

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

THE QUEEN’S MEDICAL CENTER

and

Case 20–CA–175202

**HAWAII NURSES’ ASSOCIATION
OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION LOCAL 50**

Scott E. Hovey, Jr., Esq.,
for the General Counsel

Patrick H. Jones, Darin R. Leong, & Emily R. Marr, Esqs. (Marr Jones & Wang),
for the Respondent

Jeffrey B. Bott, Esq.,
for the Charging Party

DECISION

JEFFREY D. WEDEKIND, Administrative Law Judge. The complaint in this case alleges that Queen’s Medical Center (QMC) unlawfully refused to provide a patient’s medical records to Hawaii Nurses’ Association OPEIU Local 50, the collective-bargaining representative of QMC’s registered nurses. There is no dispute that the requested information was relevant and necessary; the Union needed the information to evaluate and process a grievance under the collective-bargaining agreement challenging QMC’s suspension of a nurse for allegedly failing to give the patient proper medical care. Rather, the sole dispute is whether QMC was justified in withholding the information because of uncertainty over whether providing patient medical information to a third party in litigation, even in redacted form, would violate patient privacy rights under the Hawaii Constitution.¹

At the time of the Union’s request, this question was actually pending before the Hawaii Supreme Court in a case in which QMC was a party. The case involved a dispute between QMC and another healthcare provider, Pacific Radiation Oncology (PRO). PRO claimed that QMC had unfairly terminated its privileges to provide radiation oncology services at the medical center, and QMC counterclaimed that PRO had unfairly induced QMC patients to receive treatment at a competing medical center in which PRO had an undisclosed ownership interest.

In early 2015, a question arose in the case whether QMC was barred by the privacy provisions of the Hawaii Constitution from using or producing even redacted or de-identified patient medical records in the litigation without patient consent. The U.S. District Court in Hawaii (which had previously taken removal jurisdiction over the claims) certified this

¹ Article I, section 6 of the Hawaii Constitution, ratified in 1978, states, “The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest.”

question to the Hawaii Supreme Court in March 2015. And it was still pending a year later when the Union made its information request in early March 2016.

5 The Hawaii Supreme Court eventually issued its opinion in June 2016, about 2 months
after the Union’s information request here. The Court held that QMC was in fact barred by the
State Constitution from using or producing even de-identified patient medical records in the PRO
litigation. The Court acknowledged that the federal Health Insurance Portability and
10 Accountability Act of 1996 (HIPAA), 42 U.S.C. 1320d et seq., does not protect health
information once it has been de-identified. However, the Court held that the Hawaii Constitution
affords greater privacy protection to patient medical records than federal law; that QMC
therefore could not use or be compelled to produce such confidential records in litigation, even if
they are de-identified, absent a compelling state interest; and that there was no compelling state
interest in that case, which was essentially just a contract dispute between QMC and PRO.
15 *Pacific Radiation Oncology, LLC v. The Queen’s Medical Center*, 138 Haw. 14, 375 P.3d 1252
(June 13, 2016).

Accordingly, QMC declined to provide the requested patient medical records to the
Union. In a July 14 email, it notified the Union of the Hawaii Supreme Court’s decision in the
PRO litigation; advised that it was unclear whether the decision prevented QMC from producing
20 the patient medical information requested by the Union; and stated that it wanted to obtain
guidance from the NLRB on the issue. QMC stated that, if the Board ruled that the National
Labor Relations Act (NLRA) preempts the State Constitution as interpreted by the Hawaii
Supreme Court, it would provide the requested information to the Union in redacted form.

25 In response, on July 29, the Union filed an unfair labor practice charge with the NLRB
regional office. The regional director issued a formal complaint on the charge about a month
later, on August 31, alleging that QMC’s refusal to provide the requested information violated
Section 8(a)(5) of the NLRA.

30 In the meantime, on August 16, QMC’s HR manager asked a union shop steward if there
was anything else QMC could provide the Union instead of the requested patient medical
information. The shop steward answered that there was not.

