



Could An Affirmative Action Plan Be In Your Future?

By Kyle Frye (Atlanta)

No one would deny that labor and employment law presents a cornucopia of challenges for healthcare executives. Presently, you must contend with employee concerns caused by difficult economic times along with new laws, such as the Lilly Ledbetter Fair Pay Act. On the horizon are possibly even more daunting changes to the legal landscape, such as the Employee Free Choice Act (EFCA) – frequently referred to as the card check law. Added to these challenges is the very real possibility that a great many more hospitals and healthcare organizations will have to adopt written affirmative action plans.

The Department of Labor's Office of Federal Contracts Compliance Programs (OFCCP), the agency enforcing affirmative action regulations, has for many years looked for ways to expand its jurisdiction over healthcare. These regulations require written affirmative action plans for employers with at least 50 employees who hold a single contract or subcontract of at least \$50,000 to provide goods or services to the federal government. Obviously, if they have such a contract or subcontract, many healthcare organizations will easily fall within these parameters.

Having a written affirmative action plan involves not just the expense of adopting a plan and updating it on a yearly basis, but also requires much more detailed and expansive recordkeeping along with the distinct possibility of being faced with exhaustive reviews by the OFCCP of an organization's employment practices and decisions as well as its compensation systems. These reviews can and do result in the imposition of hiring goals, payment of back wages and adjustments to compensation.

What's The Basis For A Plan?

Receiving Medicare or Medicaid funds has long been considered *not* to be sufficient grounds for coverage, as they are not considered to be contracts for goods or services. As a result, the OFCCP has looked for some other basis to assert jurisdiction.

One such basis was a hospital's receipt of reimbursements from insurance companies, such as Blue Cross, which held a prime contract under the Federal Employee's Health Benefits Program (FEHBP). The theory was that entering into such contracts with Blue Cross made

hospitals and healthcare organizations subcontractors on the prime contract, and thus covered by the affirmative action regulations.

That issue was decided against the OFCCP in a 2003 case involving Bridgeport Hospital. There, the OFCCP argued that the Hospital was a subcontractor based on its contracts with Blue Cross that, in turn, had a prime contract with the federal government to provide medical insurance for federal workers. The OFCCP began enforcement procedures when the Hospital denied coverage.

The U.S. Department of Labor found that the Blue Cross contract did not obligate Bridgeport to provide medical services to policyholders, but rather to reimburse policyholders for medical care costs. That relationship was not a contract for goods or services and the OFCCP was cautioned that it could not establish subcontractor coverage for hospitals, pharmacies or other medical care providers based upon the existence of a contract with Blue Cross or other FEHBP providers.

Not surprisingly, the OFCCP did not abandon the effort to assert jurisdiction over healthcare providers, but merely adopted a different basis. Following the Bridgeport Hospital decision, the OFCCP began asserting jurisdiction over healthcare providers, based upon contracts with entities holding a contract to put into operation health maintenance organizations for federal employees. The OFCCP began arguing for coverage based upon contracts with Tricare to provide medical services for uniformed service members and their dependents, as well as other organizations providing HMOs for federal employees.

This approach has now been tested by three hospitals in Pennsylvania, arguing that they were not covered. The OFCCP again started enforcement proceedings, but this time an Administrative Law Judge in the Department of Labor found in favor of the OFCCP. In a decision last year, the ALJ concluded that the Bridgeport Hospital decision did not apply since the prime contractor, UPMC, had a contract to provide medical services to federal employees through HMOs, and the hospitals, in turn, had a contract with UPMC to provide medical services to the patients. This decision is, of course, subject to appeal, but on the strength of this decision we expect the OFCCP to continue its efforts to cover even more of the healthcare industry.



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Don't Let Unions Exploit Your Personnel Rules

By Rob Ashmore and Deepa Subramanian (Atlanta)

Mistakes in drafting and enforcing employment policies can help a union to organize your institution. During union organizing drives, unions regularly look for legal violations by the targeted employer, including employment policies and practices that may violate the National Labor Relations Act (NLRA). Unions pursue and publicize such violations to undermine employee confidence in management and taint employer defenses to other charges that the union may file during the organizing drive.

Some common areas of union scrutiny (and employer mistakes) include policies relating to confidentiality, no-solicitation, and no-distribution. In this article we'll take a look at each one.

Confidentiality Rules

Because of such statutes as HIPAA, the Americans with Disabilities Act, and various common laws enforced by the courts, healthcare employers must work to protect confidential information relating to patients, employees, and the institution itself. But you must also be careful not to write confidentiality rules too broadly. Under the NLRA, employees are entitled to engage in "concerted activities" for their mutual aid or protection, regardless of whether a labor union is involved. That means, among other things, that employees have the right to discuss among themselves issues relating to their pay, benefits, and working conditions. Merely announcing an overbroad confidentiality rule can violate the NLRA, regardless of whether you actually enforce the rule.

