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NLRB Rebalances Employers' Rights to Prohibit Union Solicitation on Their Property

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Last Friday, the National Labor Relations Board ("NLRB") in UPMC overturned 38-year old precedent and held that employers may lawfully prohibit non-employee union solicitation in public spaces on their property absent evidence of discriminatory enforcement. This ruling may seem like common sense to many as employers have long been permitted to control what types of activities occur on their private property in other contexts. However, for the past four decades, the NLRB has compelled employers to allow non-employee union organizers to engage in non-disruptive solicitation in areas, such as cafeterias and restaurants, where the Employer had opened its private property to the public. The NLRB's ruling in *UPMC* ends this compelled acquiesce and affirms employers' property rights.

Although labor organizations will undoubtedly decry this decision as an unjustified departure from precedent, the holding in *UPMC* merely conforms Board law to Supreme Court precedent and eliminates an intrusion to employer property rights that has long been widely criticized and soundly rejected by federal courts.

The Facts in *UPMC*.

In *UPMC*, security officers removed two nonemployee union representatives from the cafeteria at the University of Pittsburg Medical Center Presbyterian Shadyside. At the time they were removed, the nonemployee union representatives were sitting at tables on which union pins and flyers were displayed and were discussing union organizational matters with employees. Security informed the union representatives that the cafeteria was only for the use of patients, their families and visitors, and employees. In response, the union representatives pointed out that there was at least one other nonemployee in the cafeteria waiting to eat lunch with a friend who worked at the Medical Center. However, security did not remove that patron.

The NLRB Realigns the Standard with Supreme Court Precedent.

In *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), the United States Supreme Court held that an employer may deny access to its property by nonemployee union organizers, absent two limited exceptions: (1) inaccessibility (i.e., company towns and other situations where employees are largely otherwise secluded) and (2) activity-based discrimination (i.e., treating unions differently from other third parties engaged in similar activities). The Board noted that the Supreme Court viewed both

exceptions narrowly and imposed a heavy burden on the party attempting to establish either one.

However, in deciding cases in which union organizers sought access to a portion of private property open to the public, the Board created an additional exception that effectively disregarded *Babcock's* limited exceptions to the general rule restricting nonemployee access. Specifically, in *Ameron Automotive Centers*, 265 NLRB 511, 512 (1982), the Board stated that where an employer has opened up its property the "*Babcock & Wilcox* criteria need not be met, since nonemployees cannot in any event lawfully be barred from patronizing the restaurant as a general member of the public."

This third Board-created exception, referred to as the "public space" exception, found discrimination based solely on the fact that nonemployee union organizers were denied access to areas of an employer's private property where the employer has arguably permitted the public general access. Under this exception, the Board did not consider "whether the employer permitted any other nonemployees to engage in the same solicitation or promotional activities engaged in by the union."

As noted, federal courts, including the 4th, 6th, and 8th Circuits, soundly rejected this additional exception created in *Ameron Automotive Centers*.

Accordingly, relying on *Babcock* and its progeny, the current Board has now overruled *Ameron Automotive Centers* and any decision which permitted nonemployee union solicitation based on the "public space" exception, explaining that to allow such an exception, absent inaccessibility or activity-based discrimination, was "irreconcilable with well-established Supreme Court precedent" as set forth in *Babcock*. Importantly, the Board specifically noted:

[A]n employer does not have a duty to allow the use of its facility by nonemployees for promotional or organizational 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.

The Board further ruled that this new standard will be applied retroactively.

The Medical Center Was Within Its Rights to Eject the Nonemployee Union Organizers.

In applying this standard to the facts of the case, the Board held that there was no violation "because there is no evidence that the Respondent permitted *any*solicitation or promotional activity in its cafeteria." In fact, the employer had a practice of removing all nonemployees engaged in promotional or solicitation activities in or near the cafeteria.

Moreover, the Board rejected the argument that discrimination occurred because there was another nonemployee present in the cafeteria that day who was not ejected. The Board reasoned that this individual was using the cafeteria consistent with the purposes authorized by the Medical Center, *i.e.*, to eat lunch. By contrast, the nonemployee union organizers sought to use the cafeteria in a manner that went well beyond eating lunch with friends. Thus, they were rightfully ejected while the friend of the employee was permitted to remain.

Applying this Standard Moving Forward.

The core holding in *UPMC* recognizes employers' property rights and employers' rights to determine

the use of their property. Specifically, *UPMC* recognizes that an employer can invite members of the public to patronize its facilities or even rest or congregate in open spaces on the private property, such as tables and benches, without forfeiting its right to prohibit solicitation and other antagonistic activities.

Under *UPMC*, employers are no longer required to allow nonemployee union solicitation in areas of their property just because these areas are open to the public. Rather, an employer can now prohibit such activities on its property without fear of violating the Act “so long as it applies the practice in a nondiscriminatory manner by prohibiting other nonemployees from engaging in similar activity.” In other words, employers are again in control of what activities may take place in their own facilities.

In light of *UPMC*, employers should review their policies on access, solicitation, and distribution with labor counsel to ensure they are providing the desired protections.

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