INTRODUCTION:
Despite the national decline in union membership, labor organizations remain very active in higher education in both the public and private sectors. According to statistics by the National Center for the Study of Collective Bargaining in Higher Education and the Professions (“National Center”), some 537 institutions (1220 campuses) currently have faculty collective bargaining units on their campuses covering over 318,000 faculty members [1]. In addition, the National Center’s most recent survey (a decade ago) reported that some 50 different labor unions represented almost 400,000 non-faculty staff employees at over 2700 campuses around the country [2]. That number undoubtedly has increased considerably since then, as unions such as the Service Employees International and United Auto Workers and a number of other national unions have been actively seeking to enlist staff employees on college and university campuses [3].

Whatever position institutions may take with respect to the unionization of their employees, it is likely that they will face myriad questions relating to the solicitation rights of union organizers and employee sympathizers who wish to engage in union activity during the work day and on campus. Case law regarding solicitation rules has developed under the National Labor Relations Act (NLRA) [4] and provides guidance for private sector employers and employees. The private sector case law also offers guidance to state labor boards dealing with unionization in the public sector, although some state labor statutes may have provisions in this area peculiar to that state [5].

This NACUANOTE discusses the rules governing union solicitation and offers suggestions for addressing union organizing at colleges and universities.

DISCUSSION:

I. Union Solicitation on Campus

The NLRA [6], amended in 1947 by the Taft-Hartley Act [7], provides the basic statutory protection for the rights of private sector employees to unionize and otherwise engage in collective activity. The Act affords employees a right to engage in union activity during the work day and on campus. Case law regarding solicitation rules has developed under the National Labor Relations Act (NLRA) [4] and provides guidance for private sector employers and employees. The private sector case law also offers guidance to state labor boards dealing with unionization in the public sector, although some state labor statutes may have provisions in this area peculiar to that state [5].

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petitioning union can meet this threshold [10]. Thus, obtaining signature cards from employees is an indispensable element of a union campaign. Accordingly, the degree to which union organizers, whether employees or outside union agents, can solicit employees and encourage them to sign such cards is a critical component of a campaign, and can sometimes determine the success or failure of a union drive.

Solicitation itself can take a variety of forms. Employees may discuss unionization among each other during the work day; outside union organizers may dispense leaflets to employees upon arrival at work; union organizers may appear on the employer’s premises demanding to meet with employees; union cards may be distributed during the work day; or union literature may appear in work areas. Whatever form takes place, the manner of solicitation is determined by the NLRA solicitation rules.

II. Basic Solicitation Rules under the NLRA

While institutions may choose to permit union solicitation at any time, and in any location, many institutions elect to restrict such activity to the same degree they restrict other types of solicitation. Whether an institution can lawfully restrict union activity on its premises is initially determined by whether it has a valid non-solicitation policy. Many employers have general policies prohibiting various forms of solicitation, but it is important that they also have a detailed policy that does not run afoul of the NLRA.

There is nothing specifically in the NLRA that covers union solicitation and how an employer may limit such activity. However, over the years, the NLRB and the courts have tried to balance the rights of employees to engage in union and other concerted activity [11] with the employer’s right to run a business and protect its property. The law regarding solicitation rights recognizes a basic distinction between the rights of employee and non-employee union organizers. Not surprisingly, the courts and the NLRB have given greater solicitation rights to the former over the latter when balancing the competing interests of labor and management.

Employee Solicitation Rights

Employees are permitted to engage in solicitation during their non-working time. Therefore, the enforcement and promulgation of any employer policy prohibiting employees from soliciting during the entire workday or while on company property would be too broad a restriction and therefore per se illegal [12]. Thus, an employer can lawfully maintain a policy prohibiting employees from solicitation during working time (during those times of the workday when the employee is supposed to be engaged in work), but it cannot restrict such activity during non-working time [13]. Non-working time refers to lunch hours, rest breaks, and times prior to the beginning of the employee’s workday - in general, those times when the employee is not expected to be engaged in work activities [14].

An employer also may restrict employees with respect to the distribution of literature. The Board and the courts generally have determined that an employer can lawfully maintain a policy prohibiting employees from distributing union literature in working areas even if it is on non-working time, provided the policy is applied consistently [15]. It should be noted, however, that the Board has always considered the distribution of union cards to be under the category of oral solicitation rather than distribution of literature, and, thus, may not be restricted. Precluding an employee from distributing union cards during non-working time in working areas would be considered coercive of employees' protected rights [16].

