



Limiting Off-Duty Access To The Hotel

Insights

3.02.15

Many hospitality employers are surprised to learn that employees have a right under federal labor law to access the exterior, nonworking areas of the hotel property in their off-duty hours for union or other protected concerted activities. Hospitality employers are also surprised to learn that handbook rules prohibiting any off-duty employee access or conditioning off-duty employee access on manager approval are unlawful.

In fact, the legality of hotel policies restricting off-duty employee access is a complicated area of federal labor law. But you do have some options when it comes to implementing lawful rules restricting off-duty employee access. Keep in mind that any rules on off-duty access must be clearly stated in the employee handbook and take into account the nuanced requirements of federal labor law.

Here's an overview.

Exterior Areas Of The Property

The National Labor Relations Board (NLRB) has long held that employees have a presumptive right under federal labor law to access the exterior areas of the employer's property to engage in union activities or other protected concerted activity. Exterior areas of the property include parking lots, outside break areas, smoking areas, and sidewalks near the hotel entrances. For hotels, exterior areas also include the "porte-cochere," the covered area in the driveway where guests briefly park their cars to check into the hotel or to unload their luggage.

Off-duty employees who are engaging in concerted activity, for example distributing handbills regarding working conditions, have a legal right to be there. You cannot prohibit this type of off-duty employee access without "special circumstances," which is a high bar under federal labor law. A hotel employer's generalized concern about off-duty employees coming into contact with guests or customers is not a "special circumstance" that warrants prohibiting exterior property access for off-duty employees, or ejecting off-duty employees from the exterior areas of the property.

But only off-duty *employees* have the right to access the exterior areas of the property for union activity. The right does not extend to third parties, such as union business agents or outside union organizers.

Interior Areas

Employers can presumptively maintain a rule that prohibits employees from accessing the interior of the property, provided that the rule 1) is clearly disseminated to all employees; and 2) applies to off-duty employees seeking interior access for any purpose, not just for union activity.

The NLRB considers any policy that prohibits off-duty employee access without distinguishing between exterior and interior property areas to be overbroad and unlawful. For example, the board will find any rule that bans all off-duty employee access to the “property” or to the “premises” to be unlawful. The board believes these terms are too vague and overbroad, and that employees may interpret these terms to include the exterior areas of the property.

Further, the policy must be “clearly disseminated” to all employees. Practically speaking, this means the policy must be stated in an employee handbook. A verbal policy or undocumented historical practice will not meet the NLRB’s requirements.

Even if the rule is otherwise lawful, the NLRB holds that an employer cannot issue a *new* access rule in response to union activity. In other words, if you do not already have a rule on off-duty access in place, you cannot implement one once you learn that union representatives have visited the facility, or that an employee is soliciting coworkers to join a union.

Can You Require Manager Approval?

A common policy within the hospitality industry is to condition all off-duty employee property access on the express approval of the hotel manager or the senior manager on duty. This type of policy is not motivated by union animus, but rather is a matter of reasonable operational oversight. Naturally, many hotel managers want to know if an off-duty employee is on the premises, and for what purpose. Hotel managers know that off-duty employees being on hotel grounds can lead to lost revenues, such as free beverages and food among friendly coworkers. It can also result in over-socialization between on-duty and off-duty employees, which can detract from the guest experience.

Unfortunately, the NLRB holds that “manager approval” policies are overbroad and violate federal labor law. In the board’s view the problem with these policies is that they reserve too much discretion and allow managers to decide when and why employees may access the property. The NLRB believes that hotel managers will utilize their discretion to allow off-duty employees to access the property for some purposes, but will not allow off-duty employees to access the property for union activity or other protected concerted activity.

What About Off-Duty Contractors?

Hotel operators frequently utilize contractors for maintenance, laundry, or food-service work. In some cases, the NLRB has held that contractors who work at the hotel may access the exterior areas of the hotel for union activities or other protected concerted activities. Contractors are not “employees” of the hotel, but they are still “employees” of the contractor and, thus, entitled to certain legal protection under the National Labor Relations Act.

Is A Variation Possible?

The current state of the law allows hospitality employers to ban off-duty employees from accessing the hotel interior under any circumstances. This is because allowing off-duty interior access for some reasons but not others may lead to claims of union discrimination.

But a recent NLRB decision in the healthcare sector suggests another possible type of policy. In *Sodexho America* the board approved an off-duty access rule at a hospital that prohibited off-duty employees from accessing the hospital interior, except when obtaining their own medical care or when visiting hospital patients. In that case, the board held that the employer lawfully allowed the off-duty employees to use its medical facilities on the same terms as other members of the general public, but lawfully prohibited the off-duty employees from accessing the hospitality interior for any other purpose.

The Board has not yet extended this holding to the hospitality industry so it's not entirely clear whether a hotel employer can prohibit off-duty employee access to the hotel, except when the employee is accessing the hotel's amenities "in the same manner as any other guest or customer." Nor is it clear whether a hospitality employer can limit the number or frequency of visits by off-duty employees. Nevertheless, the recent *Sodexho* decision gives hospitality employers a legal foothold to implement a similar rule, and argue for its enforceability if challenged.

Our Advice Regarding Access To Property

The NLRB applies tough rules regarding off-duty employee access. You should review the specifics of your off-duty employee access rules to ensure that they are precisely worