
When 10 Days Is Not 10 Days – The National Labor Relations Act’s Strike Notice Requirement in the Health Care Industry

G. Roger King, Esq.

Jeffrey D. Winchester, Esq.

*E. Michael Rossman, Esq.**

Nearly 30 years ago, Congress amended the National Labor Relations Act ("Act") to cover non-profit hospitals.¹ In doing so, Congress provided employees at such institutions with the right to "form, join, or assist labor organizations . . . and to engage in other concerted activities."²

Included in these newly bestowed rights was the right to strike. This exposed hospitals -- and their patients -- to possible interruptions in the delivery of patient care in the event of an employee walkout. Cognizant of this fact, and recognizing that the needs of patients required special consideration in the Act, Congress also added to the Act a new Section 8(g) at this same time. Section 8(g) provides that:

A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any healthcare institution shall, not less than ten days prior to such action, notify the institution in writing . . . of that intention The notice shall state the date and time that such action will commence. The notice, once given may be extended by written agreement of both parties.³

In short, Section 8(g) requires a "labor organization" to provide a "healthcare institution" with "not less than ten days prior" notice before engaging in any "strike, picketing, or other concerted refusal to work" against the institution. This notice must include "the date and time" that the labor action will begin. The term "healthcare institution" for purposes of this section of the Act is defined as "any hospital, convalescent hospital, health maintenance organization, health clinic,

* Mr. King is a Partner in the law firm of Jones Day and he is the head of the Firm's Health Care Labor and Employment practice. Mr. Winchester is an Associate in the Firm and he is a member of the Firm's General Litigation Section. Mr. Rossman is also an Associate at Jones Day and is a member of the Firm's Labor and Employment Section.

¹ For a general discussion of the history and purposes of Section 8(g), see New York State Nurses Ass'n. (Mount Sinai Hosp.), 334 NLRB No. 103 (2001).

² 29 U.S.C. § 157.

³ 29 U.S.C. § 158(g).

nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged persons." 29 U.S.C. § 152 (14).

Congress' stated purpose for Section 8(g) was to provide healthcare institutions with sufficient notice prior to a strike or picketing to allow them to make "appropriate arrangements . . . for the continuance of patient care in the event of a work stoppage."⁴ Putting teeth into this requirement, the National Labor Relations Board ("Board") and the Courts⁵ hold that where a union fails to provide notice as required by Section 8(g), a union's strike is unlawful and unprotected by the Act. This is extremely serious because, generally speaking, employees who participate in an unprotected strike may lawfully be subject to discipline up to and including termination.⁶

Section 8(g) is thus a highly valuable tool for healthcare employers -- one that greatly aids their ability to maintain continuity of patient care in the event of labor unrest. It is not, however, without limits. Indeed, its reach, while broad, may not be as expansive as many employers would wish and, under current Board case law, sometime 10 days is just not 10 days. This paper is designed to answer some basic questions healthcare employers often pose about Section 8(g) and to provide such employers with a general understanding of the reach and limits of the provision.

A. To Whom Does Section 8(g) Apply?

Section 8(g) applies to "labor organization[s]" that seek to undertake certain actions against "healthcare institutions." These definitions may seem self-explanatory, but a few important points should be noted.

First, Section 8(g) applies only to labor organizations -- defined by the Act as "any organization . . . in which employees participate and which exists for the purpose . . . of dealing with employers concerning . . . conditions of work."⁷ Employers should keep in mind, then, that groups of healthcare employees -- whether they work at a unionized facility or not -- are not

⁴ S. Rept. 93-766, 93rd Cong., 2nd Sess. (1974).

⁵ The Board investigates and tries cases in which employers or unions are alleged to have committed unfair labor practices in violation of the Act. The United States Courts of Appeals (and the United States Supreme Court, in rare instances) hear appeals of Board decisions.

