



Preventing Off-Duty Employee Access

Insights

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Many employers prohibit off-duty employees from accessing the workplace. This is particularly true of employers in the hospitality, healthcare, and manufacturing industries, where there is a premium on ensuring guest, patient, and employee health and safety. Recently, the National Labor Relations Board issued yet another decision striking down an employer's off-duty employee access policy, finding the policy unlawfully interfered with the right of employees to engage in protected concerted activity. *J.W. Marriott at Los Angeles Live*

In effect, the Board has presented employers with a classic Hobson's Choice: either maintain a policy prohibiting off-duty employee access for any reason, or have no off-duty access policy at all.

Recent Decisions Limiting Off-Duty Access Policies

On September 28, 2012, the Board held that a hotel employer's policy prohibiting off-duty employees from accessing interior areas of the hotel without prior approval of management violated the National Labor Relations Act. Relying on a decision from 1974, the Board found that because the hotel's policy did not uniformly prohibit off-duty employee access to the property for *any and all* reasons, it was unlawful to prohibit access for only some reasons, particularly where approval of those reasons was subject to management's discretion.

In other words, under the Board's rationale, the policy must either allow all off-duty employees to access the property, or it must forbid all off-duty employees from accessing the property. Because the hotel's access policy gave management discretion to decide on what grounds an off-duty employee could return to the property, it was unlawful.

The Board's most recent decision follows a pair of off-duty employee access cases decided over the past year. In December 2011, the Board found that a hospital employer's rule prohibiting off-duty employees from accessing the premises except for "hospital-sponsored events," including retirement parties and baby showers, violated the Act.

Similarly, in July 2012, the Board struck down a hospital employer's policy to the extent that it prohibited off-duty employees from accessing the hospital except for "hospital-related business." In both of those cases, as in the most recent case, the access policies at issue permitted limited exceptions, which arguably did not include the right of employees to engage in protected concerted activity.

Board Not Unanimous

The Board's sole Republican Member, Bryan Hayes, (the Board currently has four members and one vacancy) dissented in all three off-duty employee-access cases decided this past year. According to Hayes, the 1974 case on which the majority relies does not require a blanket prohibition on all off-duty access. In his most recent dissent, Hayes wrote that "requiring employers to prohibit all access in order to prohibit any makes it virtually impossible for an employer to draft an enforceable rule restricting off-duty employee access."

Hayes continued, "The Act cannot reasonably be interpreted to force employers to choose between inhuman rigidity and giving off-duty employees free rein to the interior of their facilities." As Hayes implies, employers are faced with an impossible choice in determining how to safely address off-duty employee access.

Where Should Employers Go From Here

It remains to be seen exactly how rigid the Board will require employers to be with respect to maintaining and enforcing off-duty employee access policies. The Board majority's opinion suggests that, contrary to Hayes' dissent, employers need not maintain a blanket prohibition on all off-duty access in order for a policy to pass muster under the Act. Rather, the majority notes, an employer can create a narrow exception for "special circumstances." Unfortunately, the majority fails to define what those "special circumstances" are, forcing employers to act at their peril with respect to prohibiting off-duty employee access.

Without more specific guidance from the Board, and in light of the current Board's trend of finding employee conduct policies unlawful, you need to be cautious when including any exceptions in an off-duty access policy.

Our advice? Carefully review your access policies to ensure that managers do not have the discretion to decide under what circumstances an off-duty employee may access the premises. Policies should not permit access only for company events or business activities, as those exceptions would arguably exclude protected concerted activity.

Finally, remember that the Board can and will find off-duty employee access policies unlawful regardless of whether they are actually applied to discipline employees.

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