35 On September 14, QMC filed its answer to the complaint. QMC denied most of the
substantive allegations, including that the patient medical information was relevant and
necessary to the Union’s representational duties. QMC further asserted that it had refused to
provide the requested information to the Union “for cause and/or legitimate business reasons
and/or legitimate concerns regarding compliance with state law,” and that it “met and conferred
40 with the [Union] about its information request in an attempt to comply with all laws, including
the NLRA and State and federal privacy laws.”

45 However, 2 months later, on November 17, QMC filed a joint motion with the General
Counsel and the Union to waive an evidentiary hearing and submit the case for a decision based
on a stipulated record. QMC effectively admitted in the stipulation all of the relevant factual
allegations that it had previously denied, including that the information was relevant and
necessary to the grievance. It also admitted that the sole reason it has not produced the

information is uncertainty over whether doing so would violate the Hawaii Constitution as interpreted by the Hawaii Supreme Court.

5 On November 18, I granted the joint motion and approved the stipulated record.² The parties thereafter filed their briefs on December 19.

ANALYSIS

10 It is well established, based on numerous Board and court decisions since the NLRA was enacted in 1935, that an employer’s duty to bargain under Section 8(a)(5) of the Act includes the duty to provide information to the union that is relevant and necessary to collective bargaining and adjustment of grievances. See, e.g., *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 436 (1967), citing *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). See also *DaimlerChrysler Corp. v. NLRB*, 288 F.3d 434, 439 (D.C. Cir. 2002) (“[I]nformation is essential to the union if it is to function
15 effectively as the bargaining agent for unit employees”).

Thus, an employer must normally provide such requested information to the union without delay. An exception is where the employer has legitimate and substantial confidentiality concerns about disclosing the information. In that event, however, the employer must offer and
20 bargain in good faith over a reasonable accommodation, such as redacting the information and/or restricting its use. The burden is on the employer not the union to propose a precise alternative to providing the information without redaction or restriction. See *A-1 Door & Building Solutions*, 356 NLRB 499, 500–501 (2011); and *Borgess Medical Center*, 342 NLRB 1105, 1106 (2004). See also *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 20–21 (D.C. Cir. 1998), and cases cited there.

25 Here, there is no real dispute that QMC had legitimate and substantial confidentiality concerns about providing the confidential patient medical information to the Union. However, QMC never offered to provide the requested information to the Union in de-identified form or any other manner that would accommodate its concerns as required under the NLRA.³ Rather, it merely inquired if the Union would accept anything else instead of the patient medical information. As indicated above, this was insufficient.

30 QMC asserts that it was justified in not offering such an accommodation here because it had a legitimate and substantial concern that providing the requested patient medical information to the Union might violate the Hawaii Constitution even if QMC de-identified the information. However, as indicated by the General Counsel and the Union, the privacy provisions of the State Constitution would be preempted by the NLRA under *San Diego Building Trades Council v.*
35 *Garmon*, 359 U.S. 236 (1959) if they prevented QMC from offering and reaching such an accommodation.

² See Sec. 102.35(a)(9) of the Board’s rules. There is no dispute, and the record establishes, that the Board has jurisdiction.

³ As noted by the Union, there is also no evidence that QMC ever sought the patient’s consent to disclosure.

In *Garmon*, the U.S. Supreme Court held that States may not regulate activity that the NLRA protects, prohibits, or arguably protects and prohibits. See also *Wisconsin Dept. of Industry v. Gould*, 475 U.S. 282, 286 (1986). In subsequent decisions, the Court indicated that this holding should not be inflexibly applied in certain situations, such as where the subject conduct is merely “a peripheral concern” of the NLRA, or touches interests “so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [it cannot] be inferred that Congress had deprived the States of the power to Act.” See *Farmer v. Carpenters Local 25*, 430 U.S. 290, 296–297 (1977); and *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 188 n. 13 (1978). However, the Court later clarified that such exceptions do not apply where there is an actual substantive conflict between the NLRA and state law:

