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NLRB Rules That Employers May Ban Nonemployee Union Activity in Areas Open to the Public

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On June 14, 2019, the National Labor Relations Board ("Board") ruled in a 3-1 decision that employers may prohibit nonemployee union representatives from conducting organizing activities on employer property that is open to the public. *UPMC Presbyterian Shadyside*, 368 NLRB No. 2 (June 14, 2019). This decision overturns precedent dating back to the early 1980s which held that employers could not ban nonemployee union organizers from cafeterias and restaurants open to the public if they use the facility in a manner consistent with its intended use and are not "disruptive." See *Montgomery Ward & Co.*, 256 NLRB 800, 801 (1981), enfd. 692 F.2d 1115 (7th Cir. 1982).

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The case arose when two union organizers for the Service Employees International Union Healthcare Pennsylvania ("SEIU") met with six of the hospital employer's employees in the hospital's cafeteria, which was open to the public. The group ate lunch and discussed union organizational campaign matters. In addition, at least one off-duty employee passed out union flyers. Union flyers and pins were also displayed on the tables where the group was meeting.

After receiving complaints, a hospital security guard asked each of the individuals in the group for their identification, and told the union representatives that the cafeteria was only open to patients, their families and visitors, and employees. The guard further stated that the union representatives had to leave the premises. They refused, and the security guard called police, who subsequently escorted the union representatives from the cafeteria. Thereafter, the SEIU filed an unfair labor practice charge, alleging that the hospital had unlawfully discriminated against the union representatives in violation of Section 8(a)(1) of the National Labor Relations Act ("Act.")

When dismissing the charge, the Board ruled that the hospital did not violate the Act by ejecting union organizers from the cafeteria because there was no evidence that the hospital permitted any solicitation or promotional activity in the cafeteria. In addition, the hospital regularly removed nonemployees who engaged in promotional activities in or near the cafeteria.

Moreover, when reaching its decision, the Board overruled the "public space" exception rule, which held that discrimination prohibited by the Act could be established solely by showing that nonemployee union representatives were denied access to a public area within private property. *See Montgomery Ward & Co.* Specifically, the Board held thus:

[A]n employer does not have a duty to allow the use of its facility by nonemployees for promotional or organization 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. Absent discrimination between nonemployee union representatives and other nonemployees –i.e., 'disparate treatment where by rule or practice a property owner' bars access by nonemployee union representatives seeking to engage in certain activity 'while permit[ting] similar activity in similar relevant circumstances' by other nonemployees–the employer may decide what types of activities, if any, it will allow by nonemployees on its property.

The Board's decision comes as welcome news. Employers may now prohibit any nonemployee from soliciting on

its property, including union organizers, “so long as it applies the practice in a nondiscriminatory manner by prohibiting other nonemployees from engaging in similar activity.” Accordingly, employers should take this opportunity to review and update their policies regarding solicitation and distribution on company property. Employers with questions regarding access or solicitation rules would do well to consult with able counsel.

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