⁶ Non-supervisory employees have a right to withhold their labor to protest terms and conditions of employment and to protest employer unfair labor practices. The right of employees to strike, picket, or engage in other concerted refusal to work action, in both union and non-union employment settings, is generally considered to be protected concerted activity under the Act. While employees engaging in such actions can be replaced -- temporarily and, in some cases, permanently -- an employer does not have the right to terminate employees who engage in such protected activity. A violation of Section 8(g), however, as noted above, generally removes the "protection" from such concerted activity. See 29 U.S.C. § 158(d); see also, e.g., Beverly Health & Rehabilitation Servs., Inc. v. NLRB, 317 F.3d 316, 320 (D.C. Cir. 2003); NLRB v. Washington Heights-West Harlem-Inwood Mental Health Council, Inc., 897 F.2d 1238, 1246 (2d Cir. 1990); Greater New Orleans Artificial Kidney Ctr., 240 NLRB 432, 435 (1979).

⁷ 29 U.S.C. § 152(5).

required to provide notice under Section 8(g) if they strike or picket and they are not acting as a "labor organization" or pursuant to the authority of a "labor organization."⁸

A few recent cases illustrate this point. In Vencare Ancillary Services,⁹ for example, the Board held that five physical therapists at a non-union facility did not violate the Section 8(g) when, without advanced warning, they refused to see patients until the employer met with them to discuss wage cuts. The Board rejected the employer's argument that the group should be viewed as a "labor organization" for Section 8(g) purposes. It noted that the employees had elected no leader, had met as a group only once prior to the work stoppage, and had asked management to meet with them only on the one issue.

Likewise, in Indiana Hospital,¹⁰ the Board found Section 8(g) inapplicable in a unionized facility on the facts presented. In that case, the hospital had put up a sign-up sheet, seeking volunteers to assist with snow removal duties. No employees signed up, and the hospital claimed that the employees' refusal to sign up for snow duty, without the requisite notice, violated Section 8(g). The Board disagreed, noting that the employees had not engaged in a "work stoppage," but rather "a concerted refusal to volunteer," and that there was no evidence indicating that the employees' refusal to volunteer was "organized or authorized" by the union. As such, the Board determined that there was no strike by a "labor organization" that would require prior notice under Section 8(g).

On the other hand, in some cases, non-unionized employees of medical facilities who band together and engage in a work stoppage may be found to have violated Section 8(g). For example, in Betances Health Unit, Inc.,¹¹ a group of nine non-unionized employees met at the home of one of the employees to discuss problems they were having at work. At that meeting the assembled employees decided to call themselves the "Staff Association," elected a grievance committee, and drafted a set of demands for presentation to management. The "Staff Association" had a second meeting, held a second election, presented a revised set of demands to the employer, the "Staff Association's" grievance committee met with the employer regarding

⁸ The Board, in a number of decisions in another area of the law, has utilized a very expansive definition of the term "labor organization." For example, in a line of cases the Board has defined employee committees to be labor organizations or "in-house unions" when unfair labor practice charges have been filed against employers for alleged unlawful domination and control of such entities. Compare Electromation, Inc., 309 NLRB 990, 996 (1992), enfd., 35 F.3d 1148 (7th Cir. 1994) (finding committees to be employer-dominated labor organizations where they (1) had employee participation, and (2) dealt with the employer over (3) conditions of employment, such as absenteeism and employee compensation) with Crown Cork & Seal Co., 334 NLRB No. 92 (2001) (holding committees were not labor organizations where the employer utilized them as part of "a significant variation on the traditional plant organizational structure where authority is delegated to descending levels of managers" and the authority exercised by the committees was "unquestionably managerial").

⁹ 334 NLRB No. 119 (2001); see also Bethany Med. Ctr., 328 NLRB No. 161 (1999) (holding that a hospital's catheterization laboratory employees were not required to give notice before walking off the job to protest various job-related concerns, because "no labor organization was involved in the walkout").

