

NLRB Makes it More Difficult for Employers to Control Off-Duty Employee Access to the Workplace

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The **National Labor Relations Board (the Board)** is continuing its crusade against "off-duty access rules," most recently in **Merrill International, Inc.**, 359 N.L.R.B. 8 (Sept. 28, 2012). The Board's recent decision makes it more difficult for employers to control off-duty employee access to the workplace.

Background

About 47 years ago, the Board addressed the validity of off-duty employee access policies in **Tri-County Medical Center**, 222 NLRB 1380 (1976). In Tri-County, the Board established a three-part test for determining the validity of a rule restricting off-duty employee access to an employer's operations. A rule restricting off-duty employee access is valid **only if**: (1) limits access solely with respect to the interior of the premises or other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the premises for any purpose and not just to those employees engaging in union activity.

The Policies

At issue in **Merrill International** were two employee access policies which were promulgated, revised, and maintained by Merrill. The first policy restricted off-duty access to work areas by employees without prior management approval (Access Rule). The original Access Rule restricted off-duty access to "interior areas," but excluded from the policy non-work areas such as Merrill's parking lot. The revised rule, however, more broadly restricted access to Merrill's "property."

The second policy restricted employees' use of the hotel's facilities during nonworking hours absent management approval (Use Rule). The original Use Rule restricted access to "guest facilities." The revised Use Rule, however, restricted employee access to specific facilities such as resident floor, rooms, elevators, and public restaurants. It also restricted employee access to any "freighty" outlet.

The Ruling

The Board found both versions of these policies unlawful for related reasons:

- The revised Access Rule and both versions of the Use Rule were found to be unlawful because they could reasonably be construed as restricting employee access to non-work areas, thus running afoul of Tri-County's threshold requirement.
- Both versions of the Use and Access Rule were found to be unlawful because they impermissibly gave management **unlimited** discretion to determine which employees could access its facilities and for what purposes. Thus, the rules were not a "uniform prohibition of access" and ran afoul of Tri-County's third requirement.
- Both versions of the Use and Access Rule were found to be unlawful because reasonable employees could conclude that the nature of the activity for which they seek access would have to be disclosed to management. Consequently, this "compelled disclosure" would have a "chilling effect" on the willingness of employees to engage in "protected concerted activity" (i.e., the right for employees to act together to try to improve their pay and working conditions or to job-related problems).

The Failure

The Board appears to suggest that a "narrow, extremely specific" access rule could pass muster. It did not, however, provide specific guidance. As a result, employers are now faced with four choices: (1) prohibit all off-duty access; (2) attempt to revise an existing policy; (3) tell the doc with an existing policy; or (4) move forward with no access policy whatsoever. Employers should review these options and consult with legal counsel to discuss an appropriate course of action.

Attachment

The Original Access Rule

Associates are not permitted in the interior areas of the hotel more than fifteen minutes before or after their work shift. Occasionally, circumstances may arise when you are permitted to return to interior areas of the hotel after your work shift is over or on your days off. On these occasions, you must obtain prior approval from your manager. Failure to obtain prior approval may be considered a violation of Company policy and may result in disciplinary action. This policy does not apply to parking areas or other outside nonworking areas.

The Revised Access Rule

Employees are not permitted in the interior areas of the Property more than fifteen minutes (15) before or after their work shift. Occasionally, circumstances may arise when you are permitted to return to interior areas of the Property after your work shift is over or on your days off. On these occasions, you must obtain prior approval from your manager. Failure to obtain prior approval may be considered a violation of Company policy and may result in disciplinary action. This policy does not apply to parking areas or other outside nonworking areas.

The Original Use Rule

The hotel and its facilities are designed for the enjoyment of our guests. If you wish to use the guest facilities during nonworking hours, you need to obtain prior approval from your manager.

The Revised Use Rule

The property and its facilities are designed for the enjoyment of our guests and residence owners. You are not permitted on guest or resident floors, rooms, or elevators, in public restaurants, lounges, restrooms or any other guest or resident facility unless on a specified work assignment or with prior approval from your manager. Permission must be obtained from your manager before utilizing any Property outlet, visiting family or friends staying in the Property, or using any of the above mentioned facilities. Please ensure that the manager of the area you intend to visit is aware of the approved arrangements.