



September 1, 2009

Hilda L. Solis
Secretary
U.S. Department of Labor
200 Constitution Avenue, NW, Room N-5609
Washington, DC 20210

Re: Notice of Proposed Rulemaking and Request for Comments – Notification of Employee Rights under Federal Labor Laws; Proposed Rule (29 CFR Part 471), 74 Fed. Reg. 38488 (August 3, 2009).

Dear Secretary Solis:

The American Hospital Association (AHA), representing more than 5,000 member hospitals, health systems and other health care organizations, and 40,000 individual members, and the American Society for Healthcare Human Resources Administration (ASHHRA), an AHA-affiliate which represents 3,300 healthcare human resources managers in hospitals and other health care facilities, appreciates the opportunity to comment on the Department of Labor's (DOL) proposed rule regarding compliance with *Executive Order 13496* (the Executive Order) and its requirement that federal contractors post notices advising employees of their rights under federal labor law. The AHA and ASHHRA have considerable interest in the requirements of the Executive Order even though hospitals' receipt of federal payments under the Medicare and Medicaid programs does not confer contractor status, *see* Order No. ADM 93-1/JUR by OFCCP Acting Director Leonard J. Biermann (Dec. 16, 1993). Nevertheless, some hospitals are federal contractors that would be covered by Executive Order 13496 because they have prime contracts with federal agencies. In addition, other hospitals have been asserted – though incorrectly, we believe – to be subcontractors because they are providers under certain federal employee health benefit plans.

While the title of the Executive Order is “Notification of Rights Under Federal Labor Laws” and its stated purpose is that “workers are well informed of their rights under federal labor laws, including the National Labor Relations Act,” EO 13496 § 1, the Executive Order does not specify the content of the notices. However, the proposed rule sets forth the text of the notice in proposed 29 CFR, Part 471, Subpart A, Appendix A and defines which employers are required to post notices in proposed 29 CFR § 471.4.

Unfortunately, the proposed rule contains certain overbroad and/or inaccurate statements about the coverage and requirements of the *National Labor Relations Act* (NLRA). These inaccuracies could inadvertently encourage employees to engage in activities that are not protected by the NLRA. They also could lead to the required posting of notices by employers who are not covered by the NLRA. The result would be increased conflict between labor and management and a threat to the job security of employees who engage in activities that violate lawful employer policies. These results would subvert the goals that prompted President Obama to issue the Executive Order – “attainment of industrial peace” and an effort to ensure that “workers are well informed of their rights under Federal labor laws.” Therefore, we urge the DOL to revise the regulations.

Specifically, we urge DOL:

- To clarify that hospital employees do not enjoy a legally protected right to solicit in immediate patient care areas or when their activity might disrupt patient care or disturb patients.
- To clarify that hospital employees do not enjoy a legally protected right to wear union insignia in immediate patient care areas or when their activity might disrupt patient care or disturb patients.
- To state more clearly that employers excluded from coverage under the NLRA are not required to post notice.

These revisions, as detailed below, would ensure that the proposed rule and the notice to be posted convey to employees of health care organizations accurate information about their rights under current federal labor laws.

Clarifying that certain restrictions on union solicitation are lawful

The proposed text of the notice states, in relevant part: “It is illegal for your employer to: Prohibit you from soliciting for the union during non-work time or distributing union literature during non-work time, in non-work areas.” A reasonable hospital employee would read this notification as license to solicit for a union anywhere on an employer’s premises, even in patient care areas, so long as the employee is not on work time. A reasonable employee would similarly believe he or she would be permitted to use any “non-work areas” for distribution purposes, so long as he or she is on break.

Whether or not an employee enjoys protection for such conduct under the NLRA in a non-health care setting, such activity lawfully may be limited by a hospital or other health care employer. Indeed, the National Labor Relations Board (NLRB) has consistently ruled that health care providers may implement blanket solicitation bans covering “immediate patient care areas.”

In two decisions, *National Labor Relations Board v. Baptist Hospital*, 442 U.S. 773 (1979), and *Beth Israel Hospital v. National Labor Relations Board*, 437 U.S. 483 (1978), the U.S. Supreme Court upheld the NLRB’s approach and cautioned against unduly limited definitions of an “immediate patient care area.” In *Beth Israel Hospital*, 437 U.S. at 507, the Supreme Court also held that solicitation and distribution by health care employees, even outside immediate patient

care areas, may be prohibited if the restriction is “necessary to avoid disruption of health care operations or disturbance of patients.”

The Supreme Court approved these rules after recognizing the distinctive nature of hospitals and their work:

Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day’s activity, and where the patient and his family – irrespective of whether that patient and that family are labor or management oriented – need a restful, uncluttered, relaxing, and helpful atmosphere, rather than one remindful of the tensions of the marketplace in addition to the tensions of the sick bed.

Baptist Hospital, 442 U.S. at 783 (quoting *Beth Israel Hospital*, 437 U.S. at 509 (Blackmun, J., concurring in judgment)).

The AHA and ASHHRA recommend that the DOL revise the proposed text to include a disclaimer using language taken directly from the cited Supreme Court cases:

“It is illegal for your employer to: Prohibit you from soliciting for the union during non-work time or distributing union literature during non-work time, in non-work areas, except that a hospital or other health care employer may prohibit all solicitation in immediate patient care areas, or outside those areas when necessary to avoid disrupting health care operations or disturbing patients.”

While the suggested revision lengthens the text of this item, we believe this revision is warranted to convey a more accurate statement to workers about their rights under federal labor laws. Failure to revise the notice could lead employees to engage in unprotected activity which could result in those employees receiving discipline. An employee who engages in legally unprotected activity is subject to employer discipline, up to and including discharge.

