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Union Solicitation in the Health Care Industry: Guidelines for the Labor Law Practitioner.

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COMMENTS

Union Solicitation in the Health Care Industry: Guidelines for the Labor Law Practitioner

Emmett Hubbard Kennady III

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I. INTRODUCTION

In 1974, Congress passed the Health Care Institution Amendments (Health Care Amendments)[1] to the National Labor Relations Act (NLRA).[2] The Health Care Amendments guarantee unions the right to organize nonprofit health care institutions, a right previously allowed only in profit-managed health care facilities meeting the jurisdictional standards of the National Labor Relations Board (NLRB).[3] Organizational rights are therefore presently assured by the NLRB in both nonprofit and profit hospitals.[4] Because of the unique need to provide high quality patient care within a tranquil setting, the right to organize has caused endless controversy over where such organizational efforts should be allowed.[5] Solicitation, or attempts by pro-union employees to organize a particular union through distribution of literature, leaflets, or through other persuasive means, has traditionally been forbidden by hospitals enacting no-solicitation rules.[6] The fundamental issue, as noted by Chief Justice Burger,

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1. *See* Health Care Institution Amendments, Pub. L. No. 93-360, 88 Stat. 395 (1974) (codified at 29 U.S.C. §§ 152, 158, 183 (1976); *id.* § 169 (1976 & Supp. V)) [hereinafter cited as Health Care Amendments]. The Health Care Amendments define a health care institution as: "any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person." Health Care Amendments, 29 U.S.C. § 152(14)(1976).

2. *See* National Labor Relations (NLRA) Act, ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-169 (1976)). The two major amendments to the NLRA were the Labor Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947), and the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act, Pub. L. No. 86-257, 73 Stat. 519 (1959) (current version at 29 U.S.C. §§ 401-531 (1976). Originally, the NLRA made no mention of private, nonprofit hospitals. These hospitals were first expressly exempted from NLRA coverage by the Taft-Hartley Act. The current version of the Taft-Hartley Act is present at 29 U.S.C. §§ 151-167 (1976). For a background discussion of the Landrum-Griffin amendments, see generally Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act,* 44 MINN. L. REV. 257, 257-60 (1959).

3. *See* Butte Medical Props., 168 N.L.R.B. 266, 268 (1967) (policies of NLRA effectuated in assuming jurisdiction over proprietary hospitals whose gross revenues exceed $250,000); University Nursing Home, Inc., 168 N.L.R.B. 263, 264 (1967) (proprietary nursing homes with revenues over $100,000 proper subject for NLRA jurisdiction). In 1970, the NLRB assumed authority over nonprofit nursing homes even though health care was only a secondary function to the primary purpose of providing a social custodial facility for elderly adults. *See* Drexel Homes, Inc., 182 N.L.R.B. 1045, 1046-47 (1970).

4. *See* 29 U.S.C. § 152 (1976). The NLRB has the statutory right, however, to decline jurisdiction where there is only a minimal effect on interstate commerce. *See id.* § 164(c)(1).

5. *See* St. John's Hosp. & School of Nursing, Inc. v. NLRB, 557 F.2d 1368, 1374 (10th Cir. 1977) (clear congressional interest expressed as to where solicitation should be allowed).

6. *See generally* R. GORMAN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 179-81 (1976) (overview of employee's rights to solicit). This comment will use solicitation and distribution synonymously since distribution of materials is usually a form of solicitation. *See* St. John's Hosp. & School of Nursing v. NLRB, 557 F.2d 1368, 1376 (10th Cir. 1977) (restrictions on solicitation same as on distribution). *But see* Farah

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is "whether the employees' organizational rights affected by the hospital rules in question are superior to the hospital's needs in carrying out its mission."[7] By employing a balancing approach between these two dissimilar interests, the NLRB and the federal courts have developed a set of presumptions to determine whether a no-solicitation rule is valid.[8]

The first objective of this comment is to examine the development of these presumptions since 1974 by analyzing case law specifically relating to working areas and working hours within the health care environment. The ultimate purpose, however, is to provide concrete guidelines for the practitioner, representing either union or management, who wishes to secure safe ground for his or her client regarding permissible solicitation areas.

II. History of the NLRB's Presumptions Regarding No-Solicitation Rules

A. *National Labor Relations Act and the Health Care Amendments*

Section 7 of the NLRA, as amended, states that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to

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Mfg. Co., 187 N.L.R.B. 601, 601 (1970) (wider latitude given by NLRB regarding solicitation as opposed to distribution of literature), *enforced per curiam*, 450 F.2d 942 (5th Cir. 1971). An example of a typically *invalid* no-solicitation rule reads as follows:

> No solicitations of any kind, including solicitations for memberships or subscriptions, will be permitted by employees at any time, including work time and non-work time in any area of the Hospital which is accessible to or utilized by the public. Anyone who does so will be subject to disciplinary action. In those work areas of the Hospital not accessible to or utilized by the public, no solicitations of any kind, including solicitations for memberships or subscriptions will be permitted at any time by employees who are supposed to be working, or in such a way as to interfere with the work of other employees who are supposed to be working. Anyone who does so and thereby neglects his work or interferes with the work of others will likewise be subject to disciplinary action.
>
> No distributions of any kind, including circulars or other printed materials, shall be permitted in any work area at any time.

NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 776 n.2 (1979).

7. NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 793 (1979) (Burger, C.J., concurring). The Chief Justice would accord much greater weight to the patient's well-being than is currently recognized by the United States Supreme Court. *See id.* at 791. *Compare* Beth Israel Hosp. v. NLRB, 437 U.S. 483, 501-02 (1978) (majority decision rests on statistical evidence regarding frequency of patient use) *with* NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 791 (1979) (Burger, C.J., concurring) (no evidence necessary to prove importance of patient care).

8. *See* St. John's Hosp., Inc. v. NLRB, 557 F.2d 1368, 1374 (10th Cir. 1977) (needs of hospital patients accorded considerable weight in balancing rights of patients and employees). A discussion of the NLRB presumptions regarding no-solicitation rules is addressed in Part II of this comment.

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engage in concerted activities for the purpose of collective bargaining . . . and shall also have the right to refrain from any . . . such activities . . . ."[9] Specifically, the NLRA prevents employers from interfering with employees' rights to organize and to bargain collectively with their employer.[10] Additionally, the NLRA authorizes the formation of the National Labor Relations Board, which is an administrative agency empowered to investigate and, if necessary, prosecute unfair labor practices, as well as to conduct representation elections.[11] Congress intended the NLRB to have the authority to create and develop fundamental national labor policy.[12] Enforcement of the NLRB's orders is accomplished when the General Counsel of the NLRB successfully petitions a federal circuit court, possessing statutory jurisdictional power under the NLRA, to enforce or set aside the order.[13]

The NLRB originally lacked jurisdiction over the nonprofit health care industry,[14] which by the early 1970's constituted over 50% of all hospital employees.[15] In 1974, Congress passed the Health Care Amendments partially because of the substantial impact of the health care industry on interstate commerce, a factor not originally present when these nonprofit

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9. 29 U.S.C. § 157 (1976).

10. *See id.* § 158(a)(1). This section states that "[I]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157." *Id.* § 158(a)(1).

11. *See id.* § 153(a), (b), (d). The NLRB was initially comprised of three Board members who were appointed by the President. In 1947, the Taft-Hartley Act expanded the number of Board members to five. *See* Taft-Hartley Act, 29 U.S.C. § 153 (1976). *See generally* R. GORMAN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 7 (1976) (general explanation of functions performed by NLRB Members). The Supreme Court has ruled repeatedly that the NLRB has express congressional authority to create and interpret national labor policy. *See* Beth Israel Hosp. v. NLRB, 437 U.S. 498, 501 (1978) (congressional delegation of NLRA's interpretation to NLRB) (quoting from NLRB v. Truck Drivers Local 449, International Brotherhood of Teamsters, 353 U.S. 87, 96 (1957) (national labor policy under jurisdiction of NLRB subject to narrow judicial review)); Republic Aviation Corp. v. NLRB, 324 U.S. 793, 797-98 (1945) (NLRB to apply language of NLRA).

12. *See* Beth Israel Hosp. v. NLRB, 437 U.S. 483, 501 (1978) (congressional intent grants NLRB power to decide labor policy).

13. *See* 29 U.S.C. § 160(e), (f) (1976).

14. *See* Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. § 152(2) (1970). Drafters of the Taft-Hartley Act expressly amended section 2(2) of the Act to define the term "employer" so as to exclude "any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual." *Id.* § 152. There was one reported case *before* Taft-Hartley which upheld the Act's coverage of nonprofit hospitals. *See* Central Dispensary & Emergency Hosp., 145 F.2d 852, 853 (D.C. Cir. 1944), *cert. denied*, 324 U.S. 847 (1945).

15. *See* S. REP. No. 766, 93d Cong., 2d Sess. 2, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 3946, 3948.

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hospitals were exempted from coverage by the Taft-Hartley Act in 1947.[16] The authors of the amendments were primarily concerned, however, with the numerous work stoppages which were disrupting the entire health care system. In discussing the bill, the legislative proponents agreed "that the needs of patients in health care institutions required *special consideration*"[17] and further "recognized [the] concern for the need to avoid disruption of patient care wherever possible."[18] Specifically, subsection (a) of the final bill repealed the exemption for nonprofit hospitals while subsection (b) expansively defined health care institutions to include: "hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged persons."[19] In effect, then, the Health Care Amendments were designed to reduce the number of strikes by providing organizational and collective bargaining rights under the aegis of the NLRA while simultaneously recognizing the delicate nature of the health care situation.[20]

B. *The NLRB's Presumptions in the Industrial Area*

Following the enactment of the NLRA, industrial and commercial employers attempted to utilize no-solicitation rules partly to enforce discipline and partly to stave off organizational attempts.[21] Some of these rules

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16. *See* 120 CONG. REC. 16899-900 (1974) (statements of Rep. Ashbrook, co-sponsor of Health Care Amendments bill; nonprofit hospitals originally community charitable institutions).

17. S. REP. No. 766, 93d Cong., 2d Sess. 2, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 3946, 3948.

18. *Id., reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 3946, 3948, 3951. For an exhaustive discussion of the legislative history of the Health Care Amendments, see generally Feheley, *Amendments to the National Labor Relations Act: Health Care Institutions,* 36 OHIO ST. L.J. 235, 241-47 (1975) (reasoning for congressional approval of amendments explained). *See generally* Vernon, *Labor Relations in the Health Care Field Under the 1974 Amendments to the National Labor Relations Act: An Overview and Analysis,* 70 NW. U.L. REV. 202, 203-07 (1975) (discussion of amendments and Federal Mediation and Conciliation Service involvement).

