

*United States Government*  
*National Labor Relations Board*  
OFFICE OF THE GENERAL COUNSEL  
**Advice Memorandum**

DATE: August 10, 2018

TO: Mori Rubin, Regional Director  
Region 31

FROM: Jayme L. Sophir, Associate General Counsel  
Division of Advice

SUBJECT: Biomedical Applications of California, Inc., d/b/a 512-5012-0100  
Fresenius Medical Care North America 512-5012-0133  
Case 31-CA-202972

The Region submitted this case for advice as to whether the Employer's "Solicitation and Distribution in the Workplace" policy is unlawfully overbroad because the policy's prohibition on solicitation and distribution would reasonably be construed to ban the exercise of Section 7 activity. We conclude that the policy is unlawful only with regards to the off-duty access provision, the definition of immediate patient care areas, and the restriction on email use. With regard to the policy's definition of immediate patient care areas, although that is overbroad under current Board law, the Region should use this case as a vehicle to argue that the Board should adopt a broader view of what constitutes an immediate patient care area and should include sitting/waiting rooms and nurses stations in that definition.

### **FACTS**

Fresenius Kidney Care (Employer) provides comprehensive quality healthcare to patients with chronic kidney disease and end stage renal disease, including dialysis treatment services and patient support services. The Employer operates healthcare facilities located in San Bernardino and Colton, California, where patients receive services including hemodialysis, a treatment that is critical to a patient's long-term health.

On November 29, 2017, the Region authorized complaint in the instant case alleging that the Employer violated Section 8(a)(1) of the Act by, among other things, maintaining an overbroad solicitation and distribution policy. The Region now submits this matter to Advice in light of the Board's recent decision in *The Boeing Company*.<sup>1</sup>

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<sup>1</sup> *The Boeing Company*, 365 NLRB No. 154 (2017).

The Employer maintains the following policy, in pertinent part:

**“Solicitation and Distribution in the Workplace” Policy**

**Solicit or Solicitation**

“Solicit” or “Solicitation” is any verbal or physical act that attempts to persuade individuals to:

- Accept a principle or adhere to a philosophy,
- Purchase a product or opportunity for chance,
- Join, follow, or support an organization, or
- Pay a gratuity or make a monetary contribution for a service or cause.

Examples include, but are not limited to fundraising efforts related to a child’s school, selling cosmetic/beauty products, requesting employee participation in sports pools, and seeking donations for a charity or non-profit organization.

**Distribute or Distribution**

“Distribution” includes the handing out, laying out, displaying or delivery of any non-Fresenius written or printed material, product or good.

**Work Rules—Solicitation and Distribution**

An employee may not, for any purpose: solicit during his/her work time, solicit other employees during their work time, solicit in immediate patient care areas at any time, distribute, for any purpose, in work areas and immediate patient care areas at any time.

Note: Employees who are not scheduled to be at work may not solicit or distribute in the interior of any FMCNA facilities or in any work areas. Off duty employees are not prohibited from soliciting or distributing in parking lots and other outside non-work areas.

**Definitions**

Work Time – Any, and all time when an employee's duties require that he/she be engaged in work tasks.

Non-Work Time - The time when an employee's duties do not require that he/she be engaged in work tasks such as meal periods, authorized breaks, or time prior to or following a shift.

Work Areas – Any and all areas where employees would otherwise be expected to perform the duties of their job.

Non-Work Areas - Includes employee locker rooms, break rooms, restrooms, a cafeteria, parking lots, and employee entrances.

Immediate Patient Care Areas - Includes dialysis treatment rooms or areas, patient rooms, and all other places where patient care would be disrupted such as adjacent corridors, sitting/waiting rooms, and nurse's stations.

### **Prohibited Use of FMCNA Property or Venues of Communication**

The use of FMCNA electronic communication or interoffice mail for unauthorized solicitation or distribution is prohibited.

Warning: A representative of Human Resources is responsible for approving in advance any postings on FMCNA bulletin boards or otherwise.

### **ACTION**

We conclude that the Employer's policy is unlawful only with regard to the immediate patient care areas definition, the off-duty access provision, and the restriction on email use.