With more than 13.6 million Americans working for health care employers, including hospitals, nursing care facilities and outpatient doctors’ offices, a large number of employees would be misled if the required notice is published with inaccurate language. *See* Bureau of Labor Statistics, *Current Employment Statistics Table B-12 (Employees on Nonfarm Payrolls by Detailed Industry)* (July 2009 Preliminary Data).

Additionally, any decision to take disciplinary actions might not affect only the particular employee involved in the unprotected solicitation, but also could increase labor strife between the employer and the labor organization at issue. Disputes regarding the appropriateness of discipline also could increase the burden on the NLRB in investigating and addressing misguided claims of NLRA protection.

If DOL determines that adding clarifying disclaimers renders the notice unwieldy, it could revert to the notion it earlier considered (but rejected) of advising employees of their basic rights under the statutory text of the NLRA, without further gloss. See 74 Fed. Reg. at 38,490. This would track the NLRB's practice, which includes a much briefer general summary of protected rights in its standard notice-posting form. See NLRB Office of the General Counsel, Memorandum OM 02-43, Plain Language in Board Remedial Notices (Mar. 11, 2002) ("Federal law gives you the right to: Form, join or assist a union; Choose representatives to bargain with us on your behalf; Act together with other employees for your benefit and protection; Choose not to engage in any of these protected activities."). This approach also would be consistent with the summaries of rights under other employee-protection laws, such as notices of rights under Title VII of the Civil Rights Act of 1964 and Executive Order 11246.

Clarifying that certain restrictions on union insignia are similarly lawful

A later section of the notices states that it is "illegal" for an employer to: "Prohibit you from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances, for example, as where doing so might interfere with patient care." Although this notice provision correctly recognizes that insignia may be prohibited due to interference with patient care, it again fails to recognize the importance of restrictions in the "immediate patient care area."

Restrictions on the wearing of union insignia in "immediate patient care" areas are presumptively valid. *See Mesa Vista Hosp.*, 280 NLRB 298, 299 (1986) ("[E]mployees have the right to wear union insignia even while at work. A hospital's prohibition of the wearing of insignia, however, on working and even on nonworking time in immediate patient care areas is presumptively valid."). Also, as with other forms of solicitation, union insignia may be prohibited even outside of immediate patient care areas when necessary to avoid disruption of health care operations or disturbance of patients. *See Sacred Heart Medical Center*, 353 NLRB No. 19, slip opn. at 3 & n.3 (2008) (adopting *Beth Israel* solicitation analysis in deciding whether union insignia worn outside of immediate patient care area was protected by the NLRA).

We suggest that, at a minimum, the DOL revise the notice provision to conform to the correct legal standard:

"It is illegal for your employer to . . . Prohibit you from wearing union hats, buttons, t-shirts, and pins in the workplace except in immediate patient care areas of hospitals or other health care establishments, or under special circumstances, for example, when the prohibition is necessary to avoid disrupting health care operations or disturbing patients."

Further, we recommend that the DOL add one or two other examples of "special circumstances" to ensure an understanding that other, non-health care related concerns also may justify a ban on union insignia. See, e.g., *W San Diego*, 348 NLRB 372 (2006) (employer could lawfully prohibit wearing of large red button in public areas of hotel when it conflicted with luxury hotel's unique uniform style).

Clarifying that the list of excluded employers is illustrative and not exhaustive

The proposed rule includes section 29 C.F.R. § 471.4 which lists categories of employers who are not subject to the notice-posting requirement. The section's two subparts list 11 categories of employers, tracking a list of employers that are exempt from the NLRA by virtue of Sections 2(2) and (3). While the list is correct, it overlooks that there are a wide range of employers that are not subject to NLRB jurisdiction due to policy or administrative considerations rather than a statutory exemption. By way of example only, we note that health care institutions with small gross revenues are excluded from the NLRB's jurisdiction, *see East Oakland Health Alliance*, 218 NLRB 1270 (1975), as are certain religious educational institutions, *see NLRB v. Catholic Bishop of Chicago*, 440 U.S. (1979), and the horseracing industry. *See NLRB's Rules and Regulations*, Section 103.3, 38 F.R. 9507 (April 17, 1973).

Some hospitals that are members of the AHA and employers of human resources manager members of ASHHRA may be exempt from NLRA compliance under one or more non-statutory exemptions. We therefore are concerned by the regulation's apparent requirement that employers outside the NLRB's jurisdiction would still have to post notice.

While the DOL understandably may not wish to provide a complete list of all non-statutory exemptions to the NLRA, it could nevertheless clarify that the exclusions listed in proposed sections 471.4(a) and (b) are illustrative and not exhaustive. This would ensure that the rule is not interpreted to conflict with the NLRB's jurisdiction. **Therefore, the AHA and ASHHRA propose the following specific revision to the first paragraph of the section:**

“An employer who is not under the jurisdiction of the National Labor Relations Board is not covered by the requirements of this part. Non-covered employers include . . .”

The notice ultimately directed by the Secretary will be seen and read by millions of American employees, including many who work for hospitals and health care systems. Therefore, it is critically important that the notice and its implementing regulations accurately reflect current law. If you have any questions about our comments and recommendations, please contact Lawrence Hughes, assistant general counsel, at lhughes@aha.org or (202) 626-2346.

Sincerely,

Rick Pollack
Executive Vice President
AHA

Dan Zuhike
Board Chair
ASHHRA