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## Healthcare Employers May Not Selectively Prohibit Union Insignia in Patient Care Areas

By Eric Stevens and Jennifer Mora

Most hospital visitors have seen them – from nursing school pins to pictures of children, from advanced designations to “special messages” – and most healthcare providers allow them in some form. They are the “accessories” that adorn an employee’s identification badge. They can be informative and they can be cute, but, as a new decision from the National Labor Relations Board confirms, they can be problematic if not properly and consistently regulated.

In one of its final decisions before then-Member Craig Becker’s recess appointment expired, the NLRB ruled by a margin of two to one that it was unlawful for Saint John’s Health Center to prohibit registered nurses from wearing union ribbons in immediate patient care areas during a union organizing drive while at the same time allowing nurses to wear a ribbon the hospital endorsed stating, “Saint John’s mission is patient safe care.” *Saint John’s Health Center*, 357 NLRB No. 170 (Dec. 30, 2011). The Board held that, although a ban by a healthcare employer on the wearing of all union insignia (e.g., buttons and ribbons) in immediate patient care areas is presumptively valid, the presumption “does not protect a selective ban on only certain union insignia” unless the employer can prove that a selective ban is “necessary to avoid disruption of health-care operations or disturbance of patients.”

In the same decision, the Board considered to what extent a healthcare provider may restrict employees from returning to the workplace when they are not on duty and not there to visit a patient. The Board ordered the hospital to rescind its “off-duty employee access policy,” which the Board concluded effectively told employees that, “you may not enter the premises after your shift except when we say you can.” According to the Board, to be lawful, a policy that prohibits or restricts access to the premises by off-duty employees must prohibit access “for any purpose” and cannot make exceptions for things like retirement parties and baby showers.

The decision should prompt unionized and non-union healthcare employers to review any policies they have that prohibit or restrict the wearing of any type of insignia in immediate patient care areas or off-duty employee access. It also serves as a reminder of the importance of ensuring that such policies are enforced in a consistent and evenhanded manner.

### The Hospital’s Ban on Union Insignia in Patient Care Areas

In November 2008, union organizers provided nurses with ribbons stating, “Saint John’s RNs for

Safe Patient Care.” When the hospital became aware of the ribbons, nursing directors were instructed to prohibit nurses from wearing them in immediate patient care areas. In support of the ban, the hospital argued that the ribbons were “detrimental and disruptive to patient care.” One director told four nurses to remove the buttons and further warned them that they would be written up for “insubordination” if they continued to wear the ribbons.

At all times, the hospital had allowed nurses to wear a variety of insignia in patient care areas, including union and other political buttons. In fact, nurses were permitted to wear union buttons in those same patient care areas that stated, “Respect and Dignity” and “Saint John’s Nurses – the Heart of Healthcare.” The hospital also issued to and permitted nurses to wear a ribbon in immediate patient care areas that said, “Saint John’s mission is patient safe care.”

The Administrative Law Judge (ALJ) agreed with the hospital’s argument that the ban, which was limited to immediate patient care areas, was “presumptively valid.” However, the ALJ ultimately concluded that the hospital violated Section 8(a)(1) of the National Labor Relations Act because the ban was discriminatorily enforced. All parties to the dispute excepted to the ALJ’s conclusions. The NLRB Acting General Counsel and the union argued that the ban was not presumptively valid. On the other hand, the hospital argued that the ban was not enforced in a discriminatory manner in violation of Section 8(a) (1).

## **NLRB Holds that the Ban Was Not “Presumptively Valid” Even Though It Was Limited to Immediate Patient Care Areas**

The NLRB began its analysis by reiterating the long-standing general rule that “restrictions on wearing insignia in immediate patient care areas are presumptively valid, while restrictions on insignia in other areas of a hospital are presumptively invalid.” The Board has upheld the presumption because solicitations or insignia in patient care areas “might be unsettling to patients – particularly those who are seriously ill and thus need quiet and peace of mind.” Reasoning that the presumption protects a healthcare facility’s ban on *all* non-official buttons and ribbons in immediate patient care areas, the presumption, according to the NLRB, “does not protect a selective ban on only certain union insignia.” Instead, the majority wrote, “the burden is on the hospital to show that the selective ban is ‘necessary to avoid disruption of health-care operations or disturbance of patients.’” Because the hospital allowed nurses to wear a hospital-endorsed ribbon “virtually identical” to the one issued by the union and to wear other types of insignia with a union or political message, the hospital could not, the NLRB reasoned, “rely on the protection of the presumption of validity applicable to an *across-the board ban* to justify *its selective ban* of only the specific union insignia at issue.”