¹⁰ 315 NLRB 647, 661 (1994)

¹¹ 283 NLRB 369 (1987).

the discharge of an employee, and finally the "Staff Association" engaged in a strike in furtherance of its various demands.¹² Because this association of employees engaged in a pattern or practice of "dealing with" the employer, it qualified as a "labor organization" under Section 2(5) of the National Labor Relations Act (NLRA), and as such violated Section 8(g) by failing to give the requisite notice before engaging in a work stoppage. On these facts, the Board found that the employer's termination of the employees involved in the strike was not a violation of the Act.¹³

Second, Section 8(g) applies only when action is directed at a "healthcare institution."¹⁴ However, given the size, geographic scope and complexity of many of today's healthcare organizations, Section 8(g) may not apply to all strikes or picketing directed at healthcare employer work locations. For example, in Operating Engineers Local 3 (Washoe Health System),¹⁵ the Board's Office of General Counsel¹⁶ recommended dismissing an unfair labor practice charge filed against a union under Section 8(g) where the union picketed an administrative office building owned by a hospital. No patient care was provided at the office building, and it was "neither functionally integrated with, nor geographically proximate to" the hospital. In short, because there was no "nexus between [the] particular facility [targeted] and patient care," the Office of General Counsel concluded that Section 8(g) did not apply.¹⁷

B. To What Activities Does Section 8(g) Apply?

Section 8(g) applies when a labor organization engages in "any strike, picketing, or other concerted refusal to work." On the one hand, as might be expected given the purposes of Section 8(g), this definition is broad, and applies in situations that may not meet the traditional notions many employers have of "strikes" or "picketing."

For instance, in American Federation of Nurses (Kaiser Foundation Hospitals),¹⁸ the Board held that a union's activities in connection with a press conference at a hospital's entrance implicated Section 8(g). Although noting a union press conference, in and of itself, would not give rise to notice obligations, the Board found that the incident at issue was more than a mere press conference. There, 15 people (including union agents) were "milling around" at the conference, and many carried signs regarding staffing levels. The Board determined that the press conference involved "picketing" on the facts presented, and Section 8(g) notice was therefore required.

¹² Id. at 374-89.

¹³ Id. at 389-90.

¹⁴ 29 U.S.C. § 152(14).

¹⁵ Case No. 32-CG-49-1 (G.C. Mem. October 29, 2002).

¹⁶ The Office of General Counsel makes recommendations on whether unfair labor practice complaint should issue.

¹⁷ But see Bry-Fern Care Center, Inc. v. NLRB, 21 F.3d 706, 711 (6th Cir. 1994) (noting that employees in laundry facility that was a "satellite" of a nursing home would be covered by 8(g), as they qualified as "healthcare employees" working for a "healthcare institution").

¹⁸ 313 NLRB 1201 (1994).

Similarly, New York State Nurses Association,¹⁹ involved several nurses' concerted refusal to accept voluntary overtime assignments. Although not a strike *per se*, the Board held that the nurses' actions constituted a "concerted refusal to work" for Section 8(g) purposes. In distinguishing its ruling from that in Indiana Hospital, the Board noted that, unlike the employees' refusal to sign up for voluntary duty in Indiana Hospital, in New York State Nurses' Association there was evidence that the nurses had acted at the union's request, and "intended to put pressure on the Hospital to change its staffing practices" by refusing to volunteer for overtime, thereby engaging in a "concerted refusal to work" without the requisite notice, in violation of Section 8(g).²⁰

Furthermore, a union may be required to provide a new Section 8(g) notice if it resumes strike or picketing activity after a significant interruption. In California Nurses Association (City of Hope National Medical Center),²¹ the Board held that although the hospital "may have had grounds for fearing resumption of picketing" during a 3-week hiatus in the union's strike, the Hospital was entitled to a new Section 8(g) notice before picketing began again because a healthcare institution "is not required to play a guessing game with respect to the welfare of its patients."

Again, however, there are important limits to Section 8(g)'s reach in terms of types of actions covered. For instance, the Board has consistently refused to issue unfair labor practice complaints where unions, without notice, engaged in informational demonstrations or handbilling, where such action is non-confrontational and does not involve the use of picket signs. For example, in International Union of Operating Engineers (National Lutheran Home for the Aged),²² union activists, standing on public property several hundred feet away from the entrance to a nursing home, distributed handbills, displayed a 10-foot-tall balloon, chanted union slogans, and engaged in a 20 minute speech using a bullhorn. No current employees of the nursing home participated in the demonstration. Soon thereafter, the group disbursed. Because there had been no traditional picket signs or placards, and because there had been no confrontation between the demonstrators and individuals attempting to enter the nursing home's property, the Board's Associate general Counsel recommended a finding of no violation of Section 8(g).