19. 29 U.S.C. § 152 (1976).

20. *See generally* Feheley, *Amendments to the National Labor Relations Act: Health Care Institutions,* 36 OHIO ST. L.J. 235, 240 (1975) (amendments designed to lessen recognition strikes). Moreover, one proponent of the bill, Senator Dominick, in relating a New York Times story about striking hospital workers, expressed grave concern over the uniqueness of the health care industry and the resultant scarcity of health care service in rural areas, especially those areas which could be potentially affected by recognition strikes. *See* S. REP. No. 766, 93d Cong., 2d Sess. 2 (1974) (citing N.Y. Times, Nov. 8, 1973), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 3946, 3953-54.

21. *See* Florida Steel Corp. v. NLRB, 529 F.2d 1225, 1230 (5th Cir. 1976) (explicitly anti-union no-solicitation rule found invalid). Generally, the Fifth Circuit has ruled in in-

were so patently discriminatory that the NLRB presumed those rules facially invalid.[22] This section summarizes those industrial presumptions and follows with a discussion of the presumptions presently used in the health care industry.

The NLRB in *In re Peyton Packing Co.,*[23] set out two general industrial presumptions pertaining to no-solicitation rules enforced by employers:

> The [National Labor Relations] Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. *Such a rule must be presumed to be valid* in the absence of evidence that it was adopted for a discriminatory purpose. It is no less true that time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property. It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property. *Such a rule must be presumed to be an unreasonable impediment to self-organization* and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline.[24]

Essentially, any rule forbidding solicitation during working time was presumed enforceable.[25] The second presumption stated that any rule disallowing solicitation during nonworking hours was invalid absent countervailing factors, such as production or discipline reasons, which may be necessary to a plant's safe and efficient operation.[26]

In *Republic Aviation Corp. v. NLRB*,[27] the Supreme Court upheld the

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dustrial cases that allowing soliciting in non-working areas during non-working times is protected under the NLRA, when production or discipline is not adversely effected. *Cf.* Custom Recovery, Div. of Keystone Resources, Inc. v. NLRB, 597 F.2d 1041, 1044 (5th Cir. 1979) (employer's verbal no-solicitation rule valid in light of employer's interest in maintaining production during working hours).

22. *See* NLRB v. Mangurian's, Inc., 566 F.2d 463, 465 (5th Cir. 1978); Florida Steel Corp. v. NLRB, 529 F.2d 1225, 1230 (5th Cir. 1976); *see also* NLRB v. Computed Time Corp., 587 F.2d 790, 793 (5th Cir. 1979) (company rule prohibiting soliciting employees for "organization" membership invalidated).

23. 49 N.L.R.B. 828 (1943), *enforced*, 142 F.2d 1009 (5th Cir. 1944).

24. *Id.* at 843-44 (emphasis added).

25. *See id.* at 843.

26. *See id.* at 843-44.

27. 324 U.S. 793 (1945). A companion case from the Fifth Circuit, LeTourneau Co. of

NLRB's decision in *In re Peyton Packing Co.* by observing: "We perceive no error in the Board's adoption of this presumption [referring to the presumptions in *Peyton Packing Co.*]. . . . [T]he validity . . . depends upon the rationality of what is proved and what is inferred."[28]

These two presumptions represent the starting point in any analysis of industrial, commercial, or health care solicitation rules. The delicate nature of the hospital environment necessitates "a more finely calibrated scale" when balancing employees' organizational rights against patients' interests in noncontroversial surroundings.[29]

C. *The NLRB's Presumptions in the Health Care Field*

Until the passage of the Health Care Amendments in 1974, nonprofit hospital employers were not subject to the NLRB's jurisdiction and therefore had free reign in constructing rules prohibiting union solicitation on company property.[30] Since 1974, however, the NLRB's industrial presumptions have been generally held to apply to the health care field where they involve two related concepts: working hours and working areas, including both immediate and patient-access care areas.[31] For example, a

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Georgia v. NLRB, 143 F.2d 67 (5th Cir. 1944), *rev'd sub nom.* Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945), was decided along with *Republic Aviation*. In *LeTourneau*, employees were suspended two days for passing out union literature in violation of the company's no-solicitation rule. *See* LeTourneau Co. of Georgia v. NLRB, 143 F.2d 67, 68 (5th Cir. 1944), *rev'd sub nom.* Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).

28. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 804-05 (1945). In *Republic Aviation,* a large military aircraft manufacturer promulgated a simple rule stating: " '[s]oliciting of any type cannot be permitted in the factory or offices.' " *Id.* at 795. Citing *In re Peyton Packing Co.,* the Supreme Court held this rule violated organizational rights guaranteed by the NLRA. *See id* at 795-96, 804-05. The majority opinion in *Republic Aviation* also stressed that the NLRB was to establish national labor relations policy by hearing evidence and making findings of fact. *See id.* at 798-800. The validity of these presumptions depends in large part on several factors, including production, discipline, or safety. *See* Eastern Maine Medical Center v. NLRB, 658 F.2d 1, 4 (1st Cir. 1981) (restrictions on non-working time solicitation activity allowed only when production or discipline reasons present); Woodview Rehabilitation Center, 265 N.L.R.B. No. 122, 5 LAB. L. REP. (CCH) ¶ 15,580 at 26,608 (Dec. 13, 1982) (absence of safety reasons rendered overly broad no-solicitation rule invalid). *See generally* Feheley, *Amendments to the National Labor Relations Act: Health Care Institutions,* 36 OHIO ST. L.J. 235, 292 (1975) (general discussion of 'special circumstances').

29. *See* Beth Israel Hosp. v. NLRB, 437 U.S. 483, 505 (1978) (judicial notice taken regarding availability of other solicitation areas). *See generally* Gould, *The Supreme Court and Labor Law: The October 1978 Term,* 21 ARIZ. L. REV. 621, 630-32 (1979) (discussion of "special circumstances" of hospital setting).

30. *See* 29 U.S.C. § 152(2) (1970) (nonprofit health care facilities statutorily excluded from NLRB coverage). *See generally* Shanin, *NLRB v. Baptist Hospital, Inc.: Union Solicitation in Health Care Institutions,* 6 AM. J. L. & MED. 105, 109 (1980) (article notes exclusion of health care institutions before 1974).

31. *See* NLRB v. Florida Medical Center, Inc., 576 F.2d 666, 670 (5th Cir. 1978) (com-

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no-solicitation rule preventing solicitation in working areas is presumed valid;[32] conversely, a no-solicitation rule in nonworking areas, such as employee-only locker rooms, is presumed invalid.[33] A no-solicitation rule banning solicitation during nonworking hours would similarly be presumed invalid.[34] The Supreme Court, in adopting the NLRB's presumptions, has ruled that a hospital may rebut any presumption of invalidity by presenting evidence proving that union solicitation in the controversial area is disruptive to patient care.[35] Moreover, the Supreme Court is judicially sensitive to a hospital's primary interest in creating restful surroundings conducive to prompt rehabilitation.[36]

III. Application of the NLRB's Presumptions to Working Areas and Working Hours in the Health Care Field

Following the extension of the NLRA's coverage over nonprofit hospitals, a polarization of opinion regarding proper solicitation areas has developed. Poised at one end are employees who are seeking to exercise their self-organizational rights in hospital settings as promised under the NLRA.[37] At the opposite end are embattled employers who wish to pro-

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pany rule prohibiting solicitation during hospital time held invalid). The Supreme Court addressed permissible solicitation areas in NLRB v. Baptist Hosp., Inc., 442 U.S. 773 (1979) and Beth Israel Hosp. v. NLRB, 437 U.S. 483 (1978), discussed fully in Section III. A. of this comment. The NLRB in T.R.W. Bearings Div., Div. of T.R.W., Inc., 257 N.L.R.B. 442, 442 (1981), discussed the invalidity of the term working hours, and is the object of inquiry in Section III.B.

32. *Cf.* Guyan Valley Hosp., Inc., 198 N.L.R.B. 107, 111 (1972) (no-solicitation rule in working area presumed valid).

33. *See* NLRB v. Beth Israel Hosp., 554 F.2d 477, 480 (1st Cir. 1977) (no-solicitation rule invalid in non-working areas), *aff'd*, 437 U.S. 483 (1978).

34. *See id.* at 478-80 (rule prohibiting solicitation during non-working hours presumed invalid). *See generally* St. John's Hosp. & School of Nursing, Inc. v. NLRB, 557 F.2d 1368, 1371 n.4 (10th Cir. 1977) (hospital rule proscribing solicitation during working time upheld); Food Store Employee Union Local 347 v. NLRB, 418 F.2d 1177, 1179-80 (D.C. Cir. 1969) (company rule preventing soliciting during working hours held invalid); Winchester Spinning Corp. v. NLRB, 402 F.2d 299, 303 (4th Cir. 1968) (no-solicitation rule applying to non-working hours presumptively invalid).

35. *See* NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 781 n.11 (1979). *See also* Beth Israel Hosp. v. NLRB, 437 U.S. 483, 507 (1978) (facility must show disruption to patient care).

36. *See* NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 791 (1978) (Burger, C.J., concurring).

37. *See* 29 U.S.C. § 157 (1976). In a Supreme Court case, the majority held that:

> [o]rganization rights are not viable in a vacuum; their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others. Early in the history of the administration of the Act the Board recognized the importance of freedom of communication to the free exercise of organization rights.

Central Hardware Co. v. NLRB, 407 U.S. 539, 543 (1972); *see also* NLRB v. Magnavox Co.,

vide quiet surroundings for the patient's well-being.[38]

The NLRB and the courts agree that a total prohibition of solicitation is unfounded and unacceptable.[39] They also agree that a hospital is a unique setting and furthermore recognize the hospital's undisputed need to maintain the tranquil atmosphere essential to the hospital's primary function of providing quality patient care.[40] The NLRB and the courts thus seek to balance the rights of both employee and employer. This goal is more easily acknowledged than implemented. The following section describes the major developments of labor policy regarding NLRB presumptions for the health care industry since the passage of the Health Care Amendments in 1974.

A. *Working Areas*

1. Immediate Patient Care Areas

The first post-Health Care Amendment decision by the NLRB, *St. John's Hospital & School of Nursing, Inc.*,[41] ruled that the NLRB's presumption against the validity of an overly broad no-solicitation rule would apply *except* to working, immediate patient care areas, including "patients' rooms, operating rooms, and places where patients receive treatment, such as x-ray and therapy areas."[42] Thus, the NLRB would presume any no-solicitation rule valid which forbade solicitation in the above-enumerated areas, even during nonworking hours.[43]

The NLRB reasoned further that solicitation, if permitted in these places, would be unsettling to patients, thereby distinguishing between strictly patient care areas and "patient access" areas.[44] On appeal to the

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415 U.S. 322, 325 (1974), *reh'g denied*, 416 U.S. 952 (1974) (Court ruled place of work appropriate for dissemination of literature).

