.R.M. (BNA) 1094 (1976)); and

g. laboratory clerks/secretaries (see Kanawha Valley Memorial Hospital, Inc., 218 N.L.R.B. 846, 89 L.R.R.M. (BNA) 1451 (1975); William W. Backus Hospital, 220 N.L.R.B. 414, 415, 90 L.R.R.M. (BNA) 1696 (1975)).

The following job classifications have been excluded from the business office clerical bargaining unit:

a. pharmacy clerks (see St. Elizabeth’s Hospital of Boston, 220 N.L.R.B. 325 n.1, 90 L.R.R.M. (BNA) 1420 (1975); Medical Arts Hospital of Houston, supra, 221 N.L.R.B. at 1018 (pharmacy employees included in maintenance and service unit));

b. ward clerks (see St. Luke’s Episcopal Hospital, supra, 222 N.L.R.B. at 667 – 678; Sisters of St. Joseph of Peace, 217 N.L.R.B. 797, 89 L.R.R.M. (BNA) 1082 (1975) (although ward clerks engage in clerical functions, they do not share community of interest with business office clerical employees; clerks included in maintenance and service unit)); and

c. nursing department secretaries (see Lincoln Park Nursing & Convalescent Home, supra, 318 N.L.R.B. at 1164 (nursing department secretary excluded from office clerical unit; classified as “other types of clericals”)).

NLRB decisions are split regarding the placement of the following job classifications under the business office clerical unit:

a. admitting clerks (see St. Catherine’s Hospital of Dominican Sisters of Kenosha, Wisconsin, supra, 217 N.L.R.B. at 789 (admitting clerks held to be in business office clerical unit); contra Jewish Hospital Association of Cincinnati, 223 N.L.R.B. 614, 621, 91 L.R.R.M. (BNA) 1499 (1976));

b. billing clerks (see William W. Backus Hospital, supra, 220 N.L.R.B. at 415 (billing clerks held not in business office clerical unit); contra Jewish Hospital Association of Cincinnati, supra; St. Luke’s Episcopal Hospital, supra, 222 N.L.R.B. at 677 (billing clerks placed in service and maintenance unit));

c. mail clerks and messengers (see Seton Medical Center, supra (mail clerks and messengers deemed to be in business office clerical unit); contra Jewish Hospital Association of Cincinnati, supra; Duke University, supra, 226 N.L.R.B. at 471);
d. medical records clerks (see Sisters of St. Joseph of Peace, supra, 217 N.L.R.B. at 798; Central General Hospital, 223 N.L.R.B. 110, 111, 91 L.R.R.M. (BNA) 1433 (1976) (medical records clerks held not in business office clerical unit); contra Jewish Hospital Association of Cincinnati, supra; Seton Medical Center, supra, 221 N.L.R.B. at 122 n.21); and

e. receptionists and information desk clerks (see Southwest Community Hospital, supra, 219 N.L.R.B. at 353; Duke University, supra (receptionists and information desk clerks included in business office clerical unit); contra Jewish Hospital Association of Cincinnati, supra; Trumbull Memorial Hospital supra, 218 N.L.R.B. at 797; Lincoln Park Nursing & Convalescent Home, supra, 318 N.L.R.B. at 1164; Charter Hospital of St. Louis, Inc., 313 N.L.R.B. 951, 146 L.R.R.M. (BNA) 1001 (1994) (receptionists included in service and maintenance unit)).

6. [20.9] All Other Nonprofessional Employees

The “all other nonprofessional employees” unit includes all service and maintenance employees. Employees in this category generally perform manual and routine job functions and are not highly skilled or trained. The following classifications have been held to be included in the all-nonprofessional unit excluding technicians, skilled maintenance, business office clerks, and guards:

a. housekeeping employees (see Gnaden Huetten Memorial Hospital, Inc., 219 N.L.R.B. 235, 236, 89 L.R.R.M. (BNA) 1761 (1975));

b. nurses’ aides (see id.);

c. medical record clerical employees (see St. Luke’s General Hospital, 220 N.L.R.B. 488, 489, 90 L.R.R.M. (BNA) 1297 (1975));

d. physical therapy aides (see Gnaden Huetten Memorial Hospital, supra);

e. recovery room technicians (see Baptist Memorial Hospital, 225 N.L.R.B. 1165, 1172, 93 L.R.R.M. (BNA) 1454 (1976));

f. ward clerks (see Sisters of St. Joseph of Peace, 217 N.L.R.B. 797, 89 L.R.R.M. (BNA) 1082 (1975));

g. non-licensed counselors (see Rhode Island Hospital, 313 N.L.R.B. 343, 345, 145 L.R.R.M. (BNA) 1308 (1993) (parent consultants working with families who have children stricken with cancer); Charter Hospital of St. Louis, Inc., 313 N.L.R.B. 951, 955, 146 L.R.R.M. (BNA) 1001 (1994) (activities therapist assistant encouraging activities and game-playing in gymnasium)); and

h. community relations/equal employment opportunity coordinators (see Rhode Island Hospital, supra, 313 N.L.R.B. at 349).
7. [20.10] Security Guards

Section 9(b)(3) of the NLRA, 29 U.S.C. §159(b)(3), prevents the NLRB from including in a bargaining unit with non-guard employees “any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer’s premises.” This section also prohibits certification of a guard unit represented by a labor organization that represents employees other than guards. In establishing the security guard unit, Congress sought to prevent the conflict of interests that might arise among an employer’s guard employees when the guards are called on to enforce the employer’s security rules against striking colleagues represented by the same union. For this unit, the NLRB has determined that employees are guards within the meaning of the NLRA if they are charged with guard responsibilities that are not a minor or incidental part of their overall responsibilities.

Guard responsibilities include those typically associated with traditional police and plant security functions, such as the enforcement of rules, the possession of authority to compel compliance, and training in security procedures. Central to this determination is not a numerical accounting of the percentage of time employees spend on such duties, but rather the specific nature of the duties themselves. See Wolverine Dispatch, Inc., 321 N.L.R.B. 796, 152 L.R.R.M. (BNA) 1276 (1996); 55 Liberty Owners Corp., 318 N.L.R.B. 308, 150 L.R.R.M. (BNA) 1101 (1995); BPS Guard Services, Inc., 309 N.L.R.B. 989, 142 L.R.R.M. (BNA) 1280 (1992); Rhode Island Hospital, 313 N.L.R.B. 343, 145 L.R.R.M. (BNA) 1308 (1993). But see McDonnell Aircraft Company, Division of McDonnell Douglas Corp., 827 F.2d 324, 329 (8th Cir. 1987) (unit is not limited only to “security” or “police-type” rule enforcers but exists when employee is vested with rule enforcement obligations in relation to coworkers). See also BPS Guard Services, Inc. v. NLRB, 942 F.2d 519 (8th Cir. 1991); Syracuse University, 325 N.L.R.B. 162, 157 L.R.R.M. (BNA) 1050 (1997) (parking services field employees referred to as enforcement officers are not statutory guards).

8. [20.11] Skilled Maintenance Employees

Skilled maintenance employees generally include employees involved in the maintenance, repair, and operation of the hospital’s physical plant systems, as well as their trainers, helpers, and assistants. See Gen.Couns.Mem. 91-3 (May 9, 1991), available online at www.nlrb.gov/shared_file/42%20memo/1991/ge91-03.pdf. Classifications that generally are included in a skilled maintenance bargaining unit are

a. carpenters;

b. electricians;

c. masons/bricklayers;

d. painters;

e. pipefitters;
f. plumbers;
g. sheet metal fabricators;
h. automotive mechanics;
i. HVAC mechanics;
j. maintenance mechanics;
k. chief engineers;
l. operating engineers;
m. firemen/boiler operators;
n. locksmiths;
o. welders; and


In Park Manor Care Center, Inc., 305 N.L.R.B. 872, 875, 139 L.R.R.M. (BNA) 1049 (1991), the NLRB, quoting St. Francis Hospital, 271 N.L.R.B. 948, 953 n.39, 116 L.R.R.M. (BNA) 1465 (1984), articulated a modified standard for determining appropriate bargaining units in non-acute healthcare facilities:

[W]e do not choose at this time to substitute for either “disparity of interests” or “community of interests” yet another short-handed phrase by which units in all nursing homes or other nonacute care facilities will be measured. Instead, we prefer to take a broader approach utilizing not only “community of interests” factors but also background information gathered during rulemaking and prior precedent. Thus . . . our consideration will include those factors considered relevant by the Board in its rulemaking proceedings, the evidence presented during rulemaking with respect to units in acute care hospitals, as well as prior cases involving either the type of unit sought or the particular type of healthcare facility in dispute. . . . We hope, however, that after various units have been litigated in a number of individual facilities, and “after records have been developed and a number of cases decided from these records, certain recurring factual patterns will emerge and illustrate which units are typically appropriate.” [Footnotes omitted.]

