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The NLRB overrules longstanding board law regarding union access to employer's public spaces

By Andrea Chavez

On June 14, 2019, the National Labor Relations Board ("NLRB" or "Board") held that an employer may prohibit organizational or promotional activity by nonemployee union representatives in public areas of the employer's premises so long as the employer prohibits similar activities by other nonemployees.

The Board held in a 3–1 decision[1] that University of Pittsburgh Medical Center Presbyterian Shadyside ("University of Pittsburgh") did not violate the National Labor Relations Act (the "Act") when it removed from its cafeteria two nonemployee union representatives who were meeting with employees and displaying, on cafeteria tables, union materials for distribution to employees.

In its ruling, the Board discussed the Supreme Court's decision in *NLRB v. Babcock and Wilcox Co.*, 351 U.S. 105, 112 (1956) which held:

> It is our judgment . . . that an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution.

The Board determined that the *Babcock* principles applied to nonemployee union access regardless of whether the area on which the union wished to conduct business was closed or open to the public. In doing so, the Board overturned years of precedent that established the "public space exception," which prohibited employers from denying nonemployee union representatives access to an employer's area that is open to the public if the representatives used the facility in a manner consistent with its intended use and were not disruptive.[2]

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[1] See the full decision here.

[2] The Board explicitly overruled *Montgomery Ward & Co.*, 256 NLRB 800, 801 (1981), enfd. 692 F.2d 1115 (7th Cir. 1982) and *Ameron Automotive Centers*, 265 NLRB 511, 512 (1982) and their progeny to the extent they conflicted with the Board's holding in this case.

Here, the Board reasoned that the fact that "a cafeteria located on the employer's private property is open to the public does not mean that an employer must allow any nonemployee access for any purpose. Absent discrimination between nonemployee union representatives and other nonemployees, … the employer may decide what types of activities, if any, it will allow by nonemployees on its property."

In deciding that the University of Pittsburgh did not violate the Act by removing the nonemployee union representatives, the Board relied heavily on its finding that there was no evidence that the University of Pittsburgh permitted any solicitation or promotional activity in its cafeteria, and the University of Pittsburgh had a practice of removing nonemployees who engaged in such activities.

Takeaways

Prohibiting a nonemployee union representative from a public area within an employer's private property, such as a cafeteria, restaurant or lobby, while permitting other nonemployees to be present is no longer per se unlawful discrimination under the Act. Now, the general counsel of the NLRB has the burden of proving discrimination under the *Babcock* exception by showing that the employer permitted similar activity by other nonemployees.

Although this decision may be challenged in the courts or overturned by a future Board decision, for now, employers should adapt their formal policies to reflect this new decision. However, it is critical that employers apply any non-solicitation, non-distribution policy equally to all nonemployees.

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