Appellants argue that the appropriate framework for preemption analysis in these cases is the balancing test applied to those state laws which fall within the so-called “local interests” exception to the preemption doctrine first set forth in *Garmon*, 359 U.S. at 243–244. They contend that because New Jersey’s interest in crime control is “so deeply rooted in local feeling and responsibility,” *ibid.*, the [New Jersey Casino Crime Control Act’s qualification requirements for casino industry union officials] may yet be sustained as long as the magnitude of the State’s interest in the enactment outweighs the resulting substantive interference with federally protected rights. See *Operating Engineers v. Jones*, 460 U.S. 669, 683 (1983). []

This argument, however, confuses preemption which is based on actual federal protection of the conduct at issue from that which is based on the primary jurisdiction of the NLRB. See, e.g., *Railroad Trainmen v. Terminal Co.*, 394 U.S. 369, 383, n. 19, (1969). In the latter situation, a presumption of federal preemption applies even when the state law regulates conduct only arguably protected by federal law. Such a preemption rule avoids the potential for jurisdictional conflict between state courts or agencies and the NLRB by ensuring that primary responsibility for interpreting and applying this body of labor law remains with the NLRB. See *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 286–289 (1971); *Garmon*, 459 U.S., at 244–245. This presumption of federal preemption, based on the primary jurisdiction rationale, properly admits to exception when unusually “deeply rooted” local interests are at stake. In such cases, appropriate consideration for the vitality of our federal system and for a rational allocation of functions belies any easy inference that Congress intended to deprive the States of their ability to retain jurisdiction over such matters. We have, therefore, refrained from finding that the NLRA preempts state court jurisdiction over state breach of contract actions by strike replacements, *Belknap, Inc. v. Hale*, 463 U.S. 491(1983), state trespass actions, *Sears*, *supra*, or state tort remedies for intentional infliction of emotional distress, *Farmer*, *supra*.

If the state law regulates conduct that is actually protected by federal law, however, preemption follows not as a matter of protecting primary jurisdiction, but as a matter of substantive right. Where, as here, the issue is one of an asserted

substantive conflict with a federal enactment, then “[t]he relative importance to the State of its own law is not material . . . for the Framers of our Constitution provided that the federal law must prevail.” *Free v. Bland*, 369 U.S. 663, 666, (1962).

5 *Brown v. Hotel & Restaurant Employees Local 54*, 468 U.S. 491, 502–503 (1984) (ultimately finding no actual conflict, and therefore no preemption, because the right of employees under the NLRA to choose their bargaining representative does not include an unfettered right to choose the officials of their bargaining representative).

10 Here, as indicated above, QMC’s admitted reason for not complying with the NLRA by offering an accommodation that provided the requested patient medical information to the Union in de-identified form was its concern that doing so might conflict with the privacy provisions of the Hawaii Constitution. It is clear under the Supreme Court precedent discussed above, 15 however, that Hawaii’s privacy law would be preempted by the NLRA in the event of such a conflict. Accordingly, QMC’s concern was not a valid or legitimate basis for not complying with its obligations under the Act. Cf. *Holiday Inn on the Bay*, 317 NLRB 479, 483 (1995) (finding, for similar reasons, that the privacy provisions of the California Constitution would be 20 preempted to the extent they prevented the employer from disclosing employee personnel files to the union that were relevant and necessary to processing grievances as required under the NLRA).⁴

25 The parties additionally or alternatively argue that, even considering the exceptions discussed in *Farmer* and *Sears*, the privacy provisions of the Hawaii Constitution would be preempted if they prohibited QMC from providing the requested patient medical information to the Union in de-identified form. As discussed above, however, this argument need not be addressed.