Similarly, in California Nurses Association (Kaiser Foundation Hospitals),²³ the Board's General Counsel recommended no finding of a violation of Section 8(g) where 30 people engaged in a "rally" on the public sidewalk outside of Kaiser's Oakland Medical Center facility to increase community opposition to Kaiser's proposed closure of the facility. The union demonstrators passed out handbills, chanted slogans, sought signatures on a petition, used

¹⁹ 334 NLRB No. 103.

²⁰ Board Member Liebman dissented, taking the position that "neither a concerted refusal to perform voluntary overtime work, or to volunteer for overtime, falls within the meaning of Section 8(g)."

²¹ 315 NLRB 468, 468 (1994).

²² Case No. 5-CG-47 (G.C. Mem. Sept. 18, 2001).

²³ 32-CG-45 (G.C. Mem. April 22, 2001).

bullhorns, and carried a large banner urging Kaiser to keep the facility open. Because the union had issued a press release in advance of the rally, the sidewalk was crowded with demonstrators, onlookers, camera crews, and other members of the press. Even though the crowd of people impeded access to the facility somewhat, and even though a large banner was present at the rally, the Board's Associate General Counsel determined that the rally did not trigger Section 8(g) because it was designed to garner public support for its position, and was not "confrontational" in nature. Because the rally lacked any "signal" to those approaching the facility "to take some sympathetic action, e.g., to decide not to enter the facility involved," the Associate General Counsel determined that the rally did not qualify as "picketing" under Section 8(g).

C. When Is 10-Day Notice for a Strike or Picketing Not Required?

Significantly, the Board has held that where a strike is designed to protest "serious" or "flagrant" unfair labor practices by an employer, full compliance with Section 8(g) may not be required. However, this exception applies only in the unique situation where an employer's unfair labor practices are "so flagrant that they induce or provoke employees to strike, and otherwise leave employees with little choice but to act spontaneously." For example, in Council's Center for Problems of Living,²⁴ 11 employees were discharged for having been involved in a work stoppage, and union members subsequently engaged in picketing protesting the terminations, with insufficient notice. The Employer claimed that the picketing violated Section 8(g) due to insufficient notice. Even though the Board found that economic motives were involved in the picketing, because the main reason of the picketing was to protest the alleged serious unfair labor practice of terminating union employees without cause, the Board held that the union had not run afoul of Section 8(g).²⁵ However, the Board has found that if the union waits too long to protest an alleged "serious" unfair labor practices, the action is no longer "spontaneous," and the union must comply with Section 8(g)'s notice provision. See Teamsters Local 246 (Collington Episcopal Life Care Community, Inc.).²⁶

D. What If the Union Strikes at an Earlier or Later Time Than Is On the Notice?

Section 8(g) provides that "not less than ten days prior" to engaging in strike or picketing activity, a union must give notice to a healthcare employer and that the union's notice must "state the date and time that [the labor] action will commence." It further provides that once a notice is given, it "may be extended by written agreement of both parties."

²⁴ 289 NLRB 1122 (1988); see also Operating Engineers, Local 877 (McClean Hosp.), Case No. 1-CB-8155 (Aug. 24, 1993).

²⁵ The Second Circuit Court of Appeals disagreed with the Board's holding, and refused to enforce the Board's order, on the grounds that the action was motivated mainly by the employees' economic concerns, not by the termination of their fellow employees. See N.L.R.B. v. Washington Heights-West Harlem-Inwood Mental Health Council, Inc., 897 F.2d 1238, 1247-48 (2nd Cir. 1990).