No-Solicitation Rules

Implementing a no-solicitation rule can not only reduce work distractions for employees but also make it harder for union supporters to use their paid working time to campaign for the union. Unions most actively urge work-time solicitation where there is a large voting unit and employees disperse over a wide geographical area after work. In considering whether a no solicitation rule is lawful, the National Labor Relations Board (NLRB) considers the following factors:

Language: One common mistake is to ban employee solicitation during employees' "working hours." That term is illegally overbroad since it can be read to include break and meal periods; the more restricted term "working times" should be used instead.

Timing: If you wait to implement a no-solicitation rule until after union activity begins, the NLRB will usually find the rule unlawful because of the timing of its implementation in relation to union activity.

Work status: Employees can be required to limit solicitation to their *non-working times* (designated breaks, meal times, and before or after work). Such limits apply both to the employee soliciting and the employees being solicited. While it is not unlawful to enforce a rule against soliciting *before and after work*, enforcement of such a rule must be consistent to be lawful. Since hospitals operate around the clock, with employees coming in early and leaving late for a variety of reasons, maintaining such consistency is seldom possible in practice.

Consistency: If you allow employees to solicit during work time for other commercial organizations but bar union solicitation, the NLRB will likely find illegal discrimination. In a 2007 decision, the NLRB ruled that an employer may properly disregard "non-commercial solicitations" in determining whether an employer has enforced its rule discriminatorily against union solicitations. It remains to be seen whether the Democratic majority of the incoming NLRB will follow that decision or instead return to prior precedent that permitted only limited charitable exceptions in assessing the legality of a no-solicitation rule.

Location: Employers must usually allow employees on non-working time to solicit in various areas, such as lobbies, flower shops, cafeterias, employee break rooms, sidewalks, and parking lots.

But special NLRB rules give hospital employers the right to ban solicitation in "immediate patient care areas" even during nonworking time. While the definition of "immediate patient care areas" varies from hospital to hospital, it typically includes such areas as patient rooms, operating rooms, places where patients receive treatment such as X-rays and therapy, and adjacent elevators used by patients. Not all areas accessible to

patients will qualify as patient care areas, however.

Implementing and enforcing a no-solicitation rule in a hospital setting requires both care and ongoing efforts at consistency, since disputes over such rules are a frequent source of NLRB charges in healthcare union campaigns. Some employers take a more limited approach by focusing not on what employees say to each other during work time but instead on the principle that "Working time is for work." That approach allows employees somewhat more room to discuss unionization during work but is easier to apply in practice.

No-Distribution Policies

A hospital has broader rights to control distribution than solicitation. Unlike solicitation, where non-working employees may solicit other non-working employees even in work areas (except in immediate patient care areas), employees may be prohibited from distributing non-institutional materials in working areas at any time. Such materials include, for example, flyers, handbills, brochures, or other promotional materials. (There is one important exception: Because union authorization cards are considered to be an integral element of solicitation, handing out such cards is considered solicitation rather than distribution.)

One common area for distribution is in parking areas of the hospital. Such activity is generally lawful unless the employees are blocking ingress or egress, creating safety hazards, or leaving excessive litter in the area (as opposed to one handbill left under a windshield wiper of each car). Another issue that arises in union organizing is whether an employer is entitled to remove handbills posted or left on tables in the cafeteria or in other break areas. The answer can depend on what housekeeping rules have been enforced previously as to other non-hospital materials.



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Piercing Through The “Body Art” Issue

By Danielle Urban and A. Kevin Troutman

As tattoos, piercings and other forms of body art have become increasingly prevalent, hospitals are grappling with how to deal with this trend. While many younger workers proudly display their body art, older workers have exhibited a variety of responses. Some are offended, some have embraced the fad, while still others seem unfazed. Providing care for an ever-aging population, hospitals must also consider the reactions of patients and their families, many of whom are already frail and/or apprehensive.

Last year, a hospital group in Texas planned to implement a dress code and grooming policy requiring all tattoos to be covered, and piercings to be limited to earlobes and a nose stud only. With its new dress and grooming code, the hospitals planned to join a growing list of healthcare employers, and employers in general, to address the increasing popularity of tattoos and piercings among employees. But the proposed changes sparked vigorous debates among employees and even press coverage. In other words, body art, piercings and grooming standards have become a *sensitive* subject.

The Prevalence Of Tattoos And Piercings Has Exploded

A recent Pew Research Center poll reported that 36% of 18- to 25-year-olds and 40% of 26- to 40-year olds have at least one tattoo. In those same age groups, 30% and 22% respectively have a piercing somewhere other than their ears. The same survey found that even in the 40 to 60 year old age group, over 10% had tattoos or piercings outside of their ears, with these numbers expected to grow as the demand for tattoos and piercings – so-called “body art” – becomes even more mainstream.

The growth in popularity of body art provides challenges for employers in every industry and profession. Many employers have responded by implementing dress and grooming policies seeking to limit or prohibit employees’ open display of tattoos and piercings while at work. In 2006, for example, San Bernardino County, California, began requiring its public employees to cover any tattoos and remove visible facial piercings while at work. Since last year, Los Angeles city firefighters have been required to cover all tattoos while on the job, and for the past five years, the Los Angeles Police Department has had a requirement that all officers cover any visible tattoos.