Solicitation by Non-Employee Union Organizers

The solicitation rules are different, however, for non-employee solicitors, such as union organizers. Here, the law gives employers greater rights of restriction. In Lechmere, Inc. v. NLRB [17], the U.S. Supreme Court reiterated earlier holdings that, except in very rare circumstances, an employer may restrict non-employees from access to the property and distributing literature. In fact, an employer can keep union organizers off the property altogether, unless the location of the workplace situates employees beyond the reach of reasonable union efforts to communicate with them. If the employer permits non-employees onto the property to solicit for other purposes, however, it also will have to allow union organizers onto the property or risk being accused of unequal treatment.
Publication of the Non-Solicitation Policy

Despite the latitude accorded employers in restricting both employee and non-employee organizational activity, an employer must clearly articulate its non-solicitation policy for it to be enforceable. The statement must be in writing, and should be distributed widely so that employees are aware of the rules.

Furthermore, the timing of instituting such a policy is very important. Promulgating an otherwise valid non-solicitation policy at the onset of a union campaign may be struck down as illegal because the Board may view that the motive behind it is to target union solicitation as opposed to solicitation in general [19]. The time to put such policies into place is well before any such activity occurs.

Enforcement of the Policy

Inconsistent or unequal enforcement of a non-solicitation policy also may result in a violation of the Act [19]. For instance, if an employer who maintains a non-solicitation policy permits some solicitation on its property (such as charity or product sales) and restricts only union solicitation, the employer may be found in violation of the Act for discriminating against employees because of union activity [20]. Similarly, a policy that identifies and restricts only union solicitation and does not limit any other type of solicitation will be struck down as illegal [21]. Additionally, if an employer enforces an otherwise valid policy against union supporters but does not enforce it against anti-union employees, a violation will be found [22].

The consequences of maintaining an illegal solicitation policy, or a policy that is discriminatorily enforced, will depend on the setting. A union that is in the midst of organizing may file an unfair labor practice charge with the NLRB claiming that Section 8(a)(1) has been violated [23] and also may file section 8(a)(3) charges based on discriminatory enforcement of the policy. In either case, if the NLRB, following an administrative hearing, finds that the Act has been violated, it will issue a cease-and-desist order to the employer and order the policy rescinded. Such a ruling will assist the union in its organizational efforts both legally and rhetorically. In addition, under Board rules, a union that loses an NLRB election may file objections within five days after the election. One of those objections may be that the employer maintained an illegal solicitation policy or discriminatorily enforced it during the campaign. The major consequence of a finding by the Board that the employer’s conduct was indeed objectionable is the setting aside of the election itself and the ordering of a new election.

Special Rules for Health Care Facilities

The NLRB has developed special rules in the health care field for those institutions that also have health care facilities, which allow an employer to more tightly restrict solicitation in the workplace. “Recognizing that a hospital’s primary function is patient care and that solicitation at any time in patient care areas might be unsettling to the patients, [24]” the Board and the courts have ruled that solicitation may be restricted even during non-working time in patient care areas of a hospital [25].

Access to Meeting Space

Occasionally, a union may wish to use institutional facilities to meet with employees during an organizational campaign. If a union, or a group of employees seeking to form a union, ask for meeting space on campus, the institution should treat the request in the same manner as it would a request from other like entities. Similarly, facility fees and restrictions should apply equally to unions and non-unions alike. In developing policy, institutions should be careful to maintain comparable standards and costs among entities, or risk having their policies deemed discriminatory.

Access to Institution Mail

Unions generally may not use an institution’s internal mail system to communicate with employees it is seeking to organize. In Regents of the University of California v. Public Employment Relations Board [26], the U.S. Supreme Court, in interpreting the Private Express Statutes [27], held that a union attempting to organize faculty could not lawfully utilize the internal mail system of the University because its business was
not co-extensive with the business of the University. This holding presumably would apply whether the request for usage came from an outside union or an employee acting on the union’s behalf.

For public institutions, it also should be noted that courts have held that a university’s mail system is not to be construed as an inherent “public forum” sufficient to allow a member of the public to utilize it for free speech purposes [28]. However, some states have granted unions special access rights. In California, for example, unions are granted access rights under the Higher Education Employer-Employee Relations Act, Section 3568.

Email

The emergence of email and related computer communication programs as the dominant method of communication in the workplace has called into question the traditional rules governing solicitation policies and union campaigns.

In E.I Dupont de Nemours & Co. [29], the NLRB ruled that an employer’s email policy that permitted employee use of the company email system for personal use but prohibited distribution of union information was unlawfully discriminatory. Despite changing Board membership, the NLRB has been consistent on this issue [30].

Employers have found it difficult, if not impossible, to ban personal use of emails at work, and higher education institutions may find it particularly difficult to do so, as well. Thus, prohibiting two employees from corresponding on email about a union meeting may meet with an immediate claim of disparate treatment if emails can otherwise be used for other personal communications [31].

