

## EMPLOYMENT SERVICES ALERT

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### **The Humpty Dumpty Defense Does Not Work for Hospital in Union Organizing Campaign** *The Importance of Carefully Drafting a No-Solicitation Policy*

By [Morris Hawk](#), Attorney

*“When I use a word,” Humpty Dumpty said, in a rather scornful tone, “It means just what I choose it to mean – neither more nor less.”*

*“The question is,” said Alice, “whether you can make words mean so many different things.”*

*“The question is,” said Humpty Dumpty, “which is to be master – that is all.”<sup>1</sup>*

Being the master of the word is a fine philosophy for Humpty Dumpty. But a hospital recently learned the hard way that, when it comes to federal labor law, the National Labor Relations Board (“the Board”) is the ultimate master of what a word means. In the case, the Board concluded that a hospital violated federal labor law when it prohibited an off-duty employee from passing out pro-union literature in the hospital’s cafeteria. Although this decision specifically dealt with solicitation in a hospital setting and does not represent a change in the current law, it does provide some useful reminders for employers in drafting and enforcing no-solicitation policies that comply with federal labor law.

#### **The Board’s Decision**

The case, *UPMC Presbyterian Shadyside*<sup>2</sup>, arose from a union organizing drive at a Pittsburgh area hospital. The hospital had adopted a no-solicitation policy that permitted *on-duty employees* to engage in solicitation during “nonworking time” but prohibited “*off-duty*” employees from returning to the hospital after their shift had ended and engaging in solicitation. However, the policy was confusing because it expressly permitted off-duty employees to enter the hospital’s cafeteria during their off-duty hours. Thus, even though the policy permitted an “off-duty” employee to return to the hospital’s cafeteria (and other non-patient care areas) when that employee was not working, the policy attempted to prohibit the off-duty employee from soliciting on the basis that the policy’s definition of “nonworking time” only included the time that an *on-duty* employee was not working (not the time when an *off-duty* employee was not working).

During the union campaign, an off-duty employee and union organizer entered the hospital’s cafeteria and began handing out union flyers to employees and asking the employees to sign a pro-union petition. The employees in the cafeteria were on break (i.e., nonworking time). One of the employees (who probably just wanted to eat in peace) told a hospital manager and the manager forced the off-duty employee and the union organizer to leave the hospital. There was, of course, nothing wrong with kicking the union organizer off the property. However, the Board concluded that the hospital had violated Section 8(a)(1) of the National Labor Relations Act when it prohibited the off-duty employee from passing out union literature in the cafeteria.

The Board concluded that there was no meaningful distinction between “nonworking time” and “off-duty” time. As the Board noted, while it is permissible for a hospital or nursing home to ban solicitation in “immediate patient care areas”

<sup>1</sup> *Through the Looking Glass* by Lewis Carroll

<sup>2</sup> 366 NLRB No. 142 (August 6, 2018).

at all times, a ban on employee solicitation outside such areas (for example, the cafeteria) is presumptively invalid if the employee handing out the union flyer and the employee receiving the flyer are both on “nonworking time”. The off-duty employee who returned to the cafeteria was on “nonworking time” just like the employees in the cafeteria who were on break or eating lunch. Thus, the hospital’s policy, which prohibited off-duty employees from returning to the hospital to engage in solicitation, was unlawfully broad. It did not help the hospital that its policy, by its own terms, was internally inconsistent as noted above.

### **Takeaways for Hospitals and Nursing Homes**

The Board’s decision, although disappointing for UPMC, does provide some good lessons for hospitals and nursing homes.

1. **Bans on solicitation in “immediate patient care areas” even during “nonworking time” are still valid.** Nothing in the *UPMC* decision changes the long-standing rule that hospitals and nursing homes may completely prohibit solicitation in patient care areas. As the Supreme Court has noted, the primary function of a hospital or nursing home is patient care and a “tranquil atmosphere is essential to carrying out that function.”<sup>3</sup> For that reason, hospitals and nursing homes may completely prohibit solicitation in patient rooms, operating rooms and any other places where patients receive treatment. A solicitation policy should clearly define and describe what areas constitute patient care areas.
2. **Cafeterias, gifts shops and lobbies are not “immediate patient care areas”.** UPMC attempted to argue that its cafeteria could be characterized as a patient care area because there was a monitor in the cafeteria that tracked the status of patient procedures. The Administrative Law Judge rejected that argument, noting that the mere presence of such a monitor—by which employees and family members in the cafeteria could track the progress of a patient—does not transform the cafeteria into a work area. A cafeteria is only a work area for cafeteria workers (not employees who take breaks or eat meals there). Certainly, even in a cafeteria, an employee must be on nonworking time to engage in solicitation or to be the subject of a solicitation by a fellow employee. An employee transporting a patient through the cafeteria is working and thus, may not be the subject of a solicitation. However, the mere fact that a cafeteria is on hospital property does not mean that the hospital can ban solicitation there.
3. **A hospital solicitation policy that permits solicitation by on-shift employees on nonworking time but prohibits solicitation by off-duty employees will likely violate the Act.** The *UPMC* decision makes clear that a hospital cannot prohibit solicitation by off-duty employees in areas of the hospital (like the cafeteria) that are open to the public or the family members of patients. A ban on solicitation by off-duty employees may be permissible for an employer that otherwise denies the public access to its facility. However, for a hospital, such a ban would not survive scrutiny given the fact that the members of the public generally have access to the hospital’s cafeteria and other common areas.
4. **Your solicitation policy should be clear and understandable.** The Administrative Law Judge noted that one of the problems with the UPMC solicitation policy was that the stated definitions of “non-working time” and “off-duty” were confusing and unclear and that, while one provision seemed to ban off-duty employees from returning to work to engage in soliciting, another provision clearly stated that it was permissible for off-duty employees to return to the cafeteria. Thus, perhaps the most important takeaway from the *UPMC* case is that hospitals and nursing homes should ensure that the solicitation policies in their handbook are compliant with existing labor law, internally consistent, and easily understandable.

<sup>3</sup> *Beth Israel Hospital v. NLRB*, 437 U.S. 773 (1979).

**Takeaways for All Employers**

Most employers are not permitted to ban solicitation in working areas so long as the employee soliciting and the employee being solicited are on non-work time. Therefore, employers like hospitals and nursing homes can have slightly broader no-solicitation policies because they can ban solicitation in some work areas even if the employees who are engaged in solicitation are not working. Nevertheless, while hospitals and nursing homes are permitted under the National Labor Relations Act to have broader no-solicitation policies than the majority of employers, there are still some takeaways for all employers from the *UPMC* decision. Specifically, all employers should take the opportunity now to union-proof their employee handbooks and to make sure their no-solicitation policies, as well as related policies such as those dealing with employee postings on bulletin boards, comply with Board law. The time when employers most want to enforce their policies on solicitation and bulletin boards is during the midst of a union campaign. And, if you have not drafted a compliant policy before the union comes knocking at your door, you are going to have difficulty keeping solicitation for the union under control.

If you have any questions about this topic or need assistance with your solicitation policy or any other labor and employment matter, please contact one of the listed Roetzel attorneys.

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