²⁶ Case No. 5-CG-48 (G.C. Mem. Jan. 9, 2002) (recommending issuance of Section 8(g) complaint and rejecting claim that serious unfair labor practices excused failure to give notice where over three weeks elapsed between the alleged unlawful acts and the strike).

Thus, it is clear under Section 8(g) that if a union gives less than ten days notice in required circumstances, it has violated the Act. See, e.g., Retail Clerks Union Local 727 (Devon Gables Health Care Center, Inc.), 244 NLRB 586, 587 (1987) (finding a violation where "the Employer had 9 days' written notice of Respondent's picketing rather than the 10 to which it was entitled"). Unions, however, often unilaterally decide to begin their strike or picketing hours or even days after the time specified in the notice. Such delay would seem to be antithetical to the purposes of Section 8(g), making it more difficult for healthcare employers to make arrangements to continue patient care. The Board, though, has held that, in many cases, it will not strictly adhere to a 10-day rule in such circumstances.

Specifically, recognizing the potentially grave consequences for employees if a strike is held to be in violation of Section 8(g), the Board has crafted a "rule of reason" for analyzing the effect of such delay. This rule provides unions with a "72-hour window" after the date and time provided on the notice in which to commence a strike or picketing.²⁷ Pursuant to this Board-developed approach to Section 8(g) cases, a union will not be required to file a new 10-day notice if its strike or picketing starts within 72 hours of the date noted on the initial notice, provided that the union, in most instances, gives the employer notification at least twelve (12) hours in advance of the new strike or picket date and time. According to the Board, requiring the union to go on strike at the exact noticed date and hour, and punishing union members with potential termination if they do not strike or picket "at the precise time specified within the notice" would be unreasonably harsh; on the other hand, allowing the union to strike more than 72 hours after the noticed time would be unfair to the employer. As noted above, a caveat to this rule, if the union alters the timing of the strike, it must generally provide the healthcare employer with 12 hour advance notice of the actual time the strike will occur. However, if the divergence from the strike notice is "de minimis" -- i.e. a few hours -- the Board may waive the 12 hour advance notice rule, particularly if the employer's ability to provide patient care is not harmed. See, e.g., Operating Engineers Local No. 3 (Washoe Med. Ctr.).²⁸

The Courts of Appeals, however, have been skeptical of this Board-developed "rule of reason." Indeed, early this year, in Beverly Health & Rehabilitation Services vs. NLRB, the United States Court of Appeals for the D.C. Circuit held that the rule violated the plain language of the Act, and denied enforcement of a Board Order against an employer that had refused to rehire employees who struck after the date stated in a Section 8(g) notice.²⁹ In that case, the union sent notice to the employer on March 14 and 15, 1996, indicating an intent to go on strike at 7:00 a.m. on March 29. However, two (2) days prior to the scheduled strike, on March 27, the Union sent a notice unilaterally "extending" the strike deadline by 71 hours to 6:00 a.m. on

²⁷ See, e.g., Beverly Health & Rehabilitation Servs., 335 NLRB No. 54 (2001), enf. den. 317 F.3d 316 (2003); Alexandria Clinic, P.A., 2000 WL 33664250 (N.L.R.B. Div. of Judges June 16, 2000).

²⁸ Case No. 32-CG-46 (G.C. Mem. Feb 5. 2001).

²⁹ Beverly Health & Rehabilitation Servs., Inc v. NLRB, 317 F.3d 316, 320-21 (D.C. Cir. 2003); see also NLRB v. Washington Heights-West Harlem-Inwood Mental Health Council, Inc., 897 F.2d 1238, 1247-48 (2nd Cir. 1990) (questioning the rule in dicta).

Monday, April 1. The employer argued that the March 27 notice was a new notice of a strike, requiring the union to give an additional 10 days before striking. The Court of Appeals agreed, and in doing so, noted that the plain language of Section 8(g) does not allow for the Board's interpretation that the noticed strike may occur within a reasonable amount of time after the date contained in the notice, without consent of both parties. Because neither party can "unilaterally extend the notice at will," the Court found the Board's rule of reason to have no basis in the statute.³⁰ This is an area of the law that healthcare employers should closely follow in the coming months and years.