#### **1. The Employer's Overall "Solicitation and Distribution in the Workplace" Policy**

We first note that the *Boeing* decision did not alter the well-established standards regarding no-solicitation/distribution or no-access rules, where the Board has already struck a balance between employee rights and employer business interests.<sup>2</sup> Under extant law, employees presumptively have the right to solicit on their employer's premises during non-work time and to distribute literature on their employer's premises during non-work time and in non-work areas.<sup>3</sup> However, employers may lawfully ban work time solicitations when defined so as not to include times before or after regular working hours, lunch breaks, and rest periods.<sup>4</sup> Additionally, an employer may lawfully prohibit distribution of literature in work areas.<sup>5</sup> Thus, we conclude that under extant law the Employer's "Solicitation and Distribution in the Workplace" policy lawfully restricts employees from soliciting during their own work time or the work time of other employees, from soliciting in immediate patient care areas, and from distributing in work areas and immediate patient care areas. Moreover, we would not allege the definition of

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<sup>2</sup> See *Boeing Co.*, 365 NLRB slip op. at 8 (relying on doctrine regarding those types of rules as support in overturning *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004)).

<sup>3</sup> *Republic Aviation v. NLRB*, 324 U.S. 793; *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615.

<sup>5</sup> *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615, 621 (1962).

“solicit/solicitation” or “distribute/distribution” in the policy as unlawful. Although they are broad enough to include Section 7 activity, the application of the definitions in the directive part of the policy does not restrain employees in the exercise of their Section 7 rights. However, we conclude that the following provisions within the Employer’s “Solicitation and Distribution in the Workplace” Policy violate the Act.

2. The definition of “immediate patient care areas”

In recognition of the fact that a hospital's primary function is patient care, and “that a tranquil atmosphere is essential to carrying out that function,” the Board, with Supreme Court approval, has given health care institutions some latitude in restricting the exercise of Section 7 rights.<sup>6</sup> Therefore, under Board law, health care facilities may prohibit solicitation in “immediate patient care areas,” such as patients' rooms, operating rooms, X-ray areas, therapy areas, and other places where patients receive treatment.<sup>7</sup> However, the Board has long held that in other non-immediate care areas to which patients and visitors have access (such as lobbies, cafeterias, and hallways) such bans on solicitation are presumptively unlawful “where the facility has not justified the prohibitions as necessary to avoid disruption of health-care operations or disturbance of patients.”<sup>8</sup> “On balance, the interests of the patients well enough to frequent [non-immediate patient care areas] do not outweigh those of the employees to discuss or solicit union representation.”<sup>9</sup> Thus, in areas other than

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<sup>6</sup> *NLRB v. Baptist Hospital*, 442 U.S. 773 (1979) (generally upholding the Board’s distinction between immediate patient care areas and non-patient care areas); *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 494 (1978) (citing *St. John's Hospital & School of Nursing, Inc.*, 222 NLRB 1150 (1976), upholding the Board’s conclusion that bans on solicitation in immediate patient care areas are presumptively valid); *St. John's Hospital & School of Nursing*, 222 NLRB at 1150 (“[w]e recognize that the primary function of a hospital is patient care and that a tranquil atmosphere is essential to the carrying out of that function. In order to provide this atmosphere, hospitals may be justified in imposing somewhat more stringent prohibitions on solicitation than are generally permitted”), *enforced in relevant part* 557 F.2d 1368 (10th Cir. 1977).

<sup>7</sup> *Baptist Hospital*, 442 U.S. at 781.

<sup>8</sup> *Beth Israel Hospital*, 437 U.S. at 507. *See generally Baptist Hospital*, 442 U.S. at 789 n16 (“[i]n different hospitals, the use and physical layout of such a variety of areas may require varying resolutions of questions about the validity of bans on union solicitation”).

<sup>9</sup> *St. John's Hospital*, 222 NLRB at 1151. *See also Baptist Hospital*, 442 U.S. at 780 (affirming Board’s order finding ban on solicitation and distribution in “any area of

patient rooms, operating rooms, and places where patients receive medical treatment, the employer bears the burden of demonstrating that solicitation and/or distribution may have an adverse impact on patients or patient care to justify a complete ban.<sup>10</sup>