Protecting Employers’ Legitimate Interests

Although some employers, particularly in traditionally creative fields, may encourage employee displays of body art as a form of self-expression, many others worry that their employees’ visible body piercings and tattoos may be off-putting or even offensive to customers, investors, and the public at large. With the growing popularity of body art, particularly among younger employees, what is a hospital or a clinic to do?

Those with too-stringent grooming and dress code requirements risk driving off talented employees and hurting employee morale, while at the same time, an employer such as a hospital may have legitimate concerns that an employee’s mode of self-expression will alienate or offend patients or patients’ families. As explained below, this issue also raises some potential legal considerations.

Employers have wide latitude to establish dress and grooming policies under the law, but it also makes sense to consider the underlying reasons for appearance requirements before implementing a strict policy. Obviously, not all positions require traditional business dress, and not all positions involve interactions with customers or the public either. This means that strict grooming and dress policies, which prohibit all displays of tattoos and piercings, may be unnecessary and even demoralizing to a growing segment of employees.



Developing An Effective Policy

Even employers that permit piercings or tattoos may still find it necessary to set some limits. A detailed dress code and grooming policy should clearly spell out what is permitted. For example, if you permit the display of tattoos, you may prohibit the display of sexually graphic, violent, or otherwise offensive tattoos, or may require that employees limit the number of visible tattoos.

To ensure employee support of and compliance with dress and grooming policies, employers will probably want to consider involving workers in the development of dress and grooming policies. They should also be prepared to make a business case for any restrictive policy decisions. At minimum, this will help employees understand the business need for the policies. Having had the opportunity to provide input, employees are more likely to support a dress and grooming policy, even one they do not entirely agree with.

Dealing With Religious Issues

Hospitals must also consider how to respond if an employee asserts a right to a particular tattoo, jewelry or hairstyle on religious grounds. You cannot treat employees or applicants more or less favorably because of religious beliefs or practices. In fact, you must accommodate employees’ *sincerely held* religious practices, unless doing so would impose an undue hardship. According to the EEOC, modification of grooming requirements is an accommodation that may be *required*. But you are not required to accommodate religious beliefs or practices if doing so would impose an undue hardship on legitimate business interests.

The standard for demonstrating an undue hardship is not high, but employers must be prepared to show that they, indeed, considered the request for accommodation, as opposed to simply dismissing it out of hand.

As is so often the case, the most important factor may be proving that you have acted consistently. Employers may not place more restrictions on religious expression than on other forms of expression that have comparable effect on the workplace. Some employers have already learned the hard way that if a ball cap or flamboyant hairstyle does not pose an undue hardship, neither does a turban or a head scarf that is based upon sincerely-held religious convictions. The key, as always, is consistent and even-handed treatment of all such requests. This is another situation where supervisory training is critical. Supervisors and managers must be trained to consult with human resources when facing these situations.

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The Bottom Line

What does this mean for healthcare executives whose organizations do not currently have written affirmative action plans? First, you need to determine if you have contracts with organizations setting up health maintenance organizations for federal government employees or with Tricare, providing care for military personnel and their dependents. If so, and you otherwise meet the 50 employee and \$50,000 standards, then you should begin to explore the costs of adopting any obligations imposed by written affirmative action plans and determine whether and to what extent you wish proactively to comply with the regulations. If you would like our help in guiding you through this process just give us a call.

For more information email the author at kfrye@laborlawyers.com or call 404.231.1400.



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Conclusion

To identify areas of risk, we recommend that you conduct an audit of all policies and procedures that might be over the legal lines discussed above. For example, many employers have more than one confidentiality policy, and other policies or practices limiting employee speech and activity may vary from department to department.

Even a lawfully worded rule can result in an unfair labor practice finding if it is overbroad, implemented after the onset of union activity, or applied inconsistently against union supporters. Moreover, particularly in healthcare, your rules must be crafted carefully and tailored to your institution, as in defining the "immediate patient-care areas" where solicitation can be banned completely.

Enforcing lawful confidentiality, no-solicitation and no-distribution rules can be very helpful to the employer, but only if your institution is willing and able to enforce the rules consistently. In future editions of *Healthcare Update* we'll discuss issues related to outsider access to the premises, bulletin board postings and employee uses of emails and the internet.

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Fear that other employees may be upset by or "uncomfortable" with a religious expression is very unlikely to constitute an undue hardship. On the other hand, you can establish an undue hardship by showing that the accommodation diminishes efficiency in other jobs, impairs safety or requires more than ordinary administrative costs.

Finally, no matter how your hospital or clinic deals with these issues, applicable policies should be clearly stated in writing and readily available to all employees.

Conclusion

Like it or not, traditional dress code and appearance standards are being challenged today more than ever. While employers still retain wide latitude, practical, social and legal factors are requiring more careful consideration of requests that might have been readily (and safely) dismissed several years ago. As last year's experience in Texas demonstrated, it is advisable to seek employee input before making major changes to employee appearance standards. Failure to do so could result in unpleasant surprises.

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