38. *See* Beth Israel Hosp. v. NLRB, 437 U.S. 483, 498-99 n.16 (1978); *see also* St. John's Hosp. & School of Nursing, Inc., 222 N.L.R.B. 1150, 1150-51 (1976) (special characteristics of hospital given additional weight), *enforced in part and denied in part*, 557 F.2d 1368 (10th Cir. 1977).

39. *See* St. John's Hosp. & School of Nursing, Inc. v. NLRB, 557 F.2d 1368, 1371 (10th Cir. 1977) (special circumstances necessary to prohibit solicitation); *cf.* NLRB v. Florida Medical Center, Inc., 576 F.2d 666, 670 n.2 (5th Cir. 1978) (hospital's duty to maintain patient care given considerable weight).

40. *See* St. John's Hosp. & School of Nursing, Inc. v. NLRB, 557 F.2d 1368, 1372 (10th Cir. 1977) (peaceful environment necessary to patients' recovery).

41. 222 N.L.R.B. 1150 (1976), *enforced in part and denied in part*, 557 F.2d 1368 (10th Cir. 1977).

42. *Id.* at 1150.

43. *See id.* at 1150.

44. *See id.* at 1151. The NLRB recognized that a tranquil atmosphere is necessary for patient care. *See id.* at 1150. Patient access areas were defined to be "cafeterias, lounges, and the like . . . ." *Id.* at 1151.

United States Court of Appeals for the Tenth Circuit, the majority reviewed the balancing approach utilized by the NLRB and concluded that the NLRB did not give sufficient attention

> to the expressed congressional concern for the needs of the Hospital's patients. Once it is admitted that union solicitation is disruptive of the tranquil atmosphere . . . and may be unsettling to patients . . . it is unreasonable to conclude that these adverse effects of union solicitation will occur in some patient access areas but not in others.[45]

Consequently, the Tenth Circuit extended the definition of immediate patient care espoused by the NLRB to cover all areas to which the patient had access, including "halls, stairways, elevators, and waiting rooms accessible to patients."[46]

The *St. John's Hospital* decision presented a second pertinent issue—whether "substantial evidence" was presented by the hospital to rebut the presumption against the validity of its no-solicitation rule.[47] The Tenth Circuit's analysis revealed that a paucity of evidence was submitted by the hospital to rebut the NLRB's presumption.[48] Instead, the appeals court, using alternative reasoning, held that the "special circumstances" of the health care environment sufficiently rebutted the NLRB's presumption.[49]

The effect of the Tenth Circuit's decision was to broaden the NLRB's presumption against solicitation in working areas defined in *St. John's Hospital* to include patient access areas often frequented by patients.[50] Other circuits have declined to follow the Tenth Circuit's distinction between immediate patient care and patient access areas. The First Circuit, in *Beth Israel Hospital v. NLRB*, enforced a NLRB order permitting solici-

45. St. John's Hosp. & School of Nursing, Inc. v. NLRB, 557 F.2d 1368, 1374 (10th Cir. 1977). The Tenth Circuit thus denied enforcement of the NLRB's order regarding solicitation in patient access areas but enforced the NLRB's orders which held that the hospital had unlawfully interfered with three employees' organizational rights. *See id.* at 1378. Moreover, the Tenth Circuit, relying heavily on the legislative history behind the passage of the Health Care Amendments, stated: "There was a recognized concern for the need to avoid disruption of patient care wherever possible." *Id.* at 1374 (citing S. REP. No. 93-766, 93d Cong., 2d Sess. 2, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 3946, 3951).

46. *See* St. John's Hosp. & School of Nursing, Inc. v. NLRB, 557 F.2d 1368, 1375 (10th Cir. 1977).

47. *See id.* at 1378 (definition of substantial evidence).

48. *See id.* at 1374-75. An additional legal ground relied on by the Tenth Circuit was that the NLRB wrongly refused to consider the availability of other means of access where union activities could be permitted. *See id.* at 1375; *see also* NLRB v. Magnavox Co., 415 U.S. 322, 324 (1974) (special considerations may make no-solicitation rule essential for production or discipline reasons), *reh'g denied*, 416 U.S. 952 (1974).

49. *See* St. John's Hosp. & School of Nursing, Inc. v. NLRB, 557 F.2d 1368, 1374-75 (10th Cir. 1977).

50. *See id.* at 1375.

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tation in the cafeteria and coffee shops, but did not base their holding on a difference between immediate and patient access areas.[51] In *Lutheran Hospital of Milwaukee, Inc. v. NLRB,* the Seventh Circuit, in relying on the NLRB's expertise in labor policy matters, disagreed with the Tenth Circuit's *St. John's Hospital* holding and affirmed the NLRB's order allowing solicitation in cafeterias and lounges.[52] This cacophony of opinions by the differing circuits was soon to be addressed but not resolved by the Supreme Court.

2. Patient Access Areas

Prompted by the incongruous positions taken by the several circuits, the Supreme Court granted certiorari in *Beth Israel Hospital v. NLRB.*[53] In this case, the hospital had restricted solicitation to certain employee locker rooms and restrooms, explicitly forbidding any union activity on hospital property.[54] Upon a challenge by employees that this no-solicitation rule interfered with the employees' organizational rights guaranteed by the NLRA and the Health Care Amendments, the NLRB presumed the above rule invalid and ordered the hospital to cease from enforcing it.[55]

On appeal from the NLRB, the United States Court of Appeals for the First Circuit affirmed the NLRB's ruling, reasoning that the hospital neglected "to show that special circumstances justified its curtailment of protected activities" in the cafeteria and coffee shop areas, while letting stand

51. *See* NLRB v. Beth Israel Hosp., 554 F.2d 477, 480-81 (1st Cir. 1977), *aff'd,* 437 U.S. 483 (1978). In *Beth Israel*, the First Circuit rejected the "puzzling" distinction between patient care areas and non-patient care areas. *See id.* at 482-83. *See generally* Note, *Beth Israel Hospital v. NLRB: The No Solicitation-No Distribution Rule as Applied to the Private, Nonprofit Hospital,* 6 OHIO N.U.L. REV. 609 (1979) (background and analysis of *Beth Israel* case).

52. *See* Lutheran Hosp. of Milwaukee, Inc. v. NLRB, 564 F.2d 208, 214-16 (7th Cir. 1977), *vacated and remanded,* 438 U.S. 902 (1978). The Court of Appeals for the Seventh Circuit protected solicitation in cafeterias and coffee shops, concluding that patients and visitors are indifferent to solicitation in areas outside of immediate patient care. *See id.* at 215. The Courts of Appeals for the District of Columbia and the Sixth Circuit have denied enforcement to similar NLRB orders, orders designed to protect solicitation in corridors and cafeterias as well as in other patient access areas. *See* Baylor Univ. Medical Center v. NLRB, 578 F.2d 351, 353-54 (D.C. Cir. 1978), *vacated in part, remanded in part,* 439 U.S. 9 (1978); NLRB v. Baptist Hosp.,Inc., 576 F.2d 107, 110 (6th Cir. 1978).

53. 437 U.S. 483 (1978). *See generally* Note, *Beth Israel Hospital v. NLRB: The No Solicitation-No Distribution Rule as Applied to the Private, Nonprofit Hospital,* 6 OHIO N.U.L. REV. 609 (1979) (analysis of *Beth Israel* and its implications).

54. *See* Beth Israel Hosp., 223 N.L.R.B. 1193, 1195 (1976). The objectionable rule stated that in: "[p]atient care . . . areas, and areas open to the public such as the lobbies, cafeteria and coffee shop . . . there is to be no solicitation nor distribution of literature." *See id.* at 1195.

55. *See id.* at 1199 (1976).

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the hospital's prohibition against solicitation in areas outside the cafeteria and coffee shop.[56] Thus, the burden of proof was on the hospital to show by substantial evidence "special circumstances" as to why solicitation should not be allowed.[57]

In affirming the First Circuit's decision, the Supreme Court relied on congressional authority given to the NLRB to balance conflicting legitimate interests of both union and management, noting that there was nothing in the legislative history of the Health Care Amendments to indicate that the health care field was outside the NLRB's expertise.[58] In fact, the Supreme Court reaffirmed Congress' explicit grant of authority to the NLRB to formulate national labor policy, adding that although the NLRB lacks expertise in health-care service delivery, "[T]he Board is [an] expert in federal national labor relations policy, and it is in the Board . . . that the 1974 amendments [Health Care Amendments] vested responsibility for developing that policy in the health care industry."[59] Finally, the Supreme Court placed considerable weight, which should be carefully heeded by the practitioner, on the infrequency of patient visits to the controverted cafeteria and coffee shop areas.[60] The majority concluded that in the absence of any hospital evidence showing harmful effects to patients in these areas, the hospital would have to rescind its no-solicitation rule disallowing solicitation in these areas.[61] Although the *Beth Israel Hospital* decision could have been the Supreme Court's instrument for establishing guidelines regarding solicitation in the health care field, the end product of *Beth Israel Hospital* merely affirmed the NLRB's presumptions regarding the invalidity of a no-solicitation rule in cafeteria and coffee shop areas.[62] Consequently, solicitation was permitted by the lower courts in cafeterias and coffee shops, both of which are patient access areas according to NLRB

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56. *See* NLRB v. Beth Israel Hosp., 554 F.2d 477, 480, 482-83 (1st Cir. 1977), *aff'd,* 437 U.S. 483 (1978). Without naming such areas, the court advised the NLRB to revise its presumption in future cases where the patients' care was potentially jeopardized. *See id.* at 481.

57. *See id.* at 480. The circuit court accorded great emphasis to the hospital's primary function of providing patient care in finding that the hospital did not meet the heavy burden by merely positing "speculative" effects of employee activities. *See id.* at 482. Special circumstances were not defined but the First Circuit suggested inferentially that a case-by-case analysis was essential. *See id.* at 482-83.

58. *See* Beth Israel Hosp. v. NLRB, 437 U.S. 483, 496-97 (1978). The majority opinion found that Congress was willing to rely on the NLRB to decide policy matters for the health care industry. *See id.* at 497.

59. *See id.* at 501.

60. *See id.* at 502.

61. *See id.* at 507.

62. *See id.* at 488-89. The Supreme Court in *Beth Israel* affirmed the NLRB's congressionally-mandated authority to develop fundamental national labor policy. *See id.* at 500-01.

