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NLRB Gives Employers Win Against Non-Employee Union Organizers

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The National Labor Relations Board (NLRB) issued an employer-friendly decision last Friday, giving employers the license to potentially eject non-employee union organizers from public areas of their facilities.

Past board law established a few guideposts in an otherwise murky area regarding non-employee union organizers' access to an employer's facility. Generally, an employer could keep non-employee union organizers from entering its property, but two big exceptions existed. First, the employer could not discriminate. If it allowed outside groups (like fundraising groups or educational entities) access to its property, it had to allow non-employee union organizers the same access. Second, an employer could not keep non-employee organizers from being in a public area of its facility, as long as the activities they were engaging in were customary for that public area.

This second exception has been difficult for many employers who operate facilities with public areas, such as hospitals and restaurants. Hospitals were long required to tolerate the presence of non-employee union organizers in their public cafeterias, for example, as long as the organizers were engaging in activities customary for a cafeteria. This ambiguous standard made it difficult for employers to lawfully kick out non-employee organizers even when those organizers stretched the limit on what activities were customary in a public area.

The recent [UPMC Presbyterian Hospital](#) case is representative. In that case, union organizers came to the hospital's cafeteria and had lunch with employees, discussed the union, and had union flyers and pins available at the lunch tables. After being asked to leave, the organizers refused and eventually were escorted out by police. Instead of analyzing whether the employer properly ejected those organizers under its past standard, the NLRB issued a clear rule that an employer is not required "to permit nonemployees to engage in promotional or organizational activity in public cafeterias or restaurants absent evidence of inaccessibility or activity-based discrimination..." Instead, "[a]bsent discrimination between nonemployee union representatives and other nonemployees ... the employer may decide what types of activities, if any, it will allow by nonemployees on its property."

The decision is welcome news for health care providers and others who long had to grapple with a blurry line of whether they could lawfully prohibit such organizers from setting up shop in public areas to solicit its employees. While helpful, employers must still recognize the importance of consistent and nondiscriminatory application of its non-employee access rules. As made clear in the *UPMC Presbyterian Hospital* decision and in countless other cases, employers who allow other outside groups to access their facilities but prohibit union organizers from doing the same may be found to have discriminated against those union groups in violation of the National Labor Relations Act.

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