The NLRB in Park Manor Care Center also noted that “[a]lthough nursing homes were excluded from the Board’s rulemaking, the Board nonetheless believes that comparing and
contrasting individual nursing home work forces with those in the acute care hospitals would aid in determining appropriate units.” 305 N.L.R.B. at 875.

In practice, the NLRB adopts a general policy of accepting a petitioned-for unit as long as it is one of the many possible appropriate units in the particular facility. Virtua Health, Inc., 344 N.L.R.B. 604, 177 L.R.R.M. (BNA) 1158 (2005). The NLRB defended this policy in Virtua Health, noting: “There is nothing in the statute that requires that the unit sought be the only unit, the ultimate unit, or the most appropriate unit. The Act requires only that the unit be appropriate.” 344 N.L.R.B. at 609.


The NLRB presumes that a single-facility unit in the healthcare industry is appropriate. Catholic Healthcare West, 344 N.L.R.B. 790, 177 L.R.R.M. (BNA) 1181 (2005), citing Manor Healthcare Corp., 285 N.L.R.B. 224, 125 L.R.R.M. (BNA) 1333 (1987), and its progeny. A party opposing a single-facility unit has a heavy burden of overcoming the presumption. Catholic Healthcare West, supra. In determining the appropriateness of a single-facility unit, the NLRB in all industries considers traditional factors such as centralized control over daily operations and labor relations, including the extent of local autonomy; the degree of employee interchange, transfer, and contact; functional integration; similarity of skill, functions, and working conditions; geographic proximity; and bargaining history. In the healthcare industry, the NLRB also examines whether a single-facility unit creates an increased risk of work disruption or any other adverse impact on patient care should a labor dispute arise. When a party fails to show that allowing representation of employees in a single facility will have any greater impact on the provision of healthcare than that contemplated by the NLRB in Manor Healthcare, in rulemaking, or in subsequent cases, the presumption is not rebutted. Catholic Healthcare West, supra.

D. Other Considerations in Determining Bargaining Unit Status

1. [20.14] The Supervisory Status of Registered Nurses

The supervisory status of professional and nonprofessional nurses has been highly contested and frequently litigated. Section §2(3) of the NLRA specifically excludes from coverage “any individual employed as a supervisor.” 29 U.S.C. §152(3). Section 2(11) 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. 29 U.S.C. §152(11).

Supervisors, because they are not employees, are not bargaining unit members. Therefore, they have no right to participate in representation elections.
In cases involving nurses, the NLRB first developed a “patient care” analysis for determining supervisory status under the NLRA. The NLRB’s analysis relied on its “blanket assertion” that nurses who directed less-skilled employees in their exercise of professional judgment incidental to the treatment of patients did not exercise such authority “in the interest of the employer” and, therefore, were not statutory supervisors under the NLRA. After the Supreme Court rejected the NLRB’s “patient care” analysis as inconsistent with statutory language and Supreme Court precedent (see NLRB v. Health Care & Retirement Corporation of America, 511 U.S. 571, 128 L.Ed.2d 586, 114 S.Ct. 1778 (1994)), the NLRB then adopted an “independent judgment” analysis that presumed that a nurse’s use of professional or technical judgment when directing less-skilled employees did not amount to independent judgment under the NLRA.

In NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706, 149 L.Ed.2d 939, 121 S.Ct. 1861 (2001), the Supreme Court again rejected the NLRB’s articulated standard. In a five-four decision, the Court majority found that §2(11) of the NLRA prescribes supervisory authority based on independent judgment. The only qualifier is that such judgment not be clerical or routine — not whether such judgment is exercised by a professional or technical employee. The Court noted that nowhere in the statute is there a distinction between a professional who, for example, disciplines other employees and a professional who may responsibly direct a subordinate’s work. Both are attributes of a supervisor according to the Court.

In response to the Supreme Court’s Kentucky River Community Care opinion, the NLRB in 2006 articulated a revised legal standard for determining the supervisory status of registered nurses and other skilled employees. In Oakwood Healthcare, Inc., 348 N.L.R.B. 686, 180 L.R.R.M. (BNA) 1257 (2006), and two companion cases, Beverly Enterprises — Minnesota, Inc., 348 N.L.R.B. 727, 180 L.R.R.M. (BNA) 1288 (2006), and Croft Metals, Inc., 348 N.L.R.B. 717, 180 L.R.R.M. (BNA) 1293 (2006), the NLRB clarified definitions for the §2(11) functions of “assign,” “responsibly to direct,” and “independent judgment” as those terms are applied to employees in the healthcare industry. As to the first term, the NLRB in Oakwood Healthcare defined “assignment” as “the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” 348 N.L.R.B. at 689. In the healthcare setting, this definition encompasses charge nurse responsibilities for assigning nurses and aides to particular patients and the authority to require nurses and staff to leave early, stay past the end of their shifts, change assignments, and/or report to work when off duty. “[W]here the charge nurse makes an assignment based upon the skill, experience, and temperament of other nursing personnel and on the acuity of the patients, that charge nurse has exercised the requisite discretion to make the assignment a supervisory function ‘requir[ing] the use of independent judgment,’ ” noted the NLRB in its decision. 348 N.L.R.B. at 698, quoting 29 U.S.C. §152(11). Merely determining the order in which an employee is to perform assigned tasks or delivering ad hoc instructions to perform a discrete task is not sufficient to create supervisory status.

Assigning employees to specific geographic locations and redistributing and equalizing workloads does not establish supervisory status under §2(11). Consequently, in Oakwood Healthcare, the NLRB denied supervisory status to permanent charge nurses working in an emergency room when those nurses merely assigned employees to geographic areas within the emergency room without assessment of employee skills or the nature or severity of a patient’s condition.
The NLRB further interpreted “responsible direction” as requiring an individual to be accountable for the performance of work, meaning that “some adverse consequence,” such as discipline or a lower evaluation, may befall the individual providing the oversight if the tasks performed by the employee are not performed properly. 348 N.L.R.B. at 692. Responsible direction also requires the authority to take corrective action when work is not performed as directed. Being evaluated on the direction of others will not prove responsible direction unless reward or adverse action may be based on the employer’s evaluation of this factor. Supervisory authority also is not established when the putative supervisor has the authority merely to request (not require) that a certain action be taken. Beverly Enterprises-Minnesota, Inc., supra.

Finally, the NLRB in Oakwood Healthcare clarified the term “independent judgment” as requiring an individual to act or effectively recommend action, free of the control of others, and form an opinion or evaluation by discerning and comparing data. 348 N.L.R.B. at 692 – 693. A key factor in the independent judgment analysis is the degree of discretion exercised by the putative supervisor. As explained in Oakwood Healthcare, this means that in the healthcare industry supervisory status is undermined when the purported supervisor’s acts are dictated or controlled by detailed instructions, whether set forth in the hospital’s policies or rules, management’s verbal instructions, or the provisions of a collective-bargaining agreement. The mere existence of a hospital policy does not eliminate independent judgment from decision making if the policies allow for discretionary choices. These policies, however, cannot be so detailed as to prescribe a formulary approach or to eliminate the charge nurses’ discretion in matching nursing personnel to patients. For example, the decision to staff a shift with a certain number of nurses or to assign certain staff to a particular shift may not involve the use of independent judgment when such decisions are controlled by nurse-to-patient ratios or dictated by strict seniority provisions.

When an individual performs supervisory functions only some of the time, the supervisory status analysis turns on whether the individual spends a regular or substantial portion of his or her work time performing supervisory duties. “Regular” means according to a pattern or schedule, as opposed to sporadic substitution, and the NLRB generally recognized and confirmed in Oakwood Healthcare that 10 to 15 percent of total work time is “substantial.” 348 N.L.R.B. at 694. In Oakwood Healthcare, rotating charge nurses were not supervisors because there was no system or order for assigning charge nurse duties and the assignments were not regular or predictable. The NLRB left open the possibility that rotating charge nurses could be determined statutory supervisors in cases in which rotation occurs on a frequent basis and involves an established pattern or predictable schedule.