The hospital argued that it reasonably believed that the union ribbon would disturb patients, and that the ban was therefore necessary, because the ribbon was part of a larger campaign by the union to show that the hospital was not providing safe patient care. The NLRB rejected that argument because the hospital failed to present any evidence to suggest that the ribbon would disturb any patient or disrupt the hospital’s operations. Specifically, the NLRB faulted the hospital for not presenting actual evidence that “patients were aware of the campaign such that the ribbon was likely to disrupt patients or otherwise disrupt healthcare operations.” In fact, the NLRB concluded that such disruption was unlikely, given that the hospital-endorsed ribbon was “virtually identical” to the ribbon that it sought to ban. The NLRB wrote: “There is nothing in the record that indicates that patients would be any more concerned about the quality of patient care after seeing the Union’s ribbon that said, ‘Saint John’s RN’s for safe patient care,’ than they would be by the [hospital’s] ribbon that said, ‘Saint John’s mission is patient safe care.’” As a result, the NLRB agreed with the union that the ban was unlawful under Section 8(a)(1) of the Act.

Because the NLRB concluded that the hospital could not prove the special circumstances necessary to justify its selective ban of the union ribbon, the NLRB did not consider the ALJ’s finding that the hospital had discriminatorily enforced its ban by allowing the wearing of some union insignia but prohibiting the ribbon at issue.

## **The Hospital Unlawfully Prohibited Off-Duty Employees from Accessing the Hospital for Union Purposes**

The hospital also had a policy that prohibited off-duty employees from accessing the building of the hospital, except “to attend Health center sponsored events, such as retirement parties and baby showers.” The evidence demonstrated that off-duty employees historically were

permitted on the premises for a variety of reasons, including picking up personal belongings and items ordered from other nurses, checking the schedule, attending baby showers and birthday parties and visiting with friends or co-workers. However, the hospital enforced the policy against off-duty employees who were on the premises for the purpose of campaigning on behalf of the union.

In *Tri-County Medical Center*, 222 NLRB 1089 (1976), the NLRB developed a three-part test to determine the legality of an off-duty employee access policy, the purpose of which is to balance the property interests of an employer against the right of employees to engage in Section 7 activity. Such a policy will be upheld *only if* it: (1) limits access solely with respect to the *interior* of the facility and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the facility for *any purpose* and not just to those engaging in union activities.

The ALJ concluded that the hospital's policy violated the second prong of the test and merely directed the hospital to cease enforcing the policy without providing notice of it to employees. The NLRB agreed with the ALJ's conclusions, but expanded the analysis to address the third prong of *Tri-County* – whether the policy was discriminatorily applied to prohibit off-duty employees engaged in union activities access to the premises while allowing access to other off-duty employees – which the ALJ did not consider. According to the Board's decision, "[i]t is this third prong of the *Tri-County* test that the [hospital's] rule fails . . ." Indeed, despite the fact that the hospital had granted off-duty employees permission to access the building for a variety of reasons, including birthday parties and visiting with friends, the hospital narrowly enforced its policy against off-duty employees "who were on the premises to campaign for the Union." As a result, the NLRB ordered the hospital to rescind the policy and to cease enforcing it against any employees.

## What the Decision Means for Healthcare Employers

Healthcare employers have legitimate concerns for patient safety and family peace of mind related to pins and insignia worn by healthcare workers in a patient care setting. Accordingly, a hospital must craft a lawful insignia policy that ensures the hospital's ability to regulate and maintain patient safety, and minimize unnecessary family concern, without infringing employees' NLRA rights. First, ensure that a policy is in place that addresses the proper displaying of employee identification badges and consider restricting the wearing of all pins and insignia. Hospitals also must ensure that employees are aware of the policy. The policy should be more specific than generic – allowing "only positive messages," for instance, will not suffice. In the present case, allowing nurses to wear the hospital's message opened the door to the union's counter-message. The policy should prohibit all pins or badges except those that identify the employee and the employee's professional designation(s). If the policy is based upon patient safety rather than content, it is important to be able to articulate the risks (*e.g.*, infection, possibility of breaking fragile skin) related to such items. It is equally important that front-line supervisors, charge nurses, and managers are trained on the policy, its limits and the importance of enforcement.

Similarly, there are risks wholly unrelated to union organization that warrant a healthcare employer's restriction of employee access to the premises when not on duty. The presence of off-duty employees in patient care areas raises HIPAA and other patient confidentiality issues. Of similar concern are situations in which non-exempt employees in patient care areas may be more likely to be drawn into providing care or assistance to employees while "off the clock," thereby raising Fair Labor Standards Act (*i.e.*, overtime) issues. Off-duty employees must be aware that unless they are on duty, they have no more right, nor authority, to access a facility than any other member of the general public. Healthcare employers must ensure their policies restricting access are not only carefully tailored, but also regularly disseminated to all staff and consistently applied. As the present case demonstrates, allowing off-duty employees access to restricted areas, even for benign, casual reasons, literally opens the doors for employees to access those same areas for organizing purposes.

Consistent enforcement of clearly articulated policies is paramount. Most certainly, unions trying to attack such a policy will be aware of any exceptions and use them aggressively to challenge an otherwise lawful policy.

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