For example, in *UCSF Stanford Health Care*, the Board found that the hospital's policy banning solicitation in waiting areas and hallways outside of units, which were defined as immediate patient care areas, was unlawful.<sup>11</sup> In that case, the hospital's only justification for including the areas as immediate patient care areas was its claim that any non-patient-care related activity in those areas would disrupt patients.<sup>12</sup> However, the facts showed that the hospital did not prohibit employees from eating, sleeping, or having personal conversations in these areas and it failed to explain why solicitation was more likely to disrupt patients than the other activities. It also failed to show that patients used all the hallways and lounges or that any complaints were generated by solicitation and distribution activities in these areas.<sup>13</sup> In another case, *Brockton Hospital*, the Board held that the hospital's ban on solicitation was facially unlawful because it included hallways and corridors in its definition of immediate patient areas.<sup>14</sup> The Board pointed out that the rule, on its face, banned solicitation in the hospital beyond those areas which the Board has defined as immediate patient care areas.<sup>15</sup> Because the hospital had presented no evidence regarding why it included the areas in its definition, the Board did not have to evaluate whether including them in the definition was justified.<sup>16</sup> On the other hand, in *Intercommunity Hospital*, the Board held that the application of the hospital's lawful no solicitation rule to halls and corridors adjacent to the immediate

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the hospital which is accessible to or utilized by the public" unlawful with respect to hospital cafeteria, gift shop, and lobbies).

<sup>10</sup> *Baptist Hospital*, 442 U.S. at 780-81.

<sup>11</sup> *UCSF Stanford Health Care*, 335 NLRB 488, 533-535; (2001), *enforced sub nom. Stanford Hospital and Clinics v. NLRB*, 325 F.3d 334, 339-341 (DC Cir. 2003).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> 333 NLRB 1367, 1368 (2001).

<sup>15</sup> *Id.* at 1369 n.16.

<sup>16</sup> *Id.* at 1368-69.

patient care areas was valid because they were an extension of the immediate patient care areas.<sup>17</sup> In that case, the hospital had shown that the halls and corridors were used for patient overflow, to store vital equipment, for therapy procedures, and as an outpatient waiting area. Additionally, the hospital had shown that its central corridor was used to move patients to treatment, diagnostic evaluations, and from operations to post-operation recovery rooms and back to the patient rooms.<sup>18</sup> And in another case, *Presbyterian/St. Luke's Medical Center*, the Board affirmed an ALJD finding that a hospital's no solicitation rule that included hallways and stairways in the definition of patient care areas was lawful.<sup>19</sup> The ALJ relied upon testimony regarding the use of the hallways, stairways, and corridors by staff during emergency situations, which also involved the movement of emergency equipment, as a valid justification for including the areas as patient care areas.<sup>20</sup>

Similarly, the Board requires justification for including nurses stations as immediate patient care areas.<sup>21</sup> For instance, in *Rocky Mountain Hospital*, the Board adopted the ALJ's decision that because the Board never extended its definition of immediate patient care areas to include nurses stations, the record evidence must show that solicitation may adversely impact patient's care in order to include it as an immediate patient care area.<sup>22</sup> The ALJ concluded that since there was no record evidence regarding the work done at the nurses stations or whether patients even entered the locations, or whether the nurses stations were separated from immediate patient care areas, the hospital had not overcome the Board's presumption that a ban

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<sup>17</sup> *Intercommunity Hospital*, 255 NLRB 468, 472 (1981).

<sup>18</sup> *Id.*

<sup>19</sup> *Presbyterian/St. Luke's Medical Center*, 258 NLRB 93, 96-98 (1981), *enforced* 723 F.2d 1468 (10th Cir. 1983).

<sup>20</sup> *Id.* at 98 and n.11.

<sup>21</sup> *Intercommunity Hospital*, 255 NLRB at 473 (“[n]urses stations vary in their physical layouts from hospital to hospital. Some may be open, others partitioned, and some may have separate, private break areas. Because of the varied layouts of nurses stations, it would be inappropriate to find that prohibitions on solicitation in the areas in general are presumptively valid.”).