2. [20.15] Religious Order Members in Bargaining Units

Members of religious orders who work in healthcare institutions, such as sisters or priests, are generally excluded from bargaining units in Catholic hospitals. While clergy work alongside lay employees, their economic interests may not coincide with the regular staff. In addition, if clergy belong to the religious organization that owns or operates a healthcare institution, a conflict of interest could exist if they were included within the bargaining unit. Saint Anthony Center, 220 N.L.R.B. 1009, 90 L.R.R.M. (BNA) 1405 (1975); St. Rose de Lima Hospital, Inc., 223 N.L.R.B. 1511, 92 L.R.R.M. (BNA) 1181 (1976).
Though members of religious orders generally are excluded from bargaining units in Catholic hospitals, some courts have been hesitant to exclude these individuals automatically from collective-bargaining units simply on the basis of their religious membership and without a formal evidentiary hearing regarding a religious order’s status, control, and interest in the organization. *Mercy Hospital of Buffalo v. NLRB*, 668 F.2d 661 (2d Cir. 1982). When analyzing the role of these religious members, the NLRB examines the level of control and scope of authority a religious order may have within a particular healthcare institution. *Mercy Hospital of Buffalo*, 266 N.L.R.B. 944, 948, 113 L.R.R.M. (BNA) 1076 (1983), *enforcement granted*, 730 F.2d 75 (2d Cir. 1984). Additional facts concerning the community of interest between the religious member and other lay employees are also relevant to the determination of whether an individual may be excluded from the bargaining unit.

3. [20.16] Temporary Employees

Healthcare organizations are unique in their use of temporary and contracted employees to provide and support healthcare services. In *H.S. Care L.L.C.*, 343 N.L.R.B. 659, 176 L.R.R.M. (BNA) 1033 (2004), the NLRB overruled its prior decision in *M.B. Sturgis, Inc.*, 331 N.L.R.B. 1298, 165 L.R.R.M. (BNA) 1017 (2000), to determine that temporary employees are not appropriately included in bargaining units of regular employees. Specifically, the NLRB found inappropriate a petitioned-for unit of nursing home employees that included both employees who were solely employed by the nursing home and employees who were jointly employed by a personnel staffing agency. The NLRB concluded that permitting a combined unit of solely and jointly employed individuals contravenes §9(b) of the NLRA, 29 U.S.C. §159(b), by requiring different employers to bargain together regarding individuals in the same unit. The NLRB also stated that combined units of solely and jointly employed individuals are multiemployer units and are statutorily permissible only with the parties’ consent. The NLRB recognized that the bargaining structure of combined units gives rise to significant conflicts among the various employers and groups of employees participating in the process and are precisely the types of conflicts that §9(b) and the NLRB’s community-of-interest test are designed to avoid.

4. [20.17] Per Diem Employees

Healthcare employers frequently utilize on-call registry or per diem employees to supplement regular staff. Whether such employees are eligible to vote in representation elections under NLRB standards depends on whether there is disparity or uniformity in the average number of hours worked by the per diem/on call staff.

The NLRB utilizes two standards for determining whether per diem employees share a community of interest with regular part-time employees. In *Sisters of Mercy Health Corp.*, 298 N.L.R.B. 483, 134 L.R.R.M. (BNA) 1084 (1990), the NLRB found that absent significant disparities in the number of hours worked by on-call employees, employees are considered regular part-time if they work an average of four or more hours per week during the calendar quarter prior to the voter eligibility date. When there is a significant disparity in the number of hours worked, however, the NLRB utilizes a more restrictive formula whereby only those employees who work at least 120 hours in either of the two calendar quarters immediately prior to the eligibility date are eligible to vote. *Marquette General Hospital, Inc.*, 218 N.L.R.B. 713, 89 L.R.R.M. (BNA) 1459 (1975).
In *Marquette General Hospital*, the hours worked by on-call employees ranged from 23 to 540 in a calendar quarter. The NLRB found that “[s]election of eligible voters in cases where there is a significant difference in the number of hours worked by part-time or on-call employees depends on a careful balancing of the factors of length, regularity, and currency of employment.” 218 N.L.R.B. at 714. In situations in which a significant disparity exists in the number of hours worked, the NLRB typically will find that on-call employees who work less than 120 hours in a calendar quarter “[do] not share a community of interest with regular unit employees.” *Id.*

### III. [20.18] EMPLOYEE COMMITTEES

Section §8(a)(2) of the NLRA, 29 U.S.C. §158(a)(2), prohibits management assistance to or domination of labor organizations. This provision can be problematic for healthcare employers that often utilize employee committees, councils, and focus groups to solicit employee input on patient-care issues, promote positive employee relations, and find solutions to day-to-day work problems. For example, a nursing home was found to have violated §8(a)(2) by suggesting that its employees form a committee to bring problems to the employer’s attention. *3313 Realty Corp.*, 204 N.L.R.B. 107, 83 L.R.R.M. (BNA) 1368 (1973). Another hospital was found to have violated federal law when it formed, administrated, and financially supported an employee’s council. *Rideout Memorial Hospital*, 227 N.L.R.B. 1338, 94 L.R.R.M. (BNA) 1703 (1977). However, all hospital nursing advisory committees are not necessarily illegal. For example, in *Mercy-Memorial Hospital Corp.*, 231 N.L.R.B. 1108, 96 L.R.R.M. (BNA) 1239 (1977), the NLRB held that a committee was not a “labor organization” within the meaning of §8(a)(2) because it acted simply as a vehicle to give employees a voice during the grievance process. In *NLRB v. Streamway Division of Scott & Fetzer Co.*, 691 F.2d 288 (6th Cir. 1982), the Sixth Circuit denied enforcement of an NLRB decision and found an employee committee did not constitute a labor organization under the NLRA as employee choice was not inhibited by the employer. When a committee is formed at the same time as organizing activity, however, the NLRB is likely to view the committee as illegal.

In a non-healthcare case, the NLRB clarified the circumstances under which an employee committee may lawfully exist under the NLRA. In *Crown Cork & Seal Co.*, 334 N.L.R.B. 699, 167 L.R.R.M. (BNA) 1257 (2001), employee committees were created that dealt with a variety of workplace issues, including production, quality, training, attendance, safety, maintenance, and discipline (short of suspension or discharge). The committees made decisions by consensus and were authorized to act independently but were subject to the review of the management team. The NLRB held that because management delegated to the employee committees the authority to operate the plant in certain respects, the committees actually functioned in a supervisory capacity. The NLRB found that the groups did not deal with management and, therefore, were not labor organizations. In light of *Crown Cork*, employers have increased opportunities for use of employee committees. However, caution still should be exercised when establishing such committees in order to avoid liability under the NLRA.
IV. [20.19] SOLICITATION AND DISTRIBUTION IN HEALTHCARE

Section 7 of the NLRA confers upon employees the right to engage in “self-organization [and] to form, join, or assist labor organizations.” 29 U.S.C. §157. Section 8(a)(1), in turn, makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [§7].” [Emphasis added.] 29 U.S.C. §158(a)(1). The right of unions to communicate with employees is thus only derivative of employees’ rights under the NLRA. Consequently, the NLRB has historically applied different standards for determining the solicitation and distribution rights of employees and outside union organizers. Lechmere, Inc. v. NLRB, 502 U.S. 527, 117 L.Ed.2d 79, 112 S.Ct. 841, 845 – 847 (1992).

A. [20.20] Rights of Outside Union Organizers

An employer generally cannot be compelled to permit nonemployee union representatives to distribute literature or solicit membership on the employer’s property. Lechmere, Inc. v. NLRB, 502 U.S. 527, 117 L.Ed.2d 79, 112 S.Ct. 841, 845 – 847 (1992). There are two exceptions to this rule. First, under the “inaccessibility” exception, an employer violates §8(a)(1) of the NLRA, 29 U.S.C. §158(a)(1), if it denies a union access to the employer’s property when the union has no other means of communicating its message to employees. 112 S.Ct. at 846.

Second, under the “nondiscrimination” exception, an employer engages in discrimination if it prohibits union solicitation but selectively permits similar distribution or solicitation by other nonemployees. NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 100 L.Ed. 975, 76 S.Ct. 679, 684 (1956); Lucile Salter Packard Children’s Hospital at Stanford v. NLRB, 97 F.3d 583, 587 (D.C.Cir. 1996). Here, the NLRB has consistently found discrimination when an employer has allowed representatives of commercial and charitable organizations to access its property for solicitation or distribution activities but denied union representatives similar access. See, e.g., Simmons Industries, Inc., 321 N.L.R.B. 228, 152 L.R.R.M. (BNA) 1155 (1996); Albertson’s, Inc., 332 N.L.R.B. 1132, 166 L.R.R.M. (BNA) 1003 (2000), enforcement denied, 301 F.3d 441 (6th Cir. 2002); Shaw’s Supermarkets, Inc., No. 1-CA-39256/JD-30-05, 2005 WL 1536395 (NLRB Div.J.J. June 27, 2005). When a policy gives the employer discretion in granting or denying access to favored or familiar organizations, the NLRB also will find the policy unlawful.