30 The Union also argues that the privacy provisions of the Hawaii Constitution would be preempted by HIPAA if they prohibited QMC from providing the requested patient medical information in de-identified form. The Hawaii Supreme Court acknowledged that its holding presented this preemption issue. See 375 P.3d at 1259–1260 (both majority and concurring

⁴ The General Counsel and the Union also cite *Federal Security, Inc.*, 359 NLRB No. 1 (2012). However, that decision lacks any precedential weight. See *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014); *Flyte Tyme Worldwide*, 363 NLRB No. 107, slip op. at 1 n. 5 (2016); and *Brinker International Payroll Co.*, 363 NLRB No. 54, slip op. at 1 n. 1 (2015). Accordingly, I have not relied on it. I have also not considered or relied on QMC’s arguments disputing the Hawaii Supreme Court’s reasoning for concluding that the State Constitution protects the privacy of even de-identified patient medical records. See Br. at 7–8 (arguing, “with all due respect” to the Court, that de-identified medical records do not pose a privacy risk to patients, and that the Court’s conclusion otherwise could “potentially threaten patient safety” by preventing QMC from using patient medical records to substantiate or defend its decisions to discipline or terminate employees for failing to provide proper medical care). The reasonableness of state law is not a relevant consideration in evaluating whether it is preempted. See *Livadas v. Bradshaw*, 512 U.S. 107, 120 (1994) (“In labor preemption cases, as in others under the Supremacy Clause, our office is not to pass judgment on the reasonableness of state policy.”).

opinions). And several federal courts have held that such state laws or privileges are preempted by HIPAA to the extent they bar disclosure of de-identified medical information. See *Northwestern Memorial Hospital v. Ashcroft*, 362 F.3d 923, 925–926 (7th Cir. 2004); *Zyprexa Products Liability Litigation*, 254 F.R.D. 50, 52 (E.D. N.Y. 2008); and *Roth v. Sunrise Senior Living Management, Inc.*, 2012 WL 748401, at *2 (E.D. Pa. Mar. 8, 2012), and additional cases cited there.⁵ See also *St. Francis Regional Medical Center*, 363 NLRB No. 69, slip op. at 8 (discussing U.S. Dept. of Health and Human Services regulations and guidance indicating that HIPAA allows a healthcare provider to disclose protected health information to a collective-bargaining representative to the extent required under the NLRA for purposes of grievance resolution). However, the General Counsel does not make this argument and, again, it is unnecessary to reach the issue.

CONCLUSIONS OF LAW

1. By failing or refusing to provide the Union with the patient medical information it requested on March 7 and 16, 2016 in order to process a grievance, QMC committed an unfair labor practice in violation of Section 8(a)(5) and (1) and 2(6) and (7) of the Act.

REMEDY

The General Counsel and the Union request an order requiring QMC to immediately provide the requested patient medical information. However, neither offers any justification for ordering such unconditional and unrestricted disclosure. As discussed above, there is no dispute that legitimate and substantial privacy concerns are implicated by the Union’s request for patient medical information. Thus, as the General Counsel acknowledges (Br. 12), this is not a situation where the employer has raised a mere “naked confidentiality claim.”⁶

Further, such an order would be inconsistent with prior Board cases involving similar requests for medical information. In such cases, the Board has typically ordered the employer to offer and bargain with the union over a reasonable accommodation that addresses the privacy concerns associated with such records. See *Roseburg Forest Products*, 331 NLRB 999, 1003

⁵ This HIPAA preemption issue was also subsequently addressed by the federal district court that had certified the state constitutional question in the PRO/QMC litigation to the Hawaii Supreme Court. However, the district court did not address whether HIPAA preempts the privacy provisions of the Hawaii Constitution with respect to any and all de-identified patient medical information. Rather it addressed only whether HIPAA preempted the State Constitution’s privacy protection of the specific information that the PRO defendants sought from QMC. The district court ruled that there was no preemption because there had been prior disclosure and use of the information and the defendants were still seeking the patients’ residential zip codes. In these circumstances, the court found that the information would still be “individually identifiable health information” under HIPAA even after it had been de-identified in the manner the defendants proposed. 2016 WL 6996982, at *6 (D. Haw. Nov. 23, 2016).

⁶ See *Lasher Service Corp.*, 332 NLRB 834 (2000) (finding that the judge erred in ordering only conditional disclosure of the requested information, as the employer had “merely raised a naked confidentiality claim” without establishing that it was a legitimate claim).