E. What Are the Employer's Rights and Remedies for Section 8(g) Violations?

Healthcare employers should be aware of their rights and remedies under Section 8(g). Where a union or an employee group functioning as a labor organization fails to comply with its Section 8(g) requirements prior to a strike or picketing, employees who engage in such activities lose their NLRA protection, and the employer may, in most instances, lawfully discharge employees engaged in such unprotected activity.³¹ In addition to termination of employees involved in a strike that violates Section 8(g), other remedies are also potentially available to the employer, including injunctions against the union or employee group from engaging in further picketing or strikes without proper Section 8(g) notice, and the filing of an unfair labor practice charge against the union or employee group in question, which may result in a Board order requiring that the union or group post notices announcing that the NLRB has found it to be in violation of the Act.³² Employers may also seek compensatory damages for violations of Section 8(g), as well as declaratory and injunctive relief, without running afoul of the Acts' prohibition against filing retaliatory proceedings against unions and union members.³³ In Beverly Health & Rehabilitation Services, the employer brought suit in federal district court, seeking an injunction against a strike against its nursing home, as well as damages, alleging insufficient notice under Section 8(g). In turn, the union filed an unfair labor practice charge, alleging that the federal suit amounted to retaliation. The Administrative Law Judge (ALJ) disagreed, finding no retaliatory motive based, in large part, on the fact that the employer "sought *only* actual damages, injunctive and declaratory relief in its lawsuit, not punitive damages."³⁴

³⁰ Beverly Health & Rehabilitation Servs., Inc., 317 F.3d at 320-21.

³¹ 29 U.S.C. § 158(d); see Beverly Health & Rehab. Servs., Inc., 317 F.3d at 320; Washington Heights-West Harlem-Inwood Mental Health Council, Inc., 897 F.2d at 1246.

³² See, e.g., California Nurses' Assoc. (City of Hope Nat'l. Med. Center), 315 NLRB 468 (1994); Service Employees Int'l Union (Baptist Mem. Hosp. Systems), 266 NLRB 335 (1983).

³³ See Beverly Health & Rehabilitation Services, 1999 WL 33454799 (N.L.R.B. Div. of Judges Dec. 27, 1999) (noting that Section 8(g) action was not retaliatory because employer sought only injunctive and declaratory relief, as well as actual damages, and not punitive damages).

³⁴ Id. (emphasis added)

F. Conclusion

Section 8(g) is a very important part of the Act for healthcare employers. It is designed to provide a healthcare employer with sufficient notice of a strike or picketing so that the employer can make sufficient arrangements to maintain patient care in the event of labor unrest.

The provision does have its limits, however. Healthcare employers should keep the following in mind:

- ❑ Section 8(g) requires labor organizations to provide healthcare employers with notice at least 10 days in advance of any strike, picketing, or other concerted refusal to work.
- ❑ The notice required by Section 8(g) must state the date and time that the strike or picketing action will commence. Under the Board-crafted "rule of reason" test, a union or employee organization may lawfully strike, picket, or engage in other concerted refusal to work up to 72 hours after the date provided in a notice, as long as it provides at least 12 hours notice of the actual time the strike will begin. Indeed, in some cases where the strike or picket activity is delayed by only a few hours after the initially noticed date and time, the Board has indicated that no new notice, including a 12-hour notice, would be required.
- ❑ Section 8(g) does not apply to spontaneous actions by employees that do not involve a labor organization.
- ❑ Section 8(g) may not apply if no patient care is provided at the facility struck or picketed, even if the facility is owned by a healthcare organization.
- ❑ Section 8(g) may not apply if the activity in question is non-confrontational handbilling, rather than picketing or patrolling.
- ❑ Section 8(g) may not apply if a spontaneous strike is immediately prompted by the employer's serious and flagrant unfair labor practices.
- ❑ If the employer is confident that a violation of Section 8(g) has occurred, it may, in some cases, discipline or terminate the employees involved, and it may seek an injunction against further illegal work stoppages, as well as actual damages.

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