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NLRB Limits Union Access Rights to "Public Spaces" of Employers

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On June 14, 2019, the National Labor Relations Board (NLRB or Board) issued an important decision clarifying whether and when an employer may lawfully exclude union organizers from its privately owned public spaces. Under then extant Board caselaw, where an employer had invited the public to enter or use space on its private property, the employer could not lawfully exclude union organizers from entering and using that same "public space" because that exclusion was considered to be unlawful discrimination in violation of Section 8(a)(1) of the National Labor Relations Act (NLRA or Act). The Board's decision in *UPMC, 368 NLRB No. 2*, rejects this generalized "public area" doctrine, redefines what is and isn't unlawful discrimination for the purposes of determining a union's right of access to an employer's public spaces and, broadens employer's legal options under the NLRA.

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UPMC spawns from a hospital's ejection of two union organizers from its 11th floor public cafeteria where the organizers were meeting with hospital employees to discuss union organizing. It draws a critical distinction between the mere exclusion of union representatives from such public areas and their exclusion based on the activities they engage in while present in public areas. Citing the Supreme Court's leading union access case, *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), the Board observed that while the Act required an employer to refrain from interfering, restraining or coercing employees' exercise of their statutory rights, the Act does not require that an employer permit the use of its facilities for organizing when other means of communication are readily available. Accordingly, the Board found that an employer does not have a duty to allow the use of its facility by nonemployees for promotional or organizing purposes and the fact that a cafeteria located on an employer's private property is open to the public does not mean that an employer must allow any nonemployee access to that public space for any purpose. To the contrary, since it is on private property, an employer has a right to promulgate and enforce rules and practices regulating conduct to be carried out in that public space as long as they are facially neutral and enforced in an even-handed and consistent fashion. Thus, absent disparate treatment, where by a rule or practice, a property owner bars access by nonemployee union representatives seeking to engage in certain activities, while permitting similar activity in similar relevant circumstances by other nonemployees, an employer may decide what types of activities, if any, it will allow by nonemployees on its property and exclude those nonemployees who elect to engage in such proscribed conduct, even though they are affiliated with a union and on premises to engage in organizational activities.

Following *UPMC*, an employer's exclusion of union representatives from public areas on the employer's private property will not be deemed unlawful unless that exclusion is accompanied by evidence of the "non disruptive" activity the union representatives engaged there and absent further proof that the employer has permitted similar conduct by other nonemployees. Absent such proof, the employer's exclusion or ejection of a union's representative(s) from its public areas is not "disparate treatment" and does not constitute discrimination. Accordingly, the mere denial of a union's access to such public spaces is no longer unlawful or legally sufficient to establish a violation of the Act.

TAKEAWAYS:

- Employers can and should promulgate facially neutral rules and engage in practices regulating conduct in the public spaces on their private property, including rules prohibiting solicitation by third parties.

- The employer's rules/practices should be written in neutral, albeit broadly fashioned terms that are sufficient to reach but not target or single out union or organizing activities.
- The employer should enforce these rules in a consistent and even-handed fashion as to similar conduct under similar circumstances; to the extent that there is non-enforcement of a rule, that non-enforcement should be documented and earmarked to its specific circumstances so as to render that non-enforcement explainable and distinguishable from subsequent enforcement as to union nonemployee access/on-premises conduct.

AN IMPORTANT CAVEAT: While *UPMC* is welcomed news to employers, it may be of limited use to employers in states like California where state laws give unions greater access rights than federal law and where the courts and law enforcement are reluctant to enforce an employer's rights under the NLRA.

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