(2000). In rare instances, the Board has alternatively crafted the accommodation itself, ordering the employer to provide the medical information to the union in de-identified form and subject to restrictions on further disclosure. See *Kaleida Health, Inc.*, 356 NLRB 1373, 1381–1382 (2011).⁷ However, in no case has the Board ordered the unconditional and unrestricted disclosure of such records. Indeed, in a recent case where the Board concluded that unconditional and unrestricted disclosure of confidential information was warranted under the particular circumstance presented, it emphasized that the information (which related to a subcontracting arrangement) did not implicate personal privacy rights. See *Postal Service*, 364 NLRB No. 27, slip op. at 3 n.6 (2016), reconsideration denied 2016 WL 4502618 (Aug. 26, 2016).

Here, as indicated above, the requested information clearly does implicate personal privacy rights. Ordering unconditional and unrestricted disclosure would therefore be inappropriate. As for what kind of order would be appropriate, this appears to be one of those instances, as in *Kaleida Health*, where an order setting forth the appropriate accommodation would best effectuate the purposes of the Act. As discussed above, QMC stated in its July 2016 email to the Union that it would provide the requested patient medical information in de-identified form if ordered to do so. See also QMC’s Br. at 16 (if so ordered, QMC will “promptly produce appropriately de-identified versions of the patient records at issue.”). Further, the Union’s brief acknowledges that this would likely be adequate to satisfy its needs. See Br. at 24 (“Here, de-identified medical information would likely have provided the union with what it needed and maintained the employer’s legitimate confidentiality interest.”). In short, the parties already appear to agree that the appropriate accommodation is to de-identify the patient’s medical records. An order requiring such an accommodation therefore appears to be the most effective means to resolving both the information dispute and the pending grievance without further delay.

Accordingly, the request for an order requiring immediate and unconditional disclosure of the requested patient medical information is denied. QMC will instead be ordered to provide the information to the Union in de-identified form. Given that the Union only needs the requested information for the pending grievance, consistent with *Kaleida Health* the order will also condition disclosure to the Union on its agreement not to share the information with anyone who is not involved or necessary to processing that grievance.

ORDER⁸

The Respondent, The Queen’s Medical Center, Honolulu, Hawaii, its officers, agents, successors, and assigns, shall

⁷ It is unclear if exceptions were filed to this portion of the judge’s recommended remedial order in *Kaleida*, which the Board adopted. However, the Board has discretion to review and modify a remedy even in the absence of exceptions. *Miramar Hotel Corp.*, 336 NLRB 1203 (2001).

⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Failing or refusing to provide information to Hawaii Nurses’ Association OPEIU Local 50 that is relevant and necessary to processing grievances or otherwise performing its duties as the exclusive collective-bargaining representative of Respondent’s registered nurses.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

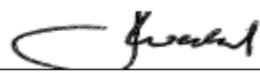
2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Promptly provide to the Union the patient medical information it requested on March 7 and 16, 2016 in order to process a grievance, with personal identifiers redacted and conditioned on the Union’s agreement not to share the de-identified medical information with anyone other than those involved in or necessary to processing the grievance.

(b) Within 14 days after service by the Region, post at its facility in Honolulu, Hawaii, copies of the attached notice marked “Appendix.”⁹ Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 7, 2016.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., January 10, 2017



 Jeffrey D. Wedekind
 Administrative Law Judge

⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

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.

WE WILL NOT fail or refuse to provide information to Hawaii Nurses' Association OPEIU Local 50 that is relevant and necessary to processing grievances or otherwise performing its duties as the exclusive collective-bargaining representative of our registered nurses.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL promptly provide to the Union the patient medical information it requested on March 7 and 16, 2016 in order to process a grievance, with personal identifiers redacted and conditioned on the Union's agreement not to share the de-identified medical information with anyone other than those involved in or necessary to processing the grievance.

THE QUEEN'S MEDICAL CENTER

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

300 Ala Moana Boulevard, Room 7-245, Honolulu, HI 96850-4980
(808) 541-2814, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/20-CA-175202 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE
DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY
OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE
WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S
COMPLIANCE OFFICER, (808) 541-2815.