NLRB Allows Employers to Ban Union Organizers From Union Activity In Employers Public Areas

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The National Labor Relations Board (NLRB) recently reconsidered and overruled forty-year precedent permitting union representatives to access public areas of an employer's premises and ruled that a hospital legally kicked nonemployee union organizers out of the hospital cafeteria who were talking union business to employees while having lunch.

In *UPMC Presbyterian Shadyside*, 368 NLRB No. 2 (June 14, 2019), the NLRB was confronted with the findings that an employer committed unfair labor practices when it tossed out two union representatives from a cafeteria that was open to the public.

Public Space Exemption Overruled

Past Board precedent established that employers violate Section 8(a)(1) of the Act when they restrict public cafeteria access for nonemployee organizers who engage in solicitation and other promotional activities but are not "disruptive," thereby creating the "public space exception."

The Board majority noted in Friday's ruling that this approach had been "soundly rejected" by a number of federal circuit courts of appeal and was inconsistent with the original analysis provided by the Supreme Court. The Board then announced that it would reverse all cases supporting this exception, and stated "to the extent that Board law created a public space' exception that requires employers to permit nonemployees to engage in promotional or organizational activity in public cafeterias or restaurants absent evidence of inaccessibility or activity-based discrimination, we overrule those decisions."

New Bright Line Rule

The Board concluded that employers do not have a duty to allow the use of their facility by nonemployees for promotional or organization activity. 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, like disparate treatment where by rule or practice a property owner bars access by nonemployee union representatives seeking to engage in certain activity while permitting similar activity in similar relevant circumstances by other nonemployees, the employer may decide what types of activities it will allow by nonemployees on its property.

The Board's application of the new rule to the UPMC case resulted in no violation of the law by the hospital for ejecting the union organizers. The Board found no accessibility issue and then the issue was whether the employer acted discriminatorily by ejecting the union representatives. Here, the employer demonstrated that it had taken action in the past to prohibit solicitation by outside parties, and thus UPMC had acted consistently with how it had treated

outsiders engaged in solicitation.

Takeaways

Employers with cafeterias open to the public now have a clear rule-the employer can bar any nonemployee from soliciting, including union organizers, so long as they bar all other nonemployees from similar activities. It is critical that the employer have a lawful non-distribution/non-solicitation policy in writing. The employer must also, of course, uniformly enforce the policy across all third parties in order for this new case law to apply. It is also important for employers to keep a written record of the instances in which they have enforced a valid non-solicitation/non-distribution so that they have evidence to defend claims of disparate treatment.

If you have any questions about the recent NLRB decision or how it can affect your business, please reach out to me or to anyone in our Labor Law group.