Another aspect of email not yet addressed by the Board is the access of outside union organizers to the employer’s email. Employers have the technology to block incoming emails, which raises the question of whether an employer can lawfully block outside email from union organizers. This issue could be addressed under the line of cases dealing with outside union access to employer facilities [32], in which case, union access to employer email systems would be available only in those extremely limited cases where the employees cannot be reached in any other way.

Access to Campus by Off-Duty Employees

While employers can institute some restrictions on employee solicitation during the workday, they will have a more difficult time restricting off-duty employees from coming on to the premises to engage in solicitation. In Tri-County Medical Center [33], the Board held that a rule denying off-duty employees access to the premises is valid only if (1) it limits access solely with respect to the interior of the employer’s buildings and other working areas; (2) it is clearly disseminated to all employees; and (3) it applies to all off-duty employees seeking access for any purpose, not just union solicitation [34]. Thus, absent unusual circumstances, it would be illegal to restrict off-duty employees from distributing union cards in an institutional parking lot or in the main quadrangle of the institution.

Because the third component of this test generally is difficult to enforce, employers often will forego restrictions on off-duty employees coming on to the workplace to solicit. Nevertheless, institutions would be well-advised to try to restrict such activity by off-duty employees, since they would be able to carry out the type of on-site soliciting that union agents themselves cannot carry out.

Union Buttons and Insignia

Once a union drive begins, many pro-union employees may begin wearing union buttons and insignia. Normally, an employer may not restrict the wearing of union buttons and insignia at work [35]. Under “special circumstances,” however, some restrictions are allowed. These have been very narrowly construed, and are limited to such specific reasons as the need to maintain discipline [36]; for safety considerations [37]; or where there may be an adverse effect on patients [38].
An Institution’s Right to Campaign and Communicate with Employees

Are administrators and supervisors bound by the employer’s solicitation rules for employees? Generally, the answer is “no.” To the extent that an institution wishes to engage in the debate over unionization, the solicitation rules that it has for employees generally are not binding on the administration [39]. However, as a practical matter, an institution will want to be careful about when and how it communicates to employees about unionization. From a political perspective, enforcing a non-solicitation rule for employees during working time, while in turn permitting supervisors to speak out against unionization during working time, makes the administration vulnerable to rhetorical attack from the organizing union. While such conduct is likely to be legal, unions are likely to accuse the administration of being hypocritical.

III. Things to Consider When Addressing Solicitation and Access Rights at A College or University

After reviewing the NLRA rules surrounding solicitation, an institution may wish to develop a policy addressing solicitation and access rights on its campus. Issues to consider include the following.

- An institution is not required to have a non-solicitation policy. However, in its absence, it will be difficult to restrict soliciting in work areas and during working time within the parameters delineated by the NLRB and the courts.

- In determining what type of solicitation policy to promulgate, consider the broad question of whether and to what degree the institution wants to restrict solicitation activity of all types, not just union solicitation. As noted, the Board’s and courts’ decisions allowing such restrictions in union campaigns generally are premised on the fact that the relevant employer had established a reasonable policy and set parameters for solicitation of all types (such as commercial and charitable solicitation activity), not just union solicitation. To the extent an institution only targets union solicitation, it will run afoul of the NLRA.

- In order to limit union solicitation, there must be a clearly articulated and disseminated written policy about which all employees are made aware. Consider the best methods of notification, including hard copy distribution, placing announcements in work areas and on the institution’s web site, and inclusion in staff and faculty handbooks.

- In drafting a policy, review the document with labor counsel to ensure compliance with NLRB or other applicable state labor laws or regulations.

- Do not issue a policy that you cannot enforce consistently and in a non-discriminatory manner. A legal, but highly detailed and restrictive policy may look good on paper, but may be so difficult to enforce as to render it useless.

- Coordinate enforcement of non-solicitation policies with campus police or security to be prepared in cases of serious disruption by outside union organizers.

- Establish a point person in either the General Counsel’s office or in Human Resources who can handle questions about solicitation from supervisors, deans, and other administrators across campus.

- Train your supervisors and administrators on any policy you issue. As noted, a record of non-discriminatory enforcement of a policy will be essential in defending against any challenges brought forward by unions. Such training might be part of a general educational session on labor relations.

- Treat an outside union the same as you would treat any other outside organization in terms of requests for meeting space on campus or access to other facilities or employees. The Board and courts will look for consistency in the treatment of outside organizations when examining solicitation
cases.

- A union organizer might have the right to be present on open areas of the campus (such as a campus bookstore, restaurant or stadium), but may not have the right to solicit on the premises unless such right has been accorded other solicitors [40].

- If you do not have a solicitation policy, do not wait for a union campaign to implement one. By waiting, there is a likelihood it will be struck down as discriminatory, as it may appear that the only purpose of promulgating it is to restrict union solicitation.

