

Labor Board Overrules Longstanding Public Space Solicitation Rules

by Grant S. Gibeau - Monday, June 17, 2019



In a major decision, the National Labor Relations Board (“NLRB”) has overturned long-standing precedent by expanding the ability of employers to eject nonemployee union organizers from publicly accessible spaces on their premises. This decision provides employers, especially those in the healthcare field, with much greater control regarding nonemployee union activity on their premises.

In [UPMC, 368 NLRB No. 2](#), a nonemployee union representative sat in a hospital’s public cafeteria to meet with employee union members regarding organizational campaign matters. While the hospital’s cafeteria was open to the public (e.g. family members visiting patients), the hospital had a consistent practice of removing nonemployees who were engaged in promotional activity, including solicitation, in or near the cafeteria. Hospital security therefore ejected the union organizer from the facility, prompting the union to file an Unfair Labor Practice charge against the hospital under the National Labor Relations Act (NLRA).

The Law Until Now

More than 60 years ago, in a case entitled [NLRB v. Babcock & Wilcox](#), the Supreme Court recognized that while employers generally could not prohibit employees from discussing union organizing among themselves, they could limit such activities on the part of nonemployees e.g. union organizers. The Supreme Court ruled that an employer may validly prohibit organizing activity by nonemployees if (1) reasonable efforts by the union through other channels would allow it to reach the employees (also known as the “inaccessibility” exception) and (2) if the

employer does not discriminate against the union by allowing other distribution (also known as the “discrimination” exception).

Some years later, the NLRB created an additional exception to the *Babcock* standard in situations where nonemployee union organizers sought access to a portion of the employer’s private property that is open to the public, such as a cafeteria or restaurant inside the employer’s facility. Specifically, the NLRB concluded that employers violate Section 8(a)(1) of the NLRA by denying access to cafeterias and restaurants open to the public if the organizers use the facility in a manner consistent with its intended use in a non-disruptive manner. Therefore, nonemployee organizers generally could not be banned from eating, meeting and/or talking with employees in these spaces.

The NLRB’s New Stance

Despite the NLRB’s consistent application of their “public space” exception, many courts criticized the doctrine because it conflicted with Supreme Court precedent and infringed upon employers’ private property rights. Thus, in the *UPMC* case, the NLRB finally came to agreement with the courts and expressly found that “to the extent that Board law created a ‘public space’ exception that requires employers to permit nonemployees to engage in promotional or organizational activity in public cafeterias or restaurants absent evidence of inaccessibility or activity-based discrimination, we overrule those decisions.”

As a result, employers may now ban union organizing in their public spaces by nonemployees as long as they adhere to the inaccessibility and nondiscrimination conditions established long ago by the U.S. Supreme Court.

BOTTOM LINE

This decision allows employers that provide publicly accessible space on their premises, (e.g. restaurants, casinos, hospitals) to have significantly more control over activity taking place there.

Before, attempting to remove nonemployee union representatives was a legal minefield almost guaranteeing an unfair labor practice charge from the union. Now, so long as an employer has a neutral policy prohibiting all forms of solicitation or promotional activity in its public areas, and assuming the union can reach employees in other ways, action can be taken to prevent access by nonemployee organizers.

Employers interested in keeping union organizers out of their public spaces should (1) review their policies to ensure that they prohibit solicitation by nonemployees, and (2) enforce these policies uniformly.