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definition.[63]

At the same time the Supreme Court was deciding *Beth Israel Hospital*, the NLRB petitioned the Sixth Circuit in *NLRB v. Baptist Hospital, Inc.*,[64] to delineate further the NLRB's presumptions as they applied to patient access areas, other than cafeterias and coffee shops.[65] In *Baptist Hospital*, the hospital's no-solicitation rule prevented soliciting "at any time . . . in any area of the Hospital which is accessible to or utilized by the public."[66] The NLRB had rejected the hospital's contention that this rule was needed for patient care, holding the no-solicitation rule invalid in any areas outside of immediate patient care as enunciated in *St. John's Hospital*.[67] Relying on legislative history behind the Health Care Amendments, the Court of Appeals for the Sixth Circuit denied, in part, enforcement of the NLRB's order.[68] The Sixth Circuit held that the hospital presented sufficient evidence justifying its no-solicitation rule.[69]

On granting certiorari, the Supreme Court affirmed the Sixth Circuit's opinion in part and vacated and remanded it in part.[70] Specifically, the Court affirmed the NLRB's presumption against solicitation in immediate patient care areas defined in *St. John's Hospital*, and reversed the Sixth Circuit's ruling that sufficient evidence was presented to prohibit solicitation in the cafeteria, gift shops, or first floor lobbies.[71] Influenced by the

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63. *See* Baylor Univ. Medical Center v. NLRB, 593 F.2d 1290, 1296 (D.C. Cir. 1979) (court remanded case to Board for reconsideration in light of *Beth Israel*), *vacated in part, remanded in part*, 439 U.S. 9 (1978); NLRB v. St. Joseph Hosp., 587 F.2d 1060, 1064-65 (10th Cir. 1978), *enforcing in part and remanding in part*, 228 N.L.R.B. 158 (1977). *But see* Beth Israel Hosp. v. NLRB, 437 U.S. 483, 509 (1978) (Blackmun, J., concurring) (patient-oriented cafeteria could justify no-solicitation rule).

64. 442 U.S. 773 (1979).

65. *See* NLRB v. Baptist Hosp., Inc., 576 F.2d 107, 110 (6th Cir. 1978) (court allowed ban on solicitation in gift shop and lobbies), *aff'd in part, vacated and remanded in part*, 442 U.S. 773 (1979). For a general discussion of the *Baptist Hospital* decision, see Note, *Presumption Against Rules Prohibiting Solicitation During Nonworking Time—NLRB's Application of Presumption in Hospital Patient Access Areas, Except for Immediate Patient Care Areas, Upheld as Valid. NLRB v. Baptist Hospital, Inc.*, 25 VILL. L. REV. 583 (1980).

66. Baptist Hosp., Inc., 223 N.L.R.B. 344, 348 (1976), *enforcement denied in part, remanded in part,* 576 F.2d 107 (6th Cir. 1976), *aff'd in part, vacated and remanded in part,* 442 U.S. 773 (1979).

67. *See id.* at 344 n.2, 346; *see also* St. John's Hosp. & School of Nursing, Inc., 222 N.L.R.B. 1150, 1150 (1976), *enforced,* St. John's Hosp. & School of Nursing, Inc. v. NLRB, 557 F.2d 1368 (10th Cir. 1977) (immediate patient care areas include patients' rooms, operating rooms, and treatment rooms).

68. *See* NLRB v. Baptist Hosp., Inc., 576 F.2d 107, 110 (6th Cir. 1978), *aff'd in part, vacated and remanded in part,* 442 U.S. 773 (1979).

69. *See id.* at 109-110.

70. *See* NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 777 (1979).

71. *See id.* at 786-87. The Court reviewed the evidence and concluded that only an occasional use by patients who were judged fit to visit such areas was not sufficient to pro-

congressional admonition that a hospital should provide an undisturbed patient care setting, the Supreme Court held that the hospital had presented sufficient evidence to rebut the NLRB's presumption against the validity of a no-solicitation rule in corridors and sitting rooms on patients' floors.[72] The practical effect of this secondary holding is that a hospital, or other health care institution as defined by the NLRA, has the burden of proof to rebut the NLRB's presumptions by presenting evidence that solicitation was likely "either to disrupt patient care *or* disturb patients."[73] Moreover, although the NLRB's findings are binding on the reviewing courts, such findings are only binding if they are supported by "substantial evidence on the record considered as a whole."[74]

Finally, the Supreme Court in *Baptist Hospital* issued a firm directive to the NLRB to modify its presumptions regarding health care areas.[75] In the past, the Court has granted the NLRB great deference in allowing the NLRB to develop labor law and its own set of presumptions.[76] Language within the *Baptist Hospital* opinion, however, indicated that the majority believed it was time for the NLRB to revamp its presumptions in the health care industry to accomodate more adequately the uniquely sensitive health care environment.[77]

The result of the Supreme Court's holdings in *Beth Israel Hospital* and

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hibit solicitation in those areas. *See id.* at 787. *See generally* Comment, *Labor Relations in the Health Care Industry—The Impact of the 1974 Health Care Amendments to the National Labor Relations Act,* 54 TUL. L. REV. 416, 442-43 (1980) (analysis of *Baptist Hospital* decision).

72. *See* NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 785-86 (1979). In a strong forewarning to the NLRB to review its presumptions, the Supreme Court added: "It must be said, however, that the experience to date raises serious doubts as to whether the Board's interpretation of its present presumption adequately takes into account the medical practices . . . incident to the delivery of patient-care services in a modern hospital." *Id.* at 789. In added footnote language, the majority opinion used the present tense to emphasize the need for "reviewing" its presumptions. *See id.* at 789 n.16.

73. *Id.* at 781 n.11.

74. *See id.* at 782 (quoting 29 U.S.C. 160(e) (1976)); NLRB v. Erie Resistor Corp., 373 U.S. 221, 235-36 (1963) (congressional intent to support NLRB findings); Universal Camera Corp. v. NLRB, 340 U.S. 474, 477-78 (1951) (NLRA provided NLRB's findings based on substantial evidence to be conclusive); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 197 (1941) (Court deferred to NLRB's findings of fact).

75. *See* NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 789-90 (1979).

76. *See* Beth Israel Hosp. v. NLRB, 437 U.S. 483, 501 (1978) (NLRB given preference in interpreting NLRA); *see also* NLRB v. Local 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, 434 U.S. 335, 350 (1978) (deference allowed to NLRB in labor matters); NLRB v. J. Weingarten, Inc., 420 U.S. 251, 266 (1975) (NLRB interpretation of policy matters weighed heavily).

77. *See* NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 789-90 n.16 (1979). This warning resulted from the increasingly complex nature of hospital facilities. *See id.* at 789 n.16; *see also* Beth Israel Hosp. v. NLRB, 437 U.S. 483, 504 n.24 (1978) (presumptions should adequately consider complexity of hospital setting).

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Baptist Hospital is that solicitation is allowed, absent a showing of disruption to patient care in cafeterias and coffee shops but is not allowed in patients' rooms, operating rooms, and other treatment rooms.[78] In areas where patients have access, like corridors and waiting rooms, the Supreme Court will likely consider the statistical data involving frequency of patient visitation as determinative in deciding whether to strike down or uphold particular health care no-solicitation rules.[79]

B. *Working Hours*

During the 1940's, the NLRB developed a set of presumptions relating to the validity of industrial no-solicitation rules prohibiting solicitation during working hours or working time.[80] An employer's right to promulgate such rules was founded upon the NLRB's reasoning announced in *Peyton Packing*: "Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid . . . ."[81]

As early as 1973, this presumption was applied to health care industry cases.[82] The application of this presumption, however, typically reflects the oscillating approach taken by the NLRB regarding union solicitation matters.[83] For example, in *Avon Convalescent Center, Inc.*,[84] the NLRB held, in a pre-1974 decision, that use of the term "working time" in a no-solicitation rule was ambiguous and therefore invalid.[85]

In the first NLRB decision following the passage of the 1974 Health

78. *See* NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 781 n.11 (1979); Beth Israel Hosp. v. NLRB, 437 U.S. 483, 495 (1978).

79. *See* Beth Israel Hosp. v. NLRB, 437 U.S. 483, 502 (1978) (lack of patient use of cafeteria of "critical significance").

80. *See In re* Peyton Packing Co., 49 N.L.R.B. 828, 843-44 (1943), *enforced,* 142 F.2d 1009 (5th Cir. 1944).

81. *Id.* at 843.

82. *See* Avon Convalescent Center, Inc., 200 N.L.R.B. 702, 704-05 (1972), *enforced,* 490 F.2d 1384 (6th Cir. 1974) (NLRB rejected distinction between working time and working hours holding no-solicitation rule overly broad and ambiguous).

83. *Compare* Guyan Valley Hosp., Inc., 198 N.L.R.B. 107, 112 (1972) (no-solicitation rule banning union solicitation in working areas held valid) *with* Summit Nursing & Convalescent Home, Inc., 196 N.L.R.B. 769, 770 (1972), *rev'd*, NLRB v. Summit Nursing & Convalescent Home, Inc., 472 F.2d 1380 (6th Cir. 1973) (absent special circumstances no-solicitation rule prohibiting solicitation in work areas held invalid).

84. 200 N.L.R.B. 702 (1972), *enforced*, 490 F.2d 1384 (6th Cir. 1974).

85. *See id.* at 704-05. The NLRB stated that while " '[w]orking time' by itself may be a term of art for labor relations lawyers and experts, . . . it is scarcely to be expected that employees will readily understand the meaning of the phrase . . . ." *Id.* at 705.

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Care Amendments, *Essex International, Inc.*,[86] the NLRB held in reversing *Avon Convalescent Center, Inc.* that a no-solicitation rule prohibiting solicitation during "working time" was presumptively valid whereas a rule forbidding solicitation during "working hours" was considered invalid.[87] The NLRB's rationale behind distinguishing these two phrases was that "working time" signified time spent in performing job related duties.[88] "Working hours" could be interpreted by employees to mean that no solicitation was permitted from the hour they arrived on the job until the hour they left the jobsite.[89]

In 1981, the NLRB majority, partly comprised of the two dissenters of *Essex*, Members Fanning and Jenkins, and now joined by new Member Zimmerman, found an industrial case, *T.R. W. Bearings Division, Division of T.R. W.*,[90] to be the judicial vehicle for reversing *Essex*.[91] In *T.R. W.*, the employer had in effect two separate no-solicitation rules, one forbidding soliciting during working hours and the other prohibiting soliciting during working time.[92] The Administrative Law Judge decided that both rules as applied were invalid.[93] The NLRB, in affirming the Administrative Law Judge's ruling, held that there existed no meaningful distinction between

86. 211 N.L.R.B. 749 (1974). In *Essex Int'l, Inc. (Essex)*, dissenting Members Fanning and Jenkins would adhere to the previous holding of *Avon*. *See id.* at 753 (Fanning and Jenkins dissenting).

