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NLRB Expands Employer Rights to Limit Activities of Non-Employee Union Organizers

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Since 1982, the National Labor Relations Board ("NLRB" or "Board") has interpreted the National Labor Relations Act ("NLRA") to prohibit employers from denying non-employee union organizers access to those parts of the employer's private property that are generally open to the public, such as cafeterias or restaurants. Thus, for example, union representatives could hold court in a hospital's cafeteria, and the employer could not stop such activity unless the union organizers were being disruptive. On June 14, 2019, the NLRB reversed this longstanding rule, opening the way for employers to exercise greater control over the activities of non-employee union organizers on the employer's property.

The case before the Board involved the University of Pennsylvania Medical Center ("UPMC" or "Hospital") which, like most hospitals, has a cafeteria that is used by UPMC employees and visiting members of the general public. UPMC did not restrict access to the cafeteria but did enforce a general practice against solicitation, pursuant to which it asked non-employees to leave when it received reports of solicitation for money or for organizations.

In February 2013, two representatives of a Service Employees International Union local who were not Hospital employees sat with UPMC employees who were eating lunch in the cafeteria, discussing, among other things, union organizational activities and displaying union flyers and pins. A UPMC security guard approached the union organizers and, upon determining what was going on, asked them to leave the property. When the union organizers refused, the security guard called 911 and six police officers then escorted the union organizers from the premises.

The union filed charges with the NLRB, and an administrative law judge ("ALJ") applied longstanding NLRB law in finding that the Hospital violated the NLRA by removing the non-employee union organizers. In response to exceptions filed by UPMC, the NLRB reversed the ALJ and took this opportunity to overturn its 38-year-old precedent, holding that employers may lawfully restrict union organizational activities by non-employees on the employer's property even in areas generally open to the public.

Employers that have public access areas may wish to review their policies in light of the Board's about-face. Policies that were carefully drafted over the past four decades may have included language that followed the now-overturned law that allowed non-employee union organizers to engage in organizational activities on the employer's publicly accessible premises so long as they were not disruptive. In revising such policies, employers should take into account the following legal principles that still apply:

- The rules for employees are different and have not changed: An employer may restrict employees only from distributing materials during the employee's working time (which does not include breaks) and in working areas or patient care areas and from soliciting other employees during either their or the other employees' working times.

- Employers may not discriminate against non-employees who are soliciting for union purposes as opposed to other purposes. For example, if the employer adopted a non-solicitation policy with regard to non-employee use of public spaces, then it must enforce it consistently against all non-employees.

- If the union can show that the workplace is so remote that there is no reasonable way to communicate with employees about union organizing without being on the employer's property, then longstanding Supreme Court precedent requires that the employer grant union representatives access to the premises.

In addition to these legal requirements, employers should carefully consider employee morale and public relations issues in developing policies concerning the use of publicly accessible spaces. Even if ejecting union organizers who are non-disruptively sitting at a table in a publicly accessible cafeteria is legal, it may not present the message to employees and the public that an employer may wish to project.

Employers that are revising non-solicitation and premises access policies should consult with an attorney experienced in labor law issues.

The case is *UPMC*, 368 NLRB No. 2 (June 14, 2019).

If you have any questions about this topic, please contact the authors, a member of the Labor & Employment Practice Group, or your lawyer at McCarter & English, LLP.

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