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NLRB Continues Trend to Protect Employer Property Rights

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Coming on the heels of its decision in *Bexar County Performing Arts Center Foundation d/b/a Tobin Center for the Performing Arts*, 368 NLRB No. 46 (2019) in which the Board rebalanced the rights of property owners versus Section 7 rights of employees during a labor dispute, the National Labor Relations Board (NLRB) recently issued another pro-employer decision. In *Kroger Limited Partnership I Mid-Atlantic*, 368 NLRB No. 64 (2019), issued September 6, 2019, the NLRB clarified when nonemployee union agents may access an employer's property to engage in protests, boycotts, and other organizing activity. The Board held that the employer did not violate the Act by removing nonemployee union agents who were encouraging customers to boycott the retail store from its parking lot. Even though the store had permitted civic and charitable organizations to solicit and distribute in the parking area and in front of the store, the Board redefined that applicable discrimination standard under the Act. By so ruling, the Board overturned a long line of cases holding that such conduct was unlawful disparate treatment and clarified what factors must be present for a violation of the Act.

Background

The Supreme Court has held that nothing in the Act compels an employer to grant nonemployee union agents access to its property. The only recognized exception, however, is that an employer may not discriminate against nonemployee union agents by excluding them from its property while allowing "other distribution" on the property. In *Sandusky Mall Company*, 329 NLRB 62 (1999), the Board applied this discrimination exception broadly to permit nonemployee union agents on an employer's premises *if* the employer has allowed "substantial civic, charitable, and promotional activities" by other nonemployees/organizations. Thus, the Board concluded that because the employer permitted a variety of charitable and civic organizations to fundraise, collect donations, or distribute information on its property, it could not ban nonemployee union agents encouraging customers to boycott the employer's business.

Even though the U.S. Court of Appeals for the Sixth Circuit denied enforcement of the Board's order, the *Sandusky* standard has controlled Board decisions since 1999, forcing employers to decide between supporting organizations such as charities or youth groups. In short, employers had to decide whether supporting these organizations was worth compromising the employer's right to limit access to its property to nonemployee union advocates. Indeed, the Fourth, Second, Seventh and Ninth Circuits followed the Sixth Circuit's reasoning and refused to enforce Board decisions implementing the *Sandusky* analysis, but the D.C. and Tenth Circuits have affirmed decisions applying *Sandusky*. Ultimately, the applicable standard in these cases, at the Board level, granted access to nonemployee union agents whenever the employer granted access to civic and charitable organizations.

The New *Kroger* Analysis

The Board in *Kroger* noted that *National Labor Relations Board vs. Babcock & Wilcox Co.* did not provide any definition to the discrimination exception advanced by the court. Thus, in reviewing the appellate court decisions refusing to enforce the *Sandusky* analysis, the *Kroger* Board reasoned, "[w]hile the courts of appeals that have considered the issue have differed in their definition of what nonemployee activities are comparable, they are unanimous in the conclusion that nonemployee protest or boycott activities are not comparable to nonemployee charitable, civic, or commercial solicitations, and that an employer does not engage in 'discrimination' within the meaning of *Babcock* when it forbids the former but permits the latter."

The Board, therefore, announced a new standard applying the *Babcock* discrimination exception. An employer unlawfully discriminates against nonemployee union agents when it treats nonemployee activities ***that are similar in nature*** disparately. Thus, synthesizing the appellate court analyses, protest and boycott activities are not similar enough in nature to charitable, civic, or commercials activities to warrant a finding of discrimination. An employer may ban nonemployee union agents engaging in protest, boycott, or organizing activities if it also bans similar activities by non-labor groups such as membership drives by fraternal societies and religious organizations. The Board also determined that its ruling should be applied retroactively to cases currently pending.

Next Steps

Employers with cases pending on exceptions before the Board where this type of union access is at issue, may want to take action to encourage the General Counsel to apply the new standard to the case. In light of this new standard, employers may also want to review their no-access policies for nonemployees to determine what civic or charitable activities they may now want to permit on their premises without fear of having to provide equal access to union organizers. Likewise, as a result of this decision, employers can identify organizations that may wish to engage in organizing (membership) activities and lawfully continue to ban such groups.