87. See id. at 750. Working time would *not* include time spent for lunch and break periods; hence, if an employee wishes to solicit when he is not performing job-related duties, he would be free to do so in non-work areas. *See id.* at 750. Working hours, as the NLRB noted, could be understood to mean that solicitation would not be allowed to occur from the time an employee "clock[ed] in" to the time he "clock[ed] out." *See id.* at 750.

88. *See id.* at 750.

89. *See id.* at 750. "Working hours," when placed in a no-solicitation rule, was "*prima facie* susceptible" of misinterpretation that all solicitation was banned. *See id.* at 750. The NLRB required specific evidence proving that solicitation during lunch breaks, etc., was communicated to employees. *See id.* at 750. *See generally* Note, *Reversal of NLRB Policy Regarding No-Solicitation Rules,* 34 BAYLOR L. REV. 143, 150-52 (1982) (general discussion of working time and working hours in no-solicitation rules).

90. 257 N.L.R.B. 442 (1981).

91. *See id.* at 442-43, 443 n.7.

92. *See id.* at 442-43. Before March of 1979, the employer had a rule prohibiting all employees from engaging in solicitation during *working time,* a rule presumptively valid according to *Essex*. *See* Essex Int'l, Inc., 211 N.L.R.B. 749, 750 (1974). Beginning in March of 1979, the employer implemented a second rule forbidding solicitation during *working hours,* which was presumptively invalid under *Essex*. *See* T.R.W. Bearings Div., Div. of T.R.W., Inc., 257 N.L.R.B. 442, 442 (1981).

93. *See* T.R.W. Bearings Div., Div. of T.R.W., Inc., 257 N.L.R.B. 442, 442 (1981). The Administrative Law Judge in *T.R. W. Bearings Div., Div. of T.R. W. (T.R. W.),* was not persuaded by specific evidence that the prohibition against solicitation during "working hours" had been communicated to the employees in such a way as to convince the employees that solicitation was permissible during lunch and break times. *See id.* at 442-43.

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working hours and working time.[94] Use of such ambiguous terms, the Board concluded, effectively restricted an employee's self-organizational rights guaranteed under the NLRA.[95] Therefore, an existing no-solicitation rule drafted to comply with *Essex* was now presumptively invalid.[96]

In 1982, the NLRB repeatedly reiterated the standard announced in *T.R.W.* in several health care cases.[97] By the close of 1982, however, pro-*T.R.W.* Member Fanning[98] and Pro-*Essex* Presiding Chairman Van de Water[99] had departed from the NLRB.[100] With the appointment of acting

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94. *See id.* at 443; *see also* Essex, Int'l, Inc., 211 N.L.R.B. 749, 753 (1974) (Fanning and Jenkins dissenting) (the terms "working time" and "working hours" ambiguous); Avon Convalescent Center, Inc., 200 N.L.R.B. 702, 704-05 (1972) (no distinction between working time and working hours), *enforced*, 490 F.2d 1384 (6th Cir. 1974).

95. *See* T.R.W. Bearings Div., Div. of T.R.W., Inc., 257 N.L.R.B. 442, 442-43 (1981). Section 7 of the NLRA guarantees employees the right to organize unions. *See* National Labor Relations Act, ch. 372, § 7, 49 Stat. 452 (1935) (current version at 29 U.S.C. § 157 (1976)).

96. *See* T.R.W. Bearings Div., Div. of T.R.W., Inc., 257 N.L.R.B. 442, 442 (1981). *Essex* decisions holding no-solicitation rules valid which contain the phrase "working time" are presumptively invalid and were overruled. *See id.* at 443 n.7.

97. *See, e.g.,* Lutheran Homes, Div. of Lutheran Homes, Inc., 264 N.L.R.B. No. 74, 111 L.R.R.M. (BNA) 1654, 1655 (1982) (verbal solicitation rule banning solicitation during working hours violative of NLRA); St. Joseph's Hosp., 263 N.L.R.B. No. 50, 111 L.R.R.M. (BNA) 1053, 1053 (1982) (no-solicitation rule containing phrase "working time" held invalid); Intermedics, Inc., 262 N.L.R.B. No. 178, 110 L.R.R.M. (BNA) 1441, 1441 (1982) (ban on solicitation during working time ruled invalid). In *Intermedics,* presiding Chairman Van de Water and Member Hunter subscribed to the *Essex* standard that "working time" connotes time devoted to actual job performance and therefore would hold valid a rule prohibiting solicitation during working hours. *See* Intermedics, Inc., 262 N.L.R.B. No. 178, 110 L.R.R.M. 1441, 1442-43 (1982). Their reasoning is based on the labor law maxim from *In re* Peyton Packing Co., 49 N.L.R.B. 828, 843 (1943), *enforced,* 142 F.2d 1009 (5th Cir. 1944), that "[w]orking time is for work." *See* Intermedics, Inc., 262 N.L.R.B. No. 178, 110 L.R.R.M. (BNA) 1441, 1442 n.7 (1982).

98. *See* T.R.W. Bearings Div., Div. of T.R.W., Inc., 257 N.L.R.B. 442 (1981). Chairman Fanning was listed as part of the majority in the unofficial reporter. *See* T.R.W. Bearings Div., Div. of T.R.W., Inc., 257 N.L.R.B. No. 47, 107 L.R.R.M. (BNA) 1481, 1481 (1981).

99. *See* Intermedics, Inc., 262 N.L.R.B. No. 178, 110 L.R.R.M. (BNA) 1441, 1442-43 (1982) (Chairman Van de Water, concurring and dissenting); *see also* St. Joseph's Hosp., 263 N.L.R.B. No. 50, 111 L.R.R.M. (BNA) 1053, 1053 (1982) (Van de Water would not rely on *T.R.W.*); Woodview Rehabilitation Center, 265 N.L.R.B. No. 122, 5 LAB. L. REP. (CCH) ¶ 15,580, at 26,608-09 (Dec. 13, 1982) (Member Hunter would also rely on *Essex*). On June 18, 1981, Chairman Van de Water was appointed by President Reagan to be a member of the NLRB for the remainder of resigning Member Penello's term. On August 13, 1981, Member Van de Water was granted a recess appointment by the President designating him to be Chairman of the NLRB. *See* 33 LAB. L.J. (inside front cover Oct. 1982) (discussion of Van de Water's qualifications).

100. *See* Walther, *Suggestions and Comments on the Future Direction of the NLRB,* 34 LAB. L.J. 215, 226 (1983); *see also Labor Management Relations,* 33 LAB. L.J. 64, 64 (1982)

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Chairman Miller and Member Hunter, present opinion *temporarily* indicates a swing back towards the *Essex* standards, which does not require working time to be defined in a no-solicitation rule.[101]

In *Medical Center of Beaver County, Inc.*,[102] the Administrative Law Judge held that the hospital employer violated section 8(a)(1) of the NLRA by maintaining the following no-solicitation dress code: "[H]ospital policy does not permit the use or wearing of . . . *while on duty*, buttons, hats . . . or unauthorized insignia which may represent any political, economic or labor organization."[103] Because this rule did not contain a definitive statement that it did not apply in non-immediate patient care areas and that it did not apply to employees on their lunch, rest, or other uncompensated periods, the Administrative Law Judge decided the rule was overly broad and discriminatory.[104] Acting Chairman Miller and Member Hunter, joining the majority opinion, subscribed to the *Essex* decision but held the rule invalid on other grounds.[105] Member Jenkins relied on *T.R.W.* and Member Zimmerman did not participate in the decision.[106]

Presently, the NLRB adheres to *T.R.W.*[107] Until the swing opinions of new Chairman Dotson and proposed Member Dennis are heard, practitioners must continue to define and distinguish working time from non-

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(Van de Water's nomination as Chairman fails before Senate Labor and Human Resources Committee).

101. *See* Medical Center of Beaver County, Inc., 266 N.L.R.B. No. 85, 5 LAB. L. REP. (CCH) ¶ 15,645, at 26,708-09 (Mar. 7, 1983) (acting Chairman Miller and Member Hunter do not rely on *T.R.W.*); Quartrol Corp., 266 N.L.R.B. No. 14, 5 LAB. L. REP. (CCH) ¶ 15,634, at 26,693-94 (Feb. 10, 1983) (Hunter, dissenting) (Hunter supportive of *Essex* decision). Members Zimmerman and Jenkins subscribe to the *T.R.W.* decision. *See* Intermedics, Inc., 262 N.L.R.B. No. 178, 110 L.R.R.M. (BNA) 1441, 1441 (1982).

102. 266 N.L.R.B. No. 85, 5 LAB. L. REP. (CCH) ¶ 15,645, at 26,708 (Mar. 7, 1983).

103. *Id.* at 26,709 (emphasis added).

104. *See id.* at 26,709.

105. *See id.* at 26,709. The no-solicitation rule was invalid, they reasoned, because the rule does not apply to only patient care areas. *See id.* at 26,709; *see generally* Intermedics, Inc., 262 N.L.R.B. No. 178, 110 L.R.R.M. (BNA) 1441, 1442 (1982) (concurring and dissenting opinion of Chairman Van de Water and Hunter; Van de Water and Hunter approve of *Essex*).

106. *See* Medical Center of Beaver County, Inc., 266 N.L.R.B. No. 85, 5 LAB. L. REP. (CCH) ¶ 15,645, at 26,708-09 (Mar. 7, 1983). Member Jenkins joined the majority opinion. *See id.* at 26,708-09.

107. *See* Olympia Plastics Corp., 266 N.L.R.B. No. 96, 5 LAB. L. REP. (CCH) ¶ 15,674, at 26,745 (Mar. 22, 1983) (rules prohibiting solicitation "after working hours" unlawful); *see also* Lincoln Hills Nursing Home, Inc., 266 N.L.R.B. No. 140, 5 LAB. L. REP. (CCH) ¶ 15,718, at 26,805-06 (May 10, 1983) (hospital's no-solicitation rule invalid and applied discriminatorily). In *Lincoln Hills,* employees were allowed to solicit sales of home decorations, cosmetics, and Girl Scout cookies, even though the written no-solicitation rule forbade solicitation in work areas during working time. *See id.* at 26,806.