Certain federal circuit courts, however, have rejected the NLRB’s discrimination standards. In Cleveland Real Estate Partners v. NLRB, 95 F.3d 457 (6th Cir. 1996), the Sixth Circuit defined discrimination to exist only when the employer has favored one union over another, or allowed employer-related information while barring similar union-related information. See also Salmon Run Shopping Center LLC v. NLRB, 534 F.3d 108 (2d Cir. 2008) (adopting Sixth Circuit’s discrimination standard as articulated in Sandusky Mall Co. v. NLRB, 242 F.3d 682 (6th Cir. 2001) (upholding standard adopted in Cleveland Real Estate Partners, supra)). Other circuit courts have adopted a more limited view that an employer may lawfully differentiate between different types of activities as long as such distinctions are not set on §7 lines. See Guardian Industries Corp., 49 F.3d 317 (7th Cir. 1995). Despite such differences in opinion, the NLRB continues to adhere to a standard that defines discrimination based on access provided to all other nonunion entities.
There are two situations in which the NLRB’s nondiscrimination rule does not apply. First, an employer does not unlawfuly discriminate against union solicitation by permitting “a small number of isolated ‘beneficent acts’” (i.e., charitable solicitations) but otherwise strictly enforcing a no solicitation policy against all other nonemployee groups, individuals, and organizations. Hammary Manufacturing Corporation, Division of U.S. Industries, 265 N.L.R.B. 57 n.4, 111 L.R.R.M. (BNA) 1346 (1982). See, e.g., Guardian Industries, supra, 49 F.3d at 321; Emerson Electric Co., U.S. Electrical Motors Division, 187 N.L.R.B. 294, 76 L.R.R.M. (BNA) 1152 (1970). When charitable solicitations are frequent or extend over a lengthy period of time, however, the beneficent acts exception does not apply. See, e.g., Riesbeck Food Markets, Inc., 315 N.L.R.B. 940, 941, 148 L.R.R.M. (BNA) 1017 (1994), enforcement denied, 91 F.3d 132 (4th Cir. 1996); Shaw’s Supermarkets, supra; Be-Lo Stores, 318 N.L.R.B. 1, 151 L.R.R.M. (BNA) 1310 (1995). The NLRB has failed to articulate a bright-line test for determining the number of permissible charitable solicitations. The NLRB has, however, found that more than two charitable solicitations in a one-year period exceeds the number of allowable solicitations under this exception.

Second, an employer does not unlawfully discriminate in the application of its solicitation policy by allowing access and solicitation by nonemployees that “[assist] the [employer] in carrying out its . . . functions” or are an integral part of the employer’s functions and responsibilities. Rochester General Hospital, 234 N.L.R.B. 253, 259, 97 L.R.R.M. (BNA) 1410 (1978). In the hospital context, acceptable activities have included blood drives, pharmaceutical sales solicitations, and medical textbook displays. Id.; George Washington University Hospital, Division of George Washington University, 227 N.L.R.B. 1362, 1374 n.39, 95 L.R.R.M. (BNA) 1163 (1977). This exception also includes solicitations by nonemployees who are “intimately related to the fringe benefits that the Hospital offers it employees,” meaning that they provide employee benefits that are paid in whole or in part by the employer. Lucile Salter Packard Children’s Hospital, supra, 97 F.3d at 588, 590. Thus, a hospital may permit representatives of its insurance provider to distribute information to employees. Solicitations by external credit unions, community services organizations, private insurance companies, and vendors contributing small percentages (up to 15 percent) of their gross receipts to employee fund-raising committees have been found to fall outside this exception. Id.

Unfortunately, this area of law is not well defined. It is not clear how significant an employer’s subsidy of benefits must be for a vendor to provide a service that is “intimately related” to employee fringe benefits. Further, NLRB caselaw is unclear as to whether an employer has an independent right to engage in solicitation on its own behalf or for its own corporate-sponsored charities.

B. [20.21] Employee Organizing Activities at Work

Employers in most other sectors generally must permit employees to solicit one another at work, provided that this solicitation is done during nonworking times (e.g., during breaks or lunch hours and before or after shifts). However, healthcare employers are entitled to enact more stringent solicitation/distribution policies in the interest of providing quality patient care. The NLRB has allowed hospitals to prohibit employee solicitation, even during nonworking time, in
areas that are strictly devoted to patient care. In *St. John’s Hospital & School of Nursing, Inc.*, 222 N.L.R.B. 1150, 91 L.R.R.M. (BNA) 1333 (1976), *enforcement granted in part, denied in part*, 557 F.2d 1368 (10th Cir. 1977), the NLRB held that solicitation may be curtailed in areas strictly devoted to patient care, such as patients’ rooms, operating rooms, and places where patients receive treatment (e.g., X-ray and therapy areas). However, the NLRB found that areas such as the cafeteria, where the public has general access, could not be off-limits for purposes of employee solicitation. On appeal, the Tenth Circuit expanded the ability of hospitals to prohibit union solicitation in their facilities by allowing hospitals to exclude union-organizing activities in patient access areas as well as patient-care areas. “Patient access” areas include corridors to treatment areas and patient lounges.

In determining the validity of hospital solicitation policies, courts use a case-by-case approach that relies on the facts of the individual situation. For example, in *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 57 L.Ed.2d 370, 98 S.Ct. 2463 (1978), the Court held that it was illegal for an employer to prohibit solicitation in the hospital’s cafeteria, which was used primarily by employees and not patients. Likewise, the hospital’s solicitation policy was found to be illegal in *NLRB v. Baylor University Medical Center*, 439 U.S. 9, 58 L.Ed.2d 202, 99 S.Ct. 299 (1978). The Court ruled that an employer’s ban on solicitation and distribution of union literature in the hospital’s cafeteria was illegal. However, the Court upheld the hospital’s right to ban employee union solicitation in the hospital’s corridors. The Court has upheld employer prohibitions against solicitation by employees in hospital corridors and sitting rooms when the hospital can demonstrate a need to preserve a “tranquil atmosphere.” *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773, 61 L.Ed.2d 251, 99 S.Ct. 2598, 2604 (1979), quoting *NLRB v. Baptist Hospital, Inc.*, 576 F.2d 107, 109 – 110 (6th Cir. 1978). In *Baptist Hospital*, the hospital justified its prohibition on solicitation in patient access areas. However, it could not justify its prohibition of solicitation in all public areas of the facility, including the lobby, cafeteria, and coffee shop. Alternatively, however, courts also have found it proper to ban union activity even in the non-patient-care areas of the hospital based on the need to deter further congestion at overcrowded facilities. *Dallas Association of Community Organizations for Reform Now v. Dallas County Hospital District*, 656 F.2d 1175 (5th Cir. 1981).

Healthcare employers also must permit employee distribution during nonworking time and in nonworking areas, unless the employer can justify a more restrictive prohibition as necessary to avoid disruption of healthcare operations or disturbance of patients. *Beth Israel Hospital, supra*, 98 S.Ct. at 2476. In all situations, the healthcare employer must enforce its solicitation and distribution restrictions in a nondiscriminatory manner. The NLRB historically has found discrimination any time an employer allows employee solicitation or distribution for certain causes (e.g., Girl Scout cookies, Mary Kay, Pampered Chef, etc.) but prohibits union solicitation or distribution. See, e.g., *St. Margaret Mercy Healthcare Centers*, 350 N.L.R.B. 203, 182 L.R.R.M. (BNA) 1241 (2007). The fact that an employer permits solicitation in patient-care areas by management or employees also may undermine the enforceability of employer restrictions on employee solicitation in immediate patient-care areas.

In evaluating a hospital’s solicitation/distribution policy, the NLRB will examine the following factors:
1. Does the prohibition apply to immediate patient-care areas or to patient access areas where there is a genuine likelihood of patient disturbance? (Occasional or infrequent patient disturbances will not justify solicitation restrictions. For example, patient elevator use does not justify banning solicitation by employees in this area.)