<sup>22</sup> *Rocky Mountain Hospital*, 289 NLRB 1347, 1360 and fn. 28 (1988).

at these locations interfered with the employees' Section 7 rights.<sup>23</sup> On the other hand, in *Intercommunity Hospital, supra*, the Board concluded that because desk areas at the nurses stations were not enclosed; patients in nearby rooms could hear conversations at the nurses station; gravely ill patients were placed closest to the nurses stations; and during the day, up to as many as seven nurses and doctors could be using the stations to provide patient care, the hospital had justified its ban on solicitation in the areas.<sup>24</sup> Also, in *St. Joseph's Hospital*, the Board adopted the ALJ's decision holding that the hospital had presented sufficient evidence to justify a ban on solicitation at its nurses stations because the evidence showed that the maternity ward nurses station was located immediately adjacent to the labor and prep rooms; the other six stations were located between 8 feet and 16 feet from the nearest patient rooms; none of the stations were enclosed; and all of the stations were separated from patient care areas by, at most, a counter that was below chin-height to someone standing nearby.<sup>25</sup>

Here, although the Employer may lawfully prohibit solicitation and distribution in immediate patient care areas and may lawfully limit solicitation in other work areas to non-working time, its ban is facially overbroad under current law to the extent that it includes adjacent corridors, sitting/waiting rooms, and nurses stations as part of its definition of "immediate patient care areas" without demonstrating that such an expansive definition is necessary to avoid disruption of patients or patient care.<sup>26</sup> The Employer has failed to present *any* evidence about these spaces, much

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<sup>23</sup> *Id.* See also, e.g., *Alle-Kiski Medical Center*, 339 NLRB 361, 366 (2003) (Board adopts ALJ's decision finding that inclusion of nursing stations in definition of "patient areas" for purpose of no-solicitation rule unlawful absent showing of potential disruption to patient care).

<sup>24</sup> *Intercommunity Hospital*, 255 NLRB at 473.

<sup>25</sup> *St. Joseph's Hospital*, 263 NLRB 375, 378 (1982).

<sup>26</sup> *Baptist Hospital*, 442 U.S. at 781 ("Board's presumption . . . place[s] on the Hospital the burden of proving, with respect to areas to which [rule] applies, that union solicitation may adversely affect patients"). See also *Rocky Mountain Hospital*, 289 NLRB at 1360 ("It may very well be that solicitations in these locations would disturb patients or disrupt health operations, however, the burden of proof on these points was on [the employer].").

less evidence sufficient to establish a likelihood that such activities would disturb patients and/or disrupt operations in these areas.<sup>27</sup>

However, the General Counsel is of the view that both sitting/waiting rooms and nurses stations should be recognized as inherent “immediate patient care areas” subject to complete bans on solicitation without further justification. Hospital sitting/waiting rooms are designated for use by patients and their families, unlike areas such as cafeterias, gift shops, and lobbies, which are generally publicly-accessible and not intended for specific use by patients and their families.<sup>28</sup> When Congress amended the Act to cover hospitals, it was not “the intent of Congress to require hospital patients and family members to hear ‘negative’ and ‘disparaging comments’ about the ‘professional capabilities’ of doctors and nurses.”<sup>29</sup> And nurses stations are integral to the delivery of patient care. They are work areas where nurses and doctors meet to confer about patients and where someone is almost always on duty and engaged in some aspect of patient care. Additionally, patients and their families routinely visit nurses stations to discuss the patients’ care.<sup>30</sup> By contrast, hospital corridors have mixed uses (e.g., some corridors are frequently used to

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<sup>27</sup> See, e.g., *UPMC, UPMC Presbyterian Shadyside, d/b/a UPMC Presbyterian Hospital and d/b/a UPMC Shadyside Hospital*, 366 NLRB No. 142, slip op. at 1 & 15 (August 6, 2018) (hospitals failed to present evidence that demonstrated solicitation/distribution ban in cafeteria was necessary to avoid disruption of healthcare operations or disturbed patient care).

<sup>28</sup> See, e.g., *Baptist Hospital*, 442 U.S. at 784 (noting testimony that hospital waiting rooms provide space for patients to visit with friends and family and for physicians to confer with patients’ families, often in times of crisis). Cf. *Brockton Hospital*, 333 NLRB 1367, 1370-1371 (2001)(Hurtgen dissenting in part) (arguing “[in] my view, these principles are premised on an overly narrow concept of how hospitals provide treatment and care to their patients. I would revise the Board’s principles to allow prohibitions of solicitation and distribution in areas where patients, their families and visitors spend a substantial amount of time”).

<sup>29</sup> Cf. *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 7 (2016) (Miscimarra concurring in part and dissenting in part).