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working time.[108]

IV. A Fifth Circuit Analysis: Working Areas and Working Hours—Uncharted Ground

The Fifth Circuit has, in at least three cases, addressed the issue of no-solicitation rules in the health care industry.[109] In a recent case of first impression, *Dallas Association of Community Organizations for Reform Now v. Dallas County Hospital District*,[110] the Fifth Circuit affirmed the district court's finding that public hospitals may impose reasonable time, place, and manner restrictions on first amendment activities, including solicitation.[111] Due to the large number of indigent patients admitted to Parkland Memorial Hospital,[112] the hospital promulgated a no-solicitation rule banning any soliciting in all areas without prior approval from the hospital administrator.[113] In this case, solicitation was not attempted by a union but rather involved a group dissatisfied with the patient care at Parkland.[114] The district court decided that a public hospital was not a

108. *See* Walther, *Suggestions and Comments on the Future Direction of the NLRB,* 34 LAB. L.J. 215, 227 (1983). On March 8, 1983, Chairman Dotson was confirmed by the Senate for a five year term beginning December 16, 1983. *See id.* at 227 n.16. Patricia Dennis, not yet confirmed, would be the second woman NLRB member. *See id.* at 227. It is also possible that Member Jenkins may not be re-appointed by the Reagan administration in August, 1983. *See* Wall St. J., August 2, 1983, at 1, col. 6.

109. *See* Dallas Ass'n of Community Orgs. for Reform Now v. Dallas County Hosp. Dist., 656 F.2d 1175, 1180 (5th Cir. 1981) (no solicitation permitted on first amendment grounds), *aff'd in part, rev'd and remanded in part*, 670 F.2d 629 (5th Cir. 1982); Vicksburg Hosp., Inc. v. NLRB, 653 F.2d 1070, 1079-80 (5th Cir. 1981) (court did not rule on no-solicitation rule); NLRB v. Florida Medical Center, Inc., 576 F.2d 666, 670 (5th Cir. 1978) (use of term "hospital time" in rule overly ambiguous).

110. 656 F.2d 1175 (5th Cir. 1981), *aff'd in part, rev'd and remanded in part*, 670 F.2d 629 (5th Cir. 1982).

111. *See id.* at 1179.

112. *See* Dallas Ass'n of Community Orgs. for Reform Now v. Dallas County Hosp. Dist., 478 F. Supp. 1250, 1253 (N.D. Tex. 1979), *aff'd,* 656 F.2d 1175 (5th Cir. 1981), *aff'd in part, rev'd and remanded in part*, 670 F.2d 629 (5th Cir. 1982). Parkland Memorial Hospital in Dallas, Texas is owned by Dallas County Hospital District. *See id.* at 1253. In 1978, the outpatient clinic, the area where solicitation was desired, averaged approximately 900 patients per day in a facility built for 400. *See id.* at 1253 n.3. Fewer than one-tenth of the outpatients paid for services rendered. *See id.* at 1253 n.4.

113. *See id.* at 1254. The hospital no-solicitation rule read as follows: "[F]or the protection of our employees and patients, solicitation of any kind on hospital premises is prohibited without prior written approval of the Hospital Administrator." *Id.* at 1254.

114. *See id.* at 1253-54. The Dallas Association of Community Organizations for Reform Now (ACORN) was a group interested in improving defective health care conditions. *See id.* at 1253-54. Their complaints included, *inter alia:* need for neighborhood clinics; improved waiting room conditions; and reduced waiting room time. *See id.* at 1254.

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"public forum"[115] for first amendment speech,[116] and held that the primary purpose of the hospital was to provide health care in an environment "sheltered from outside noise and activities."[117]

On appeal, the Fifth Circuit followed the lower court's reasoning and ruled that a public hospital was unlike those public forums traditionally recognized as open forums for free public assembly and communication,[118] such as streets and parks,[119] schools,[120] and state capitol grounds.[121] The Fifth Circuit, moreover, found that in performing public functions, hospitals were similar to jails[122] and reasonable time, place, and

115. *See id.* at 1257. The public forum concept essentially included those places in the community which were historically places for public speech. *See* Greer v. Spock, 424 U.S. 828, 838 (1976) (purpose of military institution to prepare soldiers, not to be a public forum); Hague v. Committee for Indus. Org., 307 U.S. 496, 515 (1939) (streets and parks hold right of communication in trust for public). The second public forum test is whether such places presently are appropriate for normal "forum" activities. *See* Lehman v. City of Shaker Heights, 418 U.S. 298, 302-04 (1974) (no freedom of speech violation in denial of advertising space to political candidate); Grayned v. City of Rockford, 408 U.S. 104, 117-21 (1972) (school property not proper forum for picketing activity). For a discussion of the public forum concept, see generally Horning, *The First Amendment Right to a Public Forum,* 1969 DUKE L.J. 931.

116. *See* Dallas Ass'n of Community Orgs. for Reform Now v. Dallas County Hosp. Dist., 478 F. Supp. 1250, 1257 (N.D. Tex. 1979), *aff'd*, 656 F.2d 1175 (5th Cir. 1981), *aff'd in part, rev'd and remanded in part*, 670 F.2d 629 (5th Cir. 1982). The lower court, furthermore, found no factual evidence supporting the proposition that a hospital is a public forum. *See id.* at 1257-58.

117. *See id.* at 1257-58. The forum did not gain constitutional protection merely because the outpatient area was the most appropriate place for their activity. *See id.* at 1258. Moreover, the lower court likened patients to the "captive audience" protected by the Supreme Court. *Compare id.* at 1258 (hospital patients "captive" to hospital solicitation) *with* Lehman v. City of Shaker Heights, 418 U.S. 298, 302 (1974) (bus riders "captive audience" to visual advertising) (quoting Public Utils. Comm'n v. Pollak, 343 U.S. 451, 468 (1952)).

118. *See* Dallas Ass'n of Community Orgs. for Reform Now v. Dallas County Hosp. Dist., 656 F.2d 1175, 1179-80 (5th Cir. 1981), *aff'd in part, rev'd and remanded in part*, 670 F.2d 629 (5th Cir. 1982).

119. *See, e.g.,* Flower v. United States, 407 U.S. 197, 198-99 (1972) (public street has first amendment protection); Schneider v. State, 308 U.S. 147, 160 (1939) (streets retain degree of free speech protection); Hague v. Committee for Indus. Org., 307 U.S. 496, 515 (1939) (parks traditional repositories for free speech).

120. *See* Grayned v. City of Rockford, 408 U.S. 104, 117 (1972) (free speech rights allowed as important part of educational process); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 514 (1969) (absent disruption of schools' work, free speech allowed).

121. *See* Edwards v. South Carolina, 372 U.S. 229, 230, 235 (1963) (peaceful assembly on state capitol grounds permissible).

122. *See* Dallas Ass'n of Community Orgs. for Reform Now v. Dallas County Hosp. Dist., 656 F.2d 1175, 1180 (5th Cir. 1981), *aff'd in part, rev'd and remanded in part*, 670 F.2d

manner restrictions on first amendment activities could be imposed.[123] Thus, a "reasonable restrictions on solicitation" argument is feasible and could be used to rebut presumably invalid solicitation rules by gathering substantial evidence showing an interruption of service to the patient.[124] Furthermore, the Fifth Circuit factually distinguished the instant case from *Baptist Hospital* because of the substantial evidence showing the congested nature of the hospital.[125] In its decision, the court of appeals implicitly placed great weight on the congressional intent to provide patients with undisturbed patient care.[126] The Fifth Circuit, however, refused to consider the constitutionality of the no-solicitation rule.[127] Solicitation, the court held, could be restricted because certain "sensitive" patient care areas within the hospital transcend the no-solicitation rule.[128]

In the most recent Fifth Circuit case, *Marathon LeTourneau Co., Longview Division v. NLRB*,[129] the court of appeals invalidated an unwritten industrial no-solicitation rule prohibiting solicitation during working hours.[130] In February of 1978, an employee was verbally reprimanded for

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629 (5th Cir. 1982); *see also* Adderley v. Florida, 385 U.S. 39, 47-48 (1966) (jail grounds not protected area for free speech).

123. *See* Dallas Ass'n of Community Orgs. for Reform Now v. Dallas County Hosp. Dist., 656 F.2d 1175, 1178 (5th Cir. 1981), *aff'd in part, rev'd and remanded in part*, 670 F.2d 629 (5th Cir. 1982); *see also* United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 132-33 (1981) (letter box not public forum therefore subject to time, place, and manner restrictions); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 536-37 (1980) (restriction of political mail inserts subject to time, place, and manner restrictions but not based on content). *But see* Linmark Assoc., Inc. v. Township of Willingboro, 431 U.S. 85, 94 (1977) (content of signs not subject to time, place, and manner restrictions).

124. *See* Dallas Ass'n of Community Orgs. for Reform Now v. Dallas County Hosp. Dist., 656 F.2d 1175, 1180 (5th Cir. 1981), *aff'd in part, rev'd and remanded in part*, 670 F.2d 629 (5th Cir. 1982).

125. *See id.* at 1180. Due to the handling of over 900 patients per day, employees were instructed not to use the inpatient entrance. *See id.* at 1180.

126. *See id.* at 1180-81. Without citing the legislative intent to give uninterrupted patient care, the Fifth Circuit concluded: "[W]e merely wish to enable those who need health care at Parkland to receive it without interference and without the grave possibilities of adverse medical reactions from such disturbing conditions." *Id.* at 1180.

127. *See id.* at 1181. Parenthetically, the court determined that the no-solicitation rule was clear, not vague or overbroad. *See id.* at 1181 n.15.

128. *See id.* at 1181. The court expressly limited its holding to the facts in the instant case. *See id.* at 1181.

129. 699 F.2d 248 (5th Cir. 1983).