CONCLUSION:

While the NLRA rules governing union solicitation in the workplace and the creation and enforcement of policies in this area are highly complex matters that require specialized counsel, it is important that institutions clarify their policies well before union activity begins. Careful attention to drafting them, and a history of consistent enforcement of all types of solicitation, will reap dividends when a union does initiate an organizing effort on campus.

FOOTNOTES

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RESOURCES FOR COUNSEL:

NACUA Resources:

- A Primer on Union Organizing on the Private College Campus: Legal Issues and Campaign Approaches, John Gaal, Manuscript for NACUA Discussion Group, 2006.


- Faculty Union Organization and Decertification, Nicholas DiGiovanni, Jr., NACUA March Workshop 2002.


- Unions at the Campus Gate: Guidance for Troublesome Times, Nicholas DiGiovanni, Jr., NACUA Annual Conference 1997.

Case Law:

- Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992)

- **Beth Israel Hospital v. NLRB**, 437 U.S. 483 (1978)
- **NLRB v. United Steel Workers of America** *(Nutone, Inc)*, 357 U.S. 357 (1958)
- **NLRB v. Babcock & Wilcox Co.**, 351 U.S. 105 (1956)
- **Republic Aviation Corp., v. NLRB**, 324 U.S. 793, 16 LRRM 620 (1945)
- **Cooper Tire & Rubber Company v. NLRB**, 957 F.2d 1245 (5th Cir. 1992) *cert. denied* 506 U.S. 485
- **Midland Transportation Co. v. NLRB**, 962 F.2d 1323 (8th Cir. 1992)
- **Asociacion Hosp. del Maestro Inc. v. NLRB**, 842 F.2d 575 (1st Cir. 1988)
- **Midstate Tel. Corp. v. NLRB**, 706 F.2d 401 (2nd Cir. 1983)
- **Paceco, A Division of Fruehauf Corp. v. NLRB**, 601 F.2d 180 (5th Cir. 1979)
- **Connecticut State Federation of Teachers v. Board of Education**, 538 F.2d 471 (2nd Cir. 1976)
- **Boeing Airplane Co. v. NLRB**, 217 F.2d 369 (9th Cir. 1954)
- **Enloe Medical Center**, 345 NLRB No. 54 (2005)
- **Media General Operations**, 346 NLRB No. 11 (2005)
- **Seton Co.**, 332 NLRB, No. 89 (2000)
- **Farm Fresh, Inc.**, 326 NLRB No. 81 (1998)
- **Pratt v. Whitney**, 1998 NLRB GCM LEXIS 40 (General Counsel Advice Memo, February 28, 1998)
- **Eaton Technologies Inc.**, 322 NLRB No. 148 (1997)
- **E.I. Dupont de Nemours & Co.**, 311 NLRB No. 88 (1993)
- **Ideal Macaroni Co.**, 301 NLRB No. 73 (1991)
- **South Nassau Communities Hospital**, 274 NLRB No. 179 (1985)
• **Kendall Co.**, 267 NLRB No. 154 (1983)

• **Our Way Inc.**, 268 NLRB No. 61 (1983)


• **Elmendorf & Fort Richardson Barber Concessions**, 247 NLRB No. 93 (1980)

• **George J. London Memorial Hospital**, 238 NLRB No. 96 (1978)

• **Tri-County Medical Center Inc.**, 222 NLRB No. 174 (1976)

• **Andrews Wire Corp.**, 189 NLRB No. 24 (1971)

• **The Rose Co.**, 154 NLRB No. 19 (1965)

• **Ward Mfg., Inc.**, 152 NLRB No. 127 (1965)

• **Stoddard-Quirk Mfg. Co.**, 138 NLRB No. 75 (1962)

**Statutes:**

• **National Labor Relations Act**

• **Taft-Hartley Act**

• **California Government Code §§ 16645-16649**

• **California Higher Education Employer-Employee Relations Act, Section 3568**

**Institutional Solicitation Policies:**

• **Duke University**

• **Ohio University**

• **Rollins College**

• **Sarah Lawrence College**

• **University of Puget Sound**

• **University of North Texas**

• **University of South Carolina**

**Additional Resources:**

• **Sample Solicitation Policy**, Nicholas DiGiovanni
• National Labor Relations Board

• National Center for the Study of Collective Bargaining in Higher Education and the Professions


• Hardin and Higgins, *The Developing Labor Law*, fourth ed. (BNA, Washington, 2001 (annually supplemented by ABA committee members)

• Moriarty, Savarese and Boris, ed., *Directory of Faculty Contracts and Bargaining Agents in Institutions of Higher Education*, (National Center, Hunter College, 2006)

• Hurd and Bloom, *Directory of Faculty Contracts and Bargaining Agents in Institutions of Higher Education and the Professions*, (National Center, Baruch College, 1998)