

The NLRB Stays in the News by Limiting Property Owners Ability to Exclude Protesting Contractor Employees

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A lot is happening at the National Labor Relations Board (NLRB). Last week alone we released two news alerts discussing the [NLRB adding new financial remedies for unfair labor practice charges](#) and the [return to a union-friendly definition of appropriate bargaining](#). We also released a [podcast](#) highlighting other significant recent NLRB decisions, General Counsel memorandum and field directives, and proposed rules as part of a larger tide-shift back to a union-friendly NLRB.

On Friday December 16, 2022, the NLRB released another opinion effectively reversing a Trump-era NLRB decision. The new decision limits a property owner's ability to remove protesting contractor employees from property.

New Rule

The case is called *Bexar County Performing Arts Center Foundation (Bexar County II)*. In a 3-2 decision (with the majority three comprising the NLRB's three democrats), the majority held that property owners can only exclude protesting contractor employees where a protest "significantly interferes with the use of the property or where exclusion is justified by another legitimate business reason, including, but not limited to, the need to maintain production and discipline."

The rule does not apply to protesting employees or protesting non-employees with no contractor relationship; instead, it only applies when a property owner has a contractor relationship with the protestors' employer. Common examples include mall tenants (where the mall seeks to remove striking employees of a store), a restaurant owner leasing space or when operated by a third party, or like in *Bexar County II*, protesting musicians employed by a symphony that leases performance venues from a theater.

The decision restores a 2011 opinion called *New York New York LLC*. That opinion concerned a protest by workers at a hotel restaurant owned by an outside operator.

Prior Rule

As sometimes occurs in the NLRB world, the prior rule involved the same exact case. In 2019 and in *Bexar County I*, a majority-Republican NLRB reversed *New York New York LLC* to hold that a property owner may prohibit contractor employees from protesting on property unless "(i) those employees work both regularly and exclusively on the property and (ii) the property owner fails to show that they have one or more reasonable non-trespassory alternative means to communicate their message."

Bexar County II and other recent NLRB opinions, memorandums, and proposed rules are in line with current trends to overturn Trump-era precedent.

If you have any questions regarding protesting individuals, recent NLRB actions at large, or specific labor inquiries, please contact [Jennifer Craighead Carey](#), [Caleb P. Setlock](#), or any member of the Barley Snyder [Labor Law Team](#).

DISCLAIMER: The information in this alert should not be construed as legal advice to be relied upon nor to create an attorney/client relationship. Please note that the reader's or an industry's specific situation or circumstances will vary and, thus, for example, an approach that is advisable in one industry may not be appropriate in another industry. If you have questions about your situation or about how to apply information contained in this alert to your situation or industry, you should reach out to an attorney.

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