130. *See id.* at 256-57. Based on the substantial evidence found by the Administrative Law Judge, the Fifth Circuit was obligated to uphold the NLRB's decision. *See id.* at 256. For an additional discussion of substantial evidence, see Beth Israel Hosp. v. NLRB, 437 U.S. 483, 507 (1978) (limited court review of NLRB decisions); Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951) (definition of substantial evidence); 29 U.S.C. § 160(e) (1976) (NLRB findings conclusive where supported by record as a whole). The NLRB, in

posting pro-union handbills before "clocking in" on the job.[131] During the same period, a pro-company employee was not reprimanded for distributing, in the presence of his supervisor, anti-union literature during "working hours."[132] The NLRB concluded, among other things,[133] that such actions resulted from an anti-union animus in violation of section 8 of the NLRA.[134]

On appeal, the Fifth Circuit affirmed the NLRB's ruling.[135] A no-solicitation rule, the court reasoned, may be promulgated and enforced during "working hours,"[136] but such rules must be reasonably connected to an employer's interest in productivity and must not be discriminatorily applied.[137] On a review of the record, the Fifth Circuit determined that allowing a pro-company employee to distribute literature while denying the same privilege to a pro-union employee constituted essentially selective, and thereby discriminatory, enforcement.[138] Even in the absence of selective enforcement, it is well-settled labor policy that production or discipline reasons must be advanced before solicitation can be forbidden after working hours.[139]

T.R.W., presumed invalid *any* no-solicitation rule containing the term "working hours." *See* T.R.W. Bearing Div., Div. of T.R.W., Inc., 257 N.L.R.B. 442, 442 (1981); *see also* Lutheran Homes, Div. of Lutheran Homes, Inc., 264 N.L.R.B. No. 74, 111 L.R.R.M. (BNA) 1654, 1655 (1982) (application of *T.R.W.* rule in health care setting); Tressler Lutheran Home for Children, 263 N.L.R.B. No. 42, 111 L.R.R.M. (BNA) 1591, 1591 (1982) (discussion of *T.R.W.* holding by NLRB in health care case).

131. *See* Marathon LeTourneau Co., Longview Div. v. NLRB, 699 F.2d 248, 255-56 (5th Cir. 1983).

132. *See id.* at 256.

133. *See id.* at 255. The Fifth Circuit affirmed the NLRB's finding that denying overtime assignments to an employee on account of solicitation activity may be an unfair labor practice. *See id.* at 255-56; *see also* NLRB v. Buddy Schoellkopf Prods., Inc., 410 F.2d 82, 87 (5th Cir. 1969) (unfair labor practice to deny overtime because of union activity).

134. *See* National Labor Relations Act, ch. 372, § 8, 49 Stat. 449, 452 (1935) (current version at 29 U.S.C. § 158 (1976)). This section states that: "[I]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." 29 U.S.C. § 158(a)(1).

135. *See* Marathon LeTourneau Co., Longview Div. v. NLRB, 699 F.2d 248, 256 (5th Cir. 1983).

136. *See id.* at 255-56.

137. *See id.* at 256; *see also* NLRB v. Turner Tool & Joint Rebuilders Corp., 670 F.2d 637, 641 (5th Cir. 1982) (citing Essex Int'l, Inc., 211 N.L.R.B. 749 (1974); employer solicitation rules must be non-discriminatorily applied); NLRB v. Roney Plaza Apartments, 597 F.2d 1046, 1050 (5th Cir. 1979) (barring solicitation after working hours requires production or discipline reasons); NLRB v. Mangurians's, Inc., 566 F.2d 463, 465 (5th Cir. 1978) (employee has right to distribute literature after working hours absent special circumstances).

138. *See* Marathon LeTourneau Co., Longview Div. v. NLRB, 699 F.2d 248, 256 (5th Cir. 1983).

139. *See id.* at 256; *see also* NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956). This landmark decision held that "[n]o restriction may be placed on the employees' right to

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More importantly, the *Marathon LeTourneau* appeals court declined to rely on the NLRB's *T.R.W.* decision.[140] In its final analysis, the Fifth Circuit did not define "working hours" in stating that "LeTourneau was entitled to promulgate and enforce reasonable rules controlling distribution and solicitation by its employees *during working hours*."[141] The implication was that the Fifth Circuit did not concern itself with semantic differences between working hours and working time, a distinction that continues to be a source of controversy in NLRB rulings.[142]

In this uncertain area, practitioners representing health care institutions can avoid needless litigation by adopting concrete, specific no-solicitation rules. Part V of this comment contains guidelines reflecting a conservative approach designed to assure complete compliance with the rulings of United States Supreme Court and the NLRB.

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discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline." *Id.* at 113; *see also* NLRB v. Mid-States Metal Prods., Inc., 403 F.2d 702, 704 (5th Cir. 1968) (production or discipline reasons necessitate strict no-solicitation rule); NLRB v. Walton Mfg. Co., 289 F.2d 177, 180 (5th Cir. 1961) (no-solicitation rule promulgated for production, order, or discipline reasons may not violate NLRA).

140. *See* Marathon LeTourneau Co., Longview Div. v. NLRB, 699 F.2d 248, 255-56 (5th Cir. 1983).

141. *Id.* at 255 (emphasis added). The opinion contained no discussion of *T.R.W.* where the NLRB found unlawful ambiguity in the use of the term "working hours" in a no-solicitation rule. *See id.* at 255; T.R.W. Bearing Div., Div. of T.R.W., Inc., 257 N.L.R.B. 442, 443 (1981). "Working hour" when used in a no-solicitation rule is presumed invalid by the NLRB. *See id.* at 443.

142. *See generally* Medical Center of Beaver County, Inc., 266 N.L.R.B. No. 85, 5 LAB. L. REP. (CCH) ¶ 15,645, at 26,708-09 (Mar. 7, 1983) (Member Jenkins agrees with fact that ambiguity exists between working hours and working time). This distinction eludes Members Hunter and acting Chairman Miller. *See* Intermedics, Inc., 262 N.L.R.B. No. 178, 110 L.R.R.M. (BNA) 1441, 1442 (1982) (concurring and dissenting opinion of Chairman Van de Water and Member Hunter). Although their opinion agreed with the majority that an unfair labor practice charge had occurred, they subscribed to the standard enunciated in *Essex,* which stated that a valid distinction existed between working time and working hours. *See id.* at 1442. The NLRB displays a disparate approach regarding solicitation matters. *Compare* Hammary Mfg. Corp., Div. of U.S. Indus., 265 N.L.R.B. No. 7, 111 L.R.R.M. (BNA) 1346, 1347 (1982) (exception for United Way solicitation valid while union solicitation denied), *amending* 258 N.L.R.B. 1319, 1320 (1981) *with* St. Vincent's Hosp., 265 N.L.R.B. No. 6, 111 L.R.R.M. (BNA) 1346, 1349, 1350 (1982) (exception for flower fund solicitation invalid). In the opinion of the NLRB, flower fund drives apparently lack the status of "beneficient acts," a status granted to the United Way fund-raising. *See* Hammary Mfg. Corp., Div. of U.S. Indus., 265 N.L.R.B. No. 7, 111 L.R.R.M. (BNA) 1346, 1347 n.4 (1982), *amending* 258 N.L.R.B. 1319, 1320 (1981).

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V. PRACTICAL GUIDELINES FOR THE PRACTITIONER IN DRAFTING NO-SOLICITATION RULES

A. *Proposed No-Solicitation Rule*

The no-solicitation rule recommended below is facially valid and nondiscriminatory but should be read in light of the subsequent discussion:

> No employee shall solicit or distribute any materials for any reasons when performing tasks, duties, or other functions for which the employee is being paid by the employer. Such paid time is working time, which does not include lunch, break periods, or other times when an employee is not being paid.[143]
>
> Solicitation or distribution shall not be permitted at any time by any employee or non-employee in the following immediate patient care areas: patients' rooms, operating rooms, therapy rooms, and any other patient treatment rooms.[144]
>
> Due to the significantly harmful effect on patient care, this health care facility also prohibits solicitation or distribution in recovery rooms, intensive care units, and elevators and stairways that are primarily used for the movement of patients.[145]
>
> Solicitation or distribution to non-employees is forbidden.[146]

This rule is necessarily detailed; almost all no-solicitation rules that are sweepingly stated are invalidated as overly broad by the NLRB and the

143. *See In re* Peyton Packing Co., 49 N.L.R.B. 828, 843 (1943) (no-solicitation rule enforceable during working time), *aff'd*, 145 F.2d 1009 (5th Cir. 1944); *see also* T.R.W. Bearings Div., Div. of T.R.W., Inc., 257 N.L.R.B. 442, 443 (1981) (definition of working time in rule necessary to remove ambiguity). Even if the two new NLRB members reaffirm *Essex*, this rule will still be valid since it complies with the stricter standards of *T.R.W.* which require working hours to be defined. *Compare* T.R.W. Bearings Div., Div. of T.R.W., Inc., 257 N.L.R.B. 442, 443 (1981) (no distinction between working time and working hours) *with* Essex Int'l, Inc., 211 N.L.R.B. 749, 750-51 (1974) (valid difference between terms working time and working hours).

144. *See* NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 781 n.10 (1979) (citing St. John's Hosp. & School of Nursing, Inc., 222 N.L.R.B. 1150, 1150 (1976) (definition of immediate patient care areas), *enforced in part and denied in part*, 557 F.2d 1368 (10th Cir. 1977).

145. *See* NLRB v. Baptist Hosp., 442 U.S. 773, 789-90 n.16 (1979). The Supreme Court has expressed great dissatisfaction with the limited definition of patient care areas, and has inferred quite strongly that judicial intervention may become necessary in the future. *See id.* at 789. This above proposed no-solicitation rule represents a partial expansion of the immediate patient care area definition that in all likelihood would be embraced by the United States Supreme Court. *See id.* at 789.

146. *See* Beth Israel Hosp. v. NLRB, 437 U.S. 483, 503-04 n.23 (1978). This final portion of the suggested rule would prevent possibly agitating union material from being read by patients. *See id.* at 503 n.23. This could be accomplished by requiring all employees to wear name tags. *See id.* at 503-04 n.23.

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courts.[147] Thus, any health care facility using the above rule adopts a conservative approach designed to inform employees when and where solicitation is not allowed.[148] Labor law practitioners, however, must consider the suggested rule as only one part of the overall strategy when advising clients in this sensitive and controversial area.[149]

B. *Additional Considerations for a Labor Law Practitioner*

A labor law attorney should also be aware of three ways in which a no-solicitation rule may be reinforced.[150]

1. Burden of Proof

First, a practitioner should know that the hospital has to carry the burden of proof.[151] Thus, a health care facility wishing to prohibit solicitation outside of immediate patient care areas has the *burden* to show that solicitation in the proscribed areas is likely to disrupt or disturb patient care.[152] Consequently, a hospital meets its burden of proof when presenting evidence proving a potential or actual disruption of patient care.[153] Where this burden is not met, the risk of non-persuasion falls directly on the hospital, causing the hospital's no-solicitation rule to fail.[154] If the hospital

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147. *See* Quartrol Corp., 266 N.L.R.B. No. 14, 5 LAB. L. REP. (CCH) ¶ 15,634, at 26,693-95 (Feb. 10, 1983) (overly broad no-solicitation rule failed to meet *T.R.W.* standard); *see also* NLRB v. Florida Medical Center, Inc., 576 F.2d 666, 670-71 (5th Cir. 1978) (lack of definition of non-working time in rule determined invalid as overly broad); Lutheran Homes, Div. of Lutheran Homes, Inc., 264 N.L.R.B. No. 74, 111 L.R.R.M. (BNA) 1654, 1654-55 (1982) (use of phrase "during working time" ambiguously invalid); Intermedics, Inc., 262 N.L.R.B. No. 178, 110 L.R.R.M. (BNA) 1441, 1441 (1982) (rule prohibiting solicitation "on working time" held presumptively invalid).