2. Are there other means available for employee communication (e.g., lounges, cafeterias, lobbies)? The NLRB will examine the number or percentage of employees who use or have access to the means of communication, whether the location is inconvenient, etc.

3. Can patient use of the area be documented? (This factor is important because of the NLRB’s and Supreme Court’s emphasis on the individual facts governing each case.)

4. Is the solicitation/distribution policy enforced in a nondiscriminatory manner? For example, does the hospital prohibit union-organizing solicitation while allowing employees to sell Girl Scout cookies? In Stanadyne Automotive Corp., 345 N.L.R.B. 85, 178 L.R.R.M. (BNA) 1112 (2005), vacated in part and remanded on other grounds; International Union, United Automobile, Aerospace, & Agricultural Implement Workers of America v. NLRB, 520 F.3d 192 (2d Cir. 2008), the NLRB determined that an employer may forbid employees from talking about a union during working time only if this prohibition extends to other subjects not associated with their work tasks.

In Brockton Hospital, 333 N.L.R.B. 1367, 170 L.R.R.M. (BNA) 1167 (2001), the NLRB found that a Massachusetts hospital violated the NLRA by maintaining an overly broad policy prohibiting employees from engaging in solicitation or distribution of literature in “halls and corridors used by patients.” The majority stated that prohibiting solicitation during nonworking hours or distribution of literature during nonworking time in nonworking areas is presumptively unlawful even if patients have access to such areas. Although stating that an “atmosphere of serenity” is desirable in a hospital setting to speed patient recovery, the majority said the NLRB’s presumptions regarding restrictions on solicitation and literature distributions by hospital employees reflect a careful consideration of the interests of patients, as balanced against the interest of employees to exercise their right under §7 of the NLRA, 29 U.S.C. §157, to communicate with one another regarding self-organization at the jobsite. 333 N.L.R.B. at 1369.

C. [20.22] Off-Duty Employee Solicitation

Many hospitals prohibit off-duty employees from returning to the facility for purposes of solicitation. However, these same hospitals often allow employees to return to the premises during their off-duty hours for other purposes, e.g., visiting patients, using the cafeteria, or picking up their paychecks. The NLRB has ruled that such policies violate the NLRA because the hospital enforces its policy in a discriminatory manner. Clear Lake Hospital, 223 N.L.R.B. 1, 91 L.R.R.M. (BNA) 1450 (1976); Saint Joseph Medical Center, 276 N.L.R.B. 456, 120 L.R.R.M. (BNA) 1116 (1985). The NLRB has established a three-prong test to determine the validity of rules that deny access to off-duty employees:

1. The rule must limit access only to the interior of the facility or other working areas.
2. The rule must be clearly disseminated to all employees.

3. The rule must apply to all off-duty employees seeking access to the employer’s premises. *Tri-County Medical Center, Inc.*, 222 N.L.R.B. 1089, 91 L.R.R.M. (BNA) 1323 (1976).

Therefore, healthcare employers cannot have policies that prohibit solicitation by off-duty employees if those employees are allowed on-site for other purposes. The NLRB has ruled that it is presumptively unlawful for a hospital to prohibit off-duty employees from distribution in parking lots or the grounds outside the hospital. *Presbyterian Medical Center*, 227 N.L.R.B. 904, 94 L.R.R.M. (BNA) 1695 (1977). Therefore, a hospital may not be able to limit access to these areas unless it can demonstrate that the distribution impedes patient access or compromises the delivery of quality care.

D. [20.23] Employee Rights To Utilize Employer Communication Systems

Federal law does not require that employees or labor organizations be entitled to use a particular medium of communication (such as employer bulletin boards, telephones, copiers, or e-mail systems) simply because the employer is using it. *NLRB v. United Steelworkers of America, CIO*, 357 U.S. 357, 2 L.Ed.2d 1383, 78 S.Ct. 1268, 1272 (1958). Thus, an employer generally may restrict employee use of such property, provided the restrictions are imposed in a nondiscriminatory manner. *Mid-Mountain Foods, Inc.*, 332 N.L.R.B. 229, 230, 168 L.R.R.M. (BNA) 1450 (2000).

In December 2007, the NLRB adopted a new standard for analyzing discrimination related to the enforcement of policies restricting employee solicitation via an employer’s communication system. In *Guard Publishing Co.*, 351 N.L.R.B. 1110, 183 L.R.R.M. (BNA) 1113 (2007), the NLRB reversed longstanding precedent and ruled that employers may lawfully prohibit use of their communications systems for all non-work-related purposes. Employers also may enforce policies that distinguish between the type and nature of employee activity, provided such distinctions are not based on the exercise of employee rights under §7 of the NLRA, 29 U.S.C. §157. *Guard Publishing, supra*.

Under the NLRB’s prior rule, an employer that allowed employees to use communication equipment for any non-work-related purpose was required to permit employees to use such equipment for union-related purposes. *Guard Publishing* established a new rule that permits employers to draw lines between charitable and noncharitable employee solicitation, between solicitations of a personal nature (e.g., a car for sale) and solicitations for the commercial sale of a product (e.g., Avon products), between invitations for membership and invitations of a personal nature, between solicitations and mere talk, and between business-related use and non-business-related use. An employer discriminates against union solicitation only if it permits other non-work-related communications of a similar character (such as employees’ anti-union communications or solicitations pertaining to other noncharitable organizations). *Id.*

The impact of the NLRB’s *Guard Publishing* decision is yet unknown, and thus employers should proceed with caution before drastically revising their policies to comport with the NLRB’s new standards. The three-two decision issued from a deeply divided NLRB. Arguments raised in
the strongly worded dissent written by now-NLRB Chairman Wilma Liebman likely may form the basis for limitation or reversal of *Guard Publishing* in the future.


Many healthcare employers allow employees and nonemployees to reach hospital employees through bulletin board postings. Employers that allow local civic groups to post materials on their internal bulletin boards often restrict bulletin board access for literature regarding union organizing. The NLRB has ruled that such discriminatory treatment is illegal. *Vincent’s Steak House, Inc.*, 216 N.L.R.B. 647, 89 L.R.R.M. (BNA) 1210 (1975). Therefore, the only way a healthcare employer can legally prohibit employees from using bulletin boards for union organizing is by adopting a valid, nondiscriminatory rule that prohibits employees from using bulletin boards for any purposes.

Some healthcare employers allow employees to post notices on bulletin boards, but the posting is conditioned on prior administrative approval. Such policies constitute undue interference with employees’ rights. The NLRB has interpreted such rules as discriminatorily impacting pro-union employees and interfering with their organizing rights. For example, in *Lassen Community Hospital, Division of Eskaton Health Corporation, Division of Eskaton*, 278 N.L.R.B. 370, 122 L.R.R.M. (BNA) 1029 (1986), the NLRB reasoned that a union supporter would be hesitant to approach hospital administration for approval prior to posting pro-union literature. *See also Central Vermont Hospital, Subsidiary of Central Vermont Medical Center, Inc.*, 288 N.L.R.B. 514, 128 L.R.R.M. (BNA) 1157 (1988).

F. [20.25] Union Insignia

Under the NLRA, employees generally have the right to wear union insignia in the workplace. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 89 L.Ed. 1372, 65 S.Ct. 982 (1945). However, many healthcare employers have adopted policies that prohibit employees from adorning their uniforms with buttons, pins, or other insignia. This type of policy or rule may violate §8(a)(1) of the NLRA, 29 U.S.C. §158(a)(1), unless the hospital can prove that the rule is necessary to maintain safety, efficiency, production, or discipline. *Asociacion Hospital del Maestro, Inc. v. NLRB*, 842 F.2d 575 (1st Cir. 1988). In one case, however, the NLRB upheld a nursing home employer’s rule that its employees could not wear union buttons on their uniforms during working hours. *Evergreen Nursing Home & Rehabilitation Center, Inc.*, 198 N.L.R.B. 775, 80 L.R.R.M. (BNA) 1825 (1972). The NLRB found the employer’s prohibition on union buttons was justified because (1) the buttons were large and conspicuous and detracted from the dignity of the employees’ all-white uniforms; (2) employees had direct contact with elderly patients whose reactions to the buttons were unpredictable and could result in severe agitation; and (3) the employer’s rule against wearing “unnecessary adornments” on employee uniforms was promulgated before the union had commenced its organizing campaign. *But see Mt. Clemens General Hospital*, 335 N.L.R.B. 48, 170 L.R.R.M. (BNA) 1559 (2001) (NLRB found hospital violated NLRA by discriminatorily requiring employees to remove overtime protest buttons from their nurses’ uniforms, enforcing overly broad prohibition of wearing of insignia).