<sup>30</sup> Cf. *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 205, 2007 (Battista dissenting in part)(declaring nurses’ stations to be patient care areas because, among other things, during all hours of the day, relatives of patients consult with nurses at the stations about the health status of patients; therefore, the hospital had “a legitimate concern that patient care should not be compromised by distractions” at the nurses stations).

transport patients to and from treatment and some corridors are rarely used for such purposes) and warrant the case-by-case consideration the Board grants in areas other than “immediate patient care areas.”

Therefore, the Region should issue complaint alleging that the Employer’s definition of immediate patient care areas, as written, is unlawful under current Board law because it includes adjacent corridors, sitting/waiting rooms, and nurses stations as part of its definition. However, the Region should also argue for the Board to revisit its definition of immediate patient care areas in order to classify sitting/waiting rooms and nurses stations as part of its definition of immediate patient care areas.

3. The provision restricting off-duty employees from entering the interior of the facility for the purpose of solicitation and distribution

The Board analyzes rules governing the access rights of off-duty employees to an employer’s facility under the three-part test articulated in *Tri-County*.<sup>31</sup> There, the Board held that a rule prohibiting access to off-duty employees would be valid only if it “(1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity.”<sup>32</sup> In the instant case, the Employer’s off-duty access provision fails the third prong because the provision restricts off-duty employees from entering the interior of the facility *only* for the purpose of solicitation and distribution. Therefore, it does not meet the requirement of the third prong of *Tri-County* and the Employer violates Section 8(a)(1) of the Act by maintaining it.

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<sup>31</sup> *Tri-County Medical Center*, 222 NLRB 1089 (1976).

<sup>32</sup> *Id.* at 1090. *See, e.g., Saint John’s Health Center*, 357 NLRB 2078, 2082 (2011), (employer’s no-access rule unlawful; although policy generally prohibited off-duty employee access, it explicitly permitted off-duty access for employer-sponsored events, such as retirement parties and baby showers, while denying off-duty employees the right to enter for the purpose of discussing self-organization or terms and conditions of employment); *Intercommunity Hospital*, 255 NLRB at 474-75 (hospital’s off-duty access ban facially unlawful because it permitted access to visit patients or engage in “official business with the hospital”).

4. The prohibition on the use of electronic communication for solicitation or distribution

As noted above, the Board’s recently-adopted *Boeing* standard does not apply to solicitation/distribution rules.<sup>33</sup> In addition, it only applies to facially neutral rules. This rule is facially overbroad because it seemingly permits some personal use of the Employer’s email system while prohibiting “unauthorized” solicitation or distribution.<sup>34</sup> Employees use the email system in the course of their work, are permitted to use it for some kinds of personal emails, and will likely understand the rule’s restriction on solicitation and distribution as encompassing Section 7 protected emails.<sup>35</sup> Since the prohibition is not limited to working time, it is overly broad. Further, the rule, as written, requires “authorization” to engage in Section 7 activities. The Board has repeatedly explained that any rule that requires employees to secure permission from their employer as a precondition to engaging in protected concerted activity on employees’ free time is unlawful.<sup>36</sup>

Accordingly, the Region should issue complaint, absent settlement, alleging that the policy is unlawful with regards to the definition of immediate patient care areas, the off-duty access provision, and the restriction on email use.

/s/  
J.L.S.

H:ADV.31-CA-202972.Fresenius Medical Care (b) (6)

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<sup>33</sup> See *supra* text accompanying n.2.

<sup>34</sup> Thus, we would not argue that this rule is unlawful under *Purple Communications*, 361 NLRB 1050 (2014), because it is not a total ban on non-work use of the Employer’s email.

<sup>35</sup> See, e.g., *UPMC*, 362 NLRB No. 191, slip op. at 2-4 (Aug. 27, 2016) (finding unlawful a solicitation policy that prohibits employees from using the employer’s email system “to engage in solicitation” and mandates that all “unauthorized solicitation” be reported to a supervisor or manager); *Casino San Pablo*, 361 NLRB 1350, 1352-53 (2014) (finding unlawful a rule providing that employees “may not solicit or distribute literature in the workplace at any time, for any purpose”).

<sup>36</sup> *Schwan’s Home Service*, 364 NLRB No. 20, slip op. at 4 (June 10, 2016) (collecting cases).