148. *See generally* NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 775 n.1, 776 n.2 (1979). The suggested no-solicitation rule relies for its support on the *Baptist Hospital, Beth Israel,* and *T.R.W.* decisions. *See* NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 785-86, 789 n.16 (1979); Beth Israel Hosp. v. NLRB, 437 U.S. 483, 503-04 n.23 (1978); T.R.W. Bearings Div., Div. of T.R.W., Inc., 257 N.L.R.B. 442, 443 (1981).

149. *See* NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 779, 782-83 (1979) (sufficiency of evidence, burden of proof, and legislative intent important factors in Supreme Court rulings).

150. *See id.* at 779, 782.

151. *See id.* at 781. The Supreme Court explicitly placed the burden of proof on the hospital. *See id.* at 781.

152. *See id.* at 781.

153. *See id.* at 781 n.11. Additionally, the Court noted that great deference should be given to the need for uninterrupted patient care. *See* Beth Israel Hosp. v. NLRB, 437 U.S. 483, 498-500 (1978).

154. *Cf.* NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 781-82 (1979) (hospital failed to meet burden); Beth Israel Hosp. v. NLRB, 437 U.S. 483, 502 (1978) (hospital failed to carry burden of proof); *see also* Woodview Rehabilitation Center, 265 N.L.R.B. No. 122, 5 LAB. L.

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meets the burden of proof by presenting substantial evidence, then the union must prove that no harmful effects are occurring to patients subject to union organizational activity in patient-frequented areas.[155]

2. Substantial Evidence and Statistical Data

Once the hospital submits evidence to the NLRB supporting the hospital's no-solicitation rule, the NLRB makes findings of fact that are binding on appellate courts *except* where such findings are not supported by " 'substantial evidence on the record considered as a whole'."[156] Substantial evidence has been defined as "more than a mere scintilla" and connotes such relevant evidence as a reasonable mind would accept as adequate to support a conclusion.[157] As a practical matter, the Supreme Court emphasizes that statistical data presented by the hospital indicating frequent use by patients in the controverted area will have considerable evidentiary value in these sensitive health care cases.[158]

3. Trend Towards Uninterrupted Patient Care

The Court's deliberation of these issues also reveals an enlightened sensitivity to the unique nature of the health care institutions.[159] A practi-

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REP. (CCH) ¶ 15,580, at 26,608 (Dec. 13, 1982) (employer failed to prove necessity of no-solicitation rule due to production, discipline, or safety reasons).

155. *Cf.* NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 785-86 (1979) (absent rebutting evidence hospital's evidence found sufficient to meet burden of proof).

156. *See id.* at 782 (hospital failed to submit enough evidentiary support to justify no-solicitation rule in cafeteria); *cf.* Beth Israel Hosp. v. NLRB, 437 U.S. 483, 502 (1978) (evidence proving extensive patient use found lacking); Universal Camera Corp. v. NLRB, 340 U.S. 474, 491 (1951) (Supreme Court accords deference to NLRB findings); Baylor Univ. Medical Center v. NLRB, 578 F.2d 351, 353 (D.C. Cir. 1978) (evidence presented by hospital sufficient to justify broad prohibition on solicitation).

157. *See* Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938) (definition of substantial evidence); *see also* St. John's Hosp. & School of Nursing, Inc. v. NLRB, 557 F.2d 1368, 1378 (10th Cir. 1977) (NLRB's findings of fact accepted as supported by substantial evidence). Statutory authority supports the proposition that the NLRB's findings of fact are to be given considerable weight by appellate courts. *See* 29 U.S.C. § 160(e), (f) (1976).

158. *See* NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 781-82 (1979) (citing Beth Israel Hosp. v. NLRB, 437 U.S. 483, 503 (1978); importance of patient frequency use expressly stated by Supreme Court). Significantly, in *Beth Israel,* the Supreme Court mentioned the statistical infrequency of patient use in a sensitive area at two different points in its opinion. *See* Beth Israel Hosp. v. NLRB, 437 U.S. 483, 490, 502 (1978).

159. *See* NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 791 (1979) (Burger, C.J., concurring). Chief Justice Burger's opinion represents part of a trend which is sympathetic to the purposes and needs of the hospital, as expressed in *Baptist Hospital*: "I would think no 'evidence' is needed to establish the proposition that the primary mission of every hospital is care and concern for the patients and that anything which tends to interfere with that objective cannot be tolerated . . . . The hospital's only purpose is the care . . . of its patients

tioner should additionally appreciate the congressional intent behind the Health Care Amendments to accord special consideration to the patient.[160] The Supreme Court has recognized this intent and has repeatedly emphasized that the primary function of a hospital is to provide efficient patient care.[161] Justice Brennan, writing for the majority, concluded in *Beth Israel Hospital* that:

> [T]he Board [bears] a heavy continuing responsibility to review its policies concerning organizational activities in various parts of hospitals. Hospitals carry on a public function of the utmost seriousness and importance. They give rise to unique considerations that do not apply in the industrial settings with which the Board is more familiar. The Board should stand ready to revise its ruling if future experience demonstrates that the well-being of patients is in fact jeopardized.[162]

Justice Brennan's concern for patients was subsequently reaffirmed in the *Baptist Hospital*[163] decision and moreover suggests to the practitioner a trend favoring the patients recovery in a tranquil environment.[164] In short, the congressional intention expressed in the Health Care Amendments and the judicial concern for uninterrupted patient care require all practitioners to pay special heed to this area in advising their clients in solicitation matters.[165]

. . . ." *Id.* at 791, 793 (Burger, C.J., concurring). The Chief Justice concluded by adding: "whatever doubts there may be as to the adverse effects on patients should be resolved in favor of their protection. I would not elevate the interests of unions or employees, whose highest duty is to patients, to a higher plane than that of the patients." *Id.* at 793 (Burger, C.J., concurring).

160. *See* S. REP. NO. 766, 93d CONG., 2d SESS. 2, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS, 3946, 3948.

161. *See* NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 793 (1979)(Burger, C.J., concurring); *see also* Beth Israel Hosp. v. NLRB, 437 U.S. 489, 513 (Powell, J., concurring).

162. Beth Israel Hosp. v. NLRB, 437 U.S. 489, 508 (1978) (quoting NLRB v. Beth Israel Hosp., 554 F.2d 477, 481 (1st Cir. 1977)). Justice Brennan, moreover, took judicial notice of the fact that the NLRB's guidelines are in an uncertain "flux," and concluded that the NLRB did have authority to modify its guidelines in this area. *See id.* at 508.

163. *See* NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 790 (1979) (citing Beth Israel Hosp. v. NLRB, 437 U.S. 483, 508 (1978)).

164. *See* NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 791, 793, 796-97 (1979) (Burger, C.J., concurring, and Brennan, J., concurring). Uninterrupted patient care is heavily emphasized by the present Justices. *See id.* at 793, 795.

165. *See id.* at 796-97 (Brennan, J., concurring). A practitioner might also argue that the NLRB should use its statutory rule-making authority to promulgate a no-solicitation rule. *See generally* National Labor Relations Act, ch. 372, § 6, 49 Stat. 449, 452 (1935) (current version at 29 U.S.C. § 156 (1976)). Section 6 of the NLRA states: "The Board [NLRB] shall have authority from time to time to make, amend, and rescind . . . such rules and regulations as may be necessary to carry out the provisions of this Act." *See id.* § 156. There is Supreme Court authority for the use of such rule-making power. *See* NLRB v. Bell Aero-

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VI. CONCLUSION

Presently, the practitioner should be aware of some possible developments that could occur in the near future. The United States Supreme Court has twice encouraged the National Labor Relations Board to expand their presumptions relating to immediate patient care areas in the health care industry.[166] With the addition of two new NLRB members, the National Labor Relations Board may soon follow judicial admonitions to restructure its presumptions relating to solicitation in hospital patient care areas. The no-solicitation rule offered in the previous section could be a valid starting point since the rule is consistent with the leading Supreme Court decisions in this area. A labor law practitioner in drafting a no-solicitation rule should be careful in balancing the rights of both patient and employee.[167]

As revealed by the legislative intent behind the Health Care Amendments, the first and primary concern is the patients' interest in recovering in a peaceful and tranquil environment, uninterrupted by union activity. An equally important interest, however, is the employees' right to self-organization as guaranteed by the National Labor Relations Act.[168] As a practical matter, the ultimate burden falls on the attorney representing the hospital to prove that disruption to the patient has occurred. Future NLRB holdings may be helpful in deciding how much evidence is enough, but a prudent attorney, for union or management, could substantially aid his client by amassing statistical data showing frequency of patient use of a particular "patient care" area.[169] The final analysis reveals that prompt NLRB action is urgently needed to eliminate confusion and disagreement regarding no-solicitation rules. Otherwise, it is entirely possible, even

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space Co., 416 U.S. 267, 290 (1974) (NLRB not precluded from announcing new rules under section 6 authority); NLRB v. Wyman-Gordon Co., 394 U.S. 759, 763-64 (1969) (rule-making authority of section 6 suggested by Justice Fortas). *See generally* Bernstein, *The NLRB's Adjudication—Rule Making Dilemma Under the Administrative Procedure Act,* 79 YALE L.J. 571, 589-93 (1970) (good discussion of rarely used statutory authority and Administrative Procedure Act).

166. *See generally* NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 789-90 (1979); Beth Israel Hosp. v. NLRB., 437 U.S. 483, 508 (1978).

167. *See generally* NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 791-93 (1979) (Burger, C.J., concurring) (Chief Justice accords great weight to patient care); *see also* Fanning, *Union Solicitation and Distribution of Literature on the Job—Balancing the Rights of Employers and Employees,* 9 GA. L. REV. 367, 371-73 (1975) (former Chairman Fanning expressed concern over Supreme Court mandate to form new rule in solicitation areas).

168. *See* Fanning, *Union Solicitation and Distribution of Literature on the Job—Balancing the Rights of Employers and Employees,* 9 GA. L. REV. 367, 367-68 (1975) (court must balance interests).

169. *See* Beth Israel Hosp. v. NLRB, 437 U.S. 483, 502 (1978) (statistical data of "critical significance").

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probable, that the Supreme Court may exercise its judicial prerogative by announcing guidelines accomodating both health care patients and health care employees.

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