Like solicitation and distribution policies that must be evenhandedly enforced throughout the workplace, hospital employers that allow employees to wear other buttons, such as smile faces,
nurse association pins, and religious pins, cannot prohibit employees from wearing union insignia or buttons. For example, the NLRB relied on the following four factors to determine that a nursing home employer violated the NLRA when it fired an employee who breached a rule prohibiting the wearing of union buttons:

1. While the employer’s rule prohibited wearing of union insignia, there was no similar rule against wearing buttons unrelated to union activities. In fact, employees often wore smile buttons or religious buttons during working hours.

2. There was no rule against wearing buttons until the onset of the union’s organizing campaign. The newly adopted policy was viewed as a direct attempt to thwart the union’s success.

3. The employer could not justify the rule as necessary to promote the health and welfare of residents.


Hospitals must tailor policies that prohibit wearing of buttons or union insignia to the needs of the individual institution. For example, it is unlikely that a hospital could defend a policy prohibiting all employees (including employees who have no patient contact) from wearing union insignia. In Enloe Medical Center, 345 N.L.R.B. 874, 178 L.R.R.M. (BNA) 1123 (2005), the NLRB held that requiring employees to limit their wearing of badges to non-patient-care areas that patients, families, and visitors did not frequent was overboard and exceeded the restriction that would be presumptively valid under the NLRA. In addition, such policies must be implemented prior to union-organizing campaigns and consistently applied throughout the workforce, regardless of the type of insignia or button worn.

G. [20.26] Fund-Raising Activity Conducted by Volunteer Services

Volunteer services often are directly involved in fund-raising activities for a hospital. Traditionally, as part of such fund-raising activities, volunteer service organizations invite outside vendors to sell their products to hospital employees, with a percentage of proceeds being donated to the hospital. The NLRB has consistently held that an employer acts discriminatorily by allowing nonemployee representatives of certain outside groups to solicit employees from tables and booths while denying union representatives similar access. Lucile Salter Packard Children’s Hospital at Stanford v. NLRB, 97 F.3d 583 (D.C.Cir. 1996). The charge of a vendor fee or percentage receipt of gross sales is insufficient to escape the nondiscrimination exception for union access. By allowing outside vendors to set up booths and product displays, a hospital risks the enforcement of its policy and creates substantial risk of union access. For these reasons, healthcare organizations often prohibit or restrict access of such outside vendors to limited geographic locations.
Fund-raising activities performed and staffed directly by volunteers and hospital employees create far less risk, particularly when all or substantially all proceeds are donated directly to the hospital. For example, dinner raffles, bake sales, and craft sales in which items are made or prepared entirely by employees create minimal risk of union solicitation.

H. [20.27] Legal Risks Associated with Enforcement of Overly Broad Solicitation and Distribution Policies

When an employer promulgates or maintains overly broad no-solicitation and no-distribution rules, those rules are invalid for all purposes and not valid in part as they otherwise may lawfully apply in a given area and/or context. Memorial Hospital of Rhode Island, No. 1-CA-43432/JD-49-07, 2007 WL 2126835 (NLRB Div.JJ. July 20, 2007). This means that the employer cannot enforce the policy against employees engaging in union solicitation and may be liable to provide a remedy to any employee against whom the policy has been enforced.

Further, a violation of law occurs even when “enforcement” of the policy consists only of informing employees that the policy exists, or instructing employees to cease engaging in certain union activity. Saint Vincent Hospital, 265 N.L.R.B. 38, 42, 111 L.R.R.M. (BNA) 1349 (1982). In determining whether a policy is overbroad, the NLRB considers both the number and the type of incidents involved. In more egregious situations, an employer may be required to permit a union lawful on-site access to employees for solicitation and distribution of union information. Not-for-profit organizations also need to consider whether for-profit solicitations jeopardize their tax-exempt status under state laws that may limit or restrict the type, scope, number, and structure of for-profit operations operated within the facilities of the not-for-profit organization.

The assessment of legal risks associated with specific solicitation and distribution practices is difficult, as NLRB caselaw in this area is not well defined. NLRB decisions are fact-specific and susceptible to inconsistencies based on the composition and political leanings of individual NLRBs. Put simply, any solicitation that an employer condones may hinder its ability to enforce otherwise valid policies that limit solicitation by employees and nonemployee union organizers. Healthcare employers are encouraged to make individualized assessments of the relative risks associated with particular activities that occur at their facilities. The implications of enforcing an overly broad solicitation policy are significant. Unions increasingly rely on communication technologies, such as e-mail, to organize new members. Enactment of the proposed Employee Free Choice Act of 2009, H.R. 1409, S. 560, 111th Cong., 1st Sess., may provide greater incentive for unions and employee supporters to push the bounds of articulated policies and aggressively challenge inconsistencies in the enforcement of any prohibitions placed on employee and union rights to communicate with targeted employees. The failure of an employer to enforce its policies on a consistent basis may be sufficient to open up communication channels to union solicitation.

I. [20.28] Confidentiality Policies

The NLRB has held that confidentiality policies of healthcare institutions that are narrowly tailored to protect patient confidentiality and other justifiable interests are lawful. In assessing the lawfulness of a particular policy, the NLRB must not consider the subjective impact of the rule on
individual employees, but must determine whether the rule reasonably tends to coerce employees in the exercise of their rights under §7 of the NLRA, 29 U.S.C. §157, and, if so, whether the employees’ §7 rights are outweighed by any legitimate and substantial business justification for the rule. See Pontiac Osteopathic Hospital, 284 N.L.R.B. 442, 126 L.R.R.M. (BNA) 1321 (1987).

The NLRB and federal courts recognize an employer’s interest in protecting private and confidential internal information from employees who may abuse positions of trust. See NLRB v. Brookshire Grocery Co., 919 F.2d 359 (5th Cir. 1990); Bell Federal Savings & Loan Association of Bellevue, 214 N.L.R.B. 75, 87 L.R.R.M. (BNA) 1415 (1974). Employees “are entitled to use for self-organizational purposes information and knowledge which comes to their attention in the normal course of work activity and association but are not entitled to their Employer’s private or confidential records.” Ridgely Manufacturing Co., 207 N.L.R.B. 193, 196 – 197, 84 L.R.R.M. (BNA) 1655 (1973). The NLRB has recognized that an employer has “the right to expect its employees to use greater care in using information acquired in the course of their employment.” NLRB v. Knuth Brothers, Inc., 537 F.2d 950, 956 (1976).

Confidentiality policies in healthcare institutions must be narrowly tailored to include patient information and confidential business information. The NLRB has determined that an unqualified prohibition of the release of “any information” regarding employees could be reasonably construed to restrict discussion of wages and other terms and conditions of employment in violation of the NLRA. Cintas Corp., 344 N.L.R.B. 943, 177 L.R.R.M. (BNA) 1269 (2005). Although an employer may adopt a policy requiring employees to bring problems and complaints to the attention of management, application of such a policy may result in unlawful infringement of employee §7 rights if used to curtail employee discussions regarding terms and conditions of employment. Easter Seals Connecticut, Inc., 345 N.L.R.B. 836, 178 L.R.R.M. (BNA) 1333 (2005).

V. [20.29] NOTICE OF COLLECTIVE BARGAINING

The 1974 Health Care Amendments (see §20.1 above) amended the NLRA to provide a longer contract notice provision for healthcare employers. Specifically, §8(d) of the NLRA was amended to require a party to give 90 days’ notice if that party intends to terminate or modify the agreement. 29 U.S.C. §158(d)(A). Section 8(d)(A) further specifies that 60 days’ notice must be given to the Federal Mediation and Conciliation Service and any state or territorial agency if there is a contract dispute and states that a collective-bargaining agreement remains in effect for 90 days after notice of its proposed modification or termination.

VI. [20.30] STRIKES, PICKETING, AND OTHER CONCERTED ACTIVITY

A labor organization is subject to special requirements under the NLRA before it can engage in “any strike, picketing, or other concerted refusal to work” in the healthcare industry. 29 U.S.C. §158(g). As part of the 1974 Health Care Amendments (see §20.1 above), the NLRA was amended to include §8(g), which requires:
A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any 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. 29 U.S.C. §158(g).

Congress added §8(g) after recognizing that the public has special concerns about the continuity of healthcare and well-being of patients. The purpose of §8(g) was “to give the health care institutions sufficient advance notice of a strike or picketing to permit [them to make] timely arrangements for continuity of patient care.” Alexandria Clinic, P.A., 339 N.L.R.B. 1262, 1264, 173 L.R.R.M. (BNA) 1065 (2003). A labor organization’s failure to provide the appropriate ten days’ notice prior to engaging in strike or picketing activity constitutes an unfair labor practice under the NLRA.

There has been some dispute as to what constitutes “picketing” under the NLRA. In District 1199, National Union of Hospital & Health Care Employees, Retail, Wholesale & Department Store Union, 256 N.L.R.B. 74, 107 L.R.R.M. (BNA) 1190 (1981), union organizers contended that their activity of visiting a hospital on at least six different occasions and handing out leaflets to employees entering or leaving the premises was not picketing within §8(g). The union organizers asserted it was never their intention to keep employees from work or to cause a disruption of the employer’s operation and, thus, §8(g)’s notice requirements were inapplicable.

The NLRB disagreed and held that while it may not have been the intent of the organizers to disrupt the hospital, it is conceivable that it could have been the result. Moreover, §8(g) was intended to apply to all forms of picketing and not just to that which involves a work stoppage. The NLRB concluded that the notice requirement applies to all forms of picketing since any picketing may induce actions by others that creates a risk that the delivery of health services will be disrupted. See also American Federation of Nurses, Local 535, S.E.I.U., 313 N.L.R.B. 1201, 146 L.R.R.M. (BNA) 1204 (1994); West Lawrence Care Center Inc., 308 N.L.R.B. 1011, 141 L.R.R.M. (BNA) 1262 (1992).

A. [20.31] Requirements for Compliance

A labor organization’s notification of strike or picketing activity must inform the healthcare institution of the time and date the activity will occur. The notice need not distinguish whether there will be a strike or picketing activity; nor is there a requirement that the notice specify the locations where actions will take place for employers with multiple facilities. Hospital & Institutional Workers’ Union, Local 250, SEIU, 255 N.L.R.B. 502, 107 L.R.R.M. (BNA) 1211 (1981).
1. [20.32] Writing Requirement

The ten-day notice must be in writing. 29 U.S.C. §158(g). In Retail Clerks Union Local 727, Chartered by & Affiliated with United Food & Commercial Workers International Union, AFL-CIO, CLC (Devon Gables Health Care Center, Inc.), 244 N.L.R.B. 586, 102 L.R.R.M. (BNA) 1117 (1979), the NLRB held that a union officer’s conversation with an official of the Federal Mediation and Conciliation Service was insufficient. The NLRA’s writing requirement is strictly construed.

2. [20.33] Notice to Whom

Labor organizations must notify both the healthcare institution and the Federal Mediation and Conciliation Service of their intention to strike, picket, or refuse to work. 29 U.S.C. §158(g). In enacting §8(g), the congressional committee determined that this notice would give the NLRB an opportunity to assess the legality of any striking or picketing beforehand. S.Rep. No. 766, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 3946, 3949.

3. [20.34] Timing Requirement

A labor organization must give notice at least ten days before any strike or picketing activity takes place. 29 U.S.C. §158(g). This time period is strictly construed. The NLRB held a violation of §8(g) occurred when a nursing home had just nine days’ written notice and the Federal Mediation and Conciliation Service had only seven days’ notice of strike activity. Retail Clerks Union Local 727, Chartered by & Affiliated with United Food & Commercial Workers International Union, AFL-CIO, CLC (Devon Gables Health Care Center, Inc.), 244 N.L.R.B. 586, 102 L.R.R.M. (BNA) 1117 (1979). The notice must include a specific time for the strike, which should be stated to the nearest hour. When a union failed to specify the time or date in its notice to a healthcare institution, the Ninth Circuit Court of Appeals upheld the NLRB’s decision that this was a violation of §8(g). NLRB v. Stationary Engineers, Local 39, 746 F.2d 530 (9th Cir. 1984). The court recognized that §8(g) and its legislative history clearly demonstrate the necessity of healthcare institutions being apprised with advance notice of work stoppages so they can arrange for the continuity of patient care.

The NLRB will not follow this mechanical rule, however, when there are extenuating circumstances. Such a situation arose when a labor organization mailed a ten-day notice to the hospital with insufficient postage so that it did not arrive until a month after the strike. Bio-Medical Applications of New Orleans, Inc., 240 N.L.R.B. 432, 100 L.R.R.M. (BNA) 1300 (1979), decision supplemented, 247 N.L.R.B. 973 (1980). The NLRB made an exception under these facts because the union had made reasonable efforts to deliver the notice, the employer had ten days’ actual notice of the strike, the employer implemented contingency plans during this time period, and the union extended the time for commencing the strike by giving an additional twelve hours’ notice.

In most other circumstances, however, the NLRB has reiterated a strict notice requirement. In West Lawrence Care Center Inc., 308 N.L.R.B. 1011, 141 L.R.R.M. (BNA) 1262 (1992), the NLRB found that the union violated §8(g) when it failed to give the employer a ten-day written notice. The NLRB stated:
Section 8(g) notice is not designed to protect the interests of either employers or employees. Section 8(g) notice protects the interests of third parties for whom an unanticipated work stoppage may be a life-or-death matter. We are reluctant to conclude that the full Congress intended to sacrifice the safety of the sick or dying to help labor organizations at health care institutions avoid a ten-day delay in going on strike. 308 N.L.R.B at 1016, quoting NLRB v. Washington Heights-West Harlem-Inwood Mental Health Council, Inc., 897 F.2d 1238, 1248 (2d Cir. 1990).

4. [20.35] Delay of Strike

In Bio-Medical Applications of New Orleans, Inc., 240 N.L.R.B. 432, 435, 100 L.R.R.M. (BNA) 1300 (1979), the NLRB adopted a “reasonableness” standard that permitted a union to unilaterally delay the start of a strike “between 12 and 72 hours . . . where there is at least 12 hours advance notice given to the employer of the postponement.” In doing so, the NLRB relied on a Senate Report to the 1974 amendments to the NLRA that stated:

It is not the intention of the Committee that a labor organization shall be required to commence a strike or picketing at the precise time specified in the notice; on the other hand, it would be inconsistent with the Committee’s intent if a labor organization failed to act within a reasonable time after the time specified in the notice. Thus, it would be unreasonable, in the Committee’s judgment, if a strike or picketing commenced more than 72 hours after the time specified in the notice. In addition . . . if a labor organization does not strike at the time specified in the notice, at least 12 hours notice should be given of the actual time for commencement of the action. [Emphasis added by NLRB.] 240 N.L.R.B. at 434 – 435, quoting S.Rep. No. 766, 93d Cong., 2d Sess. 4 (1974).

The NLRB’s 72-hour rule went relatively unchallenged until federal courts in the Second and D.C. Circuits, respectively, denied enforcement of unfair labor practice charges based on a union’s failure to adhere to the “unambiguous language of the statute requiring the Union to specify in writing the date and time it would strike.” NLRB v. Washington Heights-West Harlem-Inwood Mental Health Council, Inc., 897 F.2d 1238, 1247 (2d Cir. 1990). See also Beverly Health & Rehabilitation Services, Inc. v. NLRB, 317 F.3d 316, 321 (D.C.Cir. 2003). In Beverly Health & Rehabilitation, the D.C. Circuit noted: “If the Congress had intended to allow either party to extend the notice unilaterally, it could easily have said so — but it did not. Instead, the Congress carved out but a single express exception — when both parties consent in writing — an exception that would be unnecessary if either party could unilaterally extend the notice at will.” Id.

In Alexandria Clinic, P.A., 339 N.L.R.B. 1262, 1271, 173 L.R.R.M. (BNA) 1065 (2003), the NLRB joined the Second and D.C. Circuits in holding that the plain language of §8(g) bars a union from unilaterally extending the date and time of a strike as disclosed in the union’s ten-day notice. The NLRB explained: “In our view, by relying on the legislative history to find that unilateral extensions of strike notices were permissible, the Board in [Bio-Medical Applications of New Orleans] effectively rewrote the third sentence of Section 8(g) to make its requirements discretionary rather than mandatory.” 339 N.L.R.B. at 1265. In Alexandria Clinic, the NLRB
overruled Bio-Medical Applications of New Orleans and began enforcing a plain-meaning interpretation of §8(g), explaining that its new interpretation effectuated the policy underlying the statute — to protect patient healthcare — and eliminated “the kind of needless uncertainty and concomitant litigation generated [by] the imprecise and ambiguous ‘substantial compliance’ standard of [Bio-Medical Applications of New Orleans].” 339 N.L.R.B. at 1266. In Minnesota Licensed Practical Nurses Ass'n v. NLRB, 406 F.3d 1020 (8th Cir. 2005), the Eighth Circuit, in denying a petition for review of the NLRB’s decision in Alexandria Clinic, upheld the NLRB’s construction of §8(g) and the termination of 24 nurses who engaged in strike activities in violation of the NLRA.

In Alexandria Clinic, the NLRB left open two issues as not presented by the facts of the case: whether a de minimis delay in the start of a strike would violate §8(g) and whether “the traditional doctrine of equitable estoppel” might apply when a strike was postponed by an unanticipated emergency and the employer “unreasonably declined to grant an extension.” 339 N.L.R.B. at 1267 n.17 (finding four-hour delay not de minimis and no evidence of unanticipated emergency presented). These two issues promise to be matters litigated in years to come.

B. [20.36] Consequences of Violating the Ten-Day Notice

Failure to comply with notice requirements under §8(g) of the NLRA, 29 U.S.C. §158(g), may lead to unfair labor practice charges. A healthcare institution also may seek remedial action against both the union and individual employees. An employer may seek a cease-and-desist order against the union to end the strike or picketing. The employer also may request that the union post copies of a notice, signed by its authorized representatives, at its business offices and meeting halls assuring that no further violations of §8(g) will occur.

C. Rights of Employees To Engage in Strike and Picketing Activity

1. [20.37] Unrepresented Employees

The notification requirements of §8(g) of the NLRA, 29 U.S.C. §158(g), apply only to “labor organizations.” Courts, as well as the NLRB, have read the clear, unambiguous language of §8(g) to mean what it says: the notice requirements are applicable only if the strike is by a labor organization. When no labor organization is involved, employees are not legally required to provide notice of strike or picketing activity. For example, two unrepresented nursing home employees did not have to comply with §8(g) when they engaged in a half-hour work stoppage to present a grievance of understaffing and lack of supplies to their employer. Walker Methodist Residence & Health Care Center, Inc., 227 N.L.R.B. 1630, 94 L.R.R.M. (BNA) 1516 (1977). See also Bethany Medical Center, 328 N.L.R.B. 1094, 162 L.R.R.M. (BNA) 1403 (1999). Six unrepresented nurses who engaged in an unannounced work stoppage to protest understaffing were likewise free from §8(g) requirements. Mercy Hospital Ass’n, 235 N.L.R.B. 681, 98 L.R.R.M. (BNA) 1077 (1978). When 17 unrepresented employees, who were in the process of joining a union, held a “sick in” to protest personnel policies, the NLRB held that this concerted activity was protected by §7 of the NLRA. Long Beach Youth Center, Inc., 230 N.L.R.B. 648, 95 L.R.R.M. (BNA) 1451 (1977), enforced, 591 F.2d 1276 (9th Cir. 1979). Similarly, in Bethany Medical Center, supra, laboratory employees engaged in protected concerted activity when they
walked off their jobs for two hours in protest of certain terms and conditions of employment. The employees notified their employer just 15 minutes before the start of their daily appointments. In each situation the NLRB found that the special strike notice requirements of §8(g) applied only to labor organizations, not to groups of employees. The NLRB’s rationale has been that the legislative history and policy considerations indicate that the notice requirement is intended to apply to large-scale protests that will harm the institution.

2. [20.38] Represented Employees

Represented employees who engage in strike activity in situations in which their labor organization has failed to provide the requisite ten days’ written notice under §8(g) of the NLRA, 29 U.S.C. §158(g), are subject to disciplinary action and/or termination. Section 8(d) of the NLRA states that “[a]ny employee . . . who engages in any strike within the appropriate period specified in [§8(g)] shall lose his status as an employee of the employer engaged in the particular labor dispute.” 29 U.S.C. §158(d).

Formerly, the NLRB and reviewing courts also interpreted §8(d) as subjecting employees to termination for engaging in union-organized picketing activity when a union failed to provide the requisite ten-day notice under §8(g). Then in Civil Service Employees Association, Local 1000, AFSCME v. NLRB, 569 F.3d 88 (2d Cir. 2009), the U.S. Court of Appeals for the Second Circuit revisited its interpretation of §8(d) as it relates to employees engaging in union-organized picketing activity. The case involved a union that tried to organize employees at a health clinic operated in a correctional facility located in Albany, New York. When the employer refused to recognize the union as the employees’ bargaining representative, the union organized a picketing demonstration in which five clinic employees participated. The employer filed unfair labor practice charges against the union for failing to provide ten days’ notice of the picketing as required under §8(g). The employer then also discharged the five employees who picketed the clinic, but rehired them a month later. The union filed charges against the employer, alleging that the employer violated the employees’ §8(g) organizing rights by discharging them.

In following established precedent, the NLRB held that the employer lawfully terminated its employees. The NLRB reasoned that by virtue of the union violating §8(g), the employees’ participation in the unlawful picket removed their protected status under the NLRA. The NLRB held that an “employee who pickets in violation of section 8(g) is engaged in unprotected conduct, and is thus vulnerable to employer discipline.” 569 F.3d at 90, quoting Correctional Medical Services, Inc., 349 N.L.R.B. 1198, 1201, 182 L.R.R.M. (BNA) 1144 (2006).

On appeal, the Second Circuit disagreed. The court applied a strict construction of the NLRA, noting that §8(g) requires only labor organizations, not employees, to provide ten days’ notice before engaging in any strike or picketing activity. Section 8(d), in turn, strips employees of their status as employees only if they engage in any strike at a healthcare institution without the labor organization providing ten days’ notice. Section 8(d) says nothing regarding the status of employees who engage in picketing activity without a labor notice. Regardless of the potential disruption that employee picketing could cause to a facility’s ability to deliver patient care, the court determined that only a statutory amendment could resolve the issue. It is likely that the NLRB and other federal circuit courts will follow the Second Circuit’s lead in interpreting §8(d) as not applying to employee participation in a union’s illegal picketing activity.
D. [20.39] Strikes by Third-Party Unions

The NLRB has determined that all labor organizations that direct their strike and picketing activity to a healthcare organization must satisfy the notice requirements under §8(g) of the NLRA, 29 U.S.C. §158(g), regardless of whether they represent or seek to represent employees of the institution. In Bricklayers & Allied Craftsmen, Local 40, 252 N.L.R.B. 252, 105 L.R.R.M. (BNA) 1317 (1980), a union representing bricklayers and allied craftsmen protested hospital construction that had employed nonunion workers. A ten-day notice was filed. However, picketing of the hospital did not take place until ten days after the stated picket date. The union claimed the pickets were informational in nature and directed only to the public and not at the hospital or any employees or workers at the job site. The NLRB found that the picketing was directed at the hospital and had the potential to disrupt healthcare services and held that the activity was a violation of §8(g).

Section 8(g) permits no exception for sympathy picketing and strike activity. Therefore, a union that did not represent any employees at a healthcare institution violated the NLRA when four of its officers joined a picket line of another union and picketed for one and a half hours. District 1199, National Union of Hospital & Healthcare Employees, RWDSU, 222 N.L.R.B. 212, 91 L.R.R.M. (BNA) 1097 (1976), enforcement denied without op., 556 F.2d 558 (2d Cir. 1976).

However, a labor organization will not necessarily be required to provide a §8(g) notice when it engages in strike or picket activity on the grounds of a healthcare institution but does not direct such activity at the institution. For example, the District of Columbia Court of Appeals reversed and remanded two NLRB decisions in which construction workers picketed work that was subcontracted to nonunion workers. In Laborers’ International Union of North America, AFL-CIO, Local Union No. 1057 v. NLRB, 567 F.2d 1006, 1010 (D.C.Cir. 1977), the court noted that the phrasing of the statute was ambiguous and required the court to look at the legislative history to determine congressional intent. This review resulted in the court concluding that there was no plausible reason to infer that §8(g) would require non-healthcare employees to notify the Federal Mediation and Conciliation Service and the institution when these parties had no control over the protest.

The NLRB later adopted this appellate court position in Bricklayers & Allied Craftsmen, supra, in which workers constructing an addition to a hospital began organizing for union representation. They picketed their employer and the general contractor to encourage agreement to a collective-bargaining agreement. The NLRB held that this activity was not a violation of §8(g) because the picketing was not directed at a healthcare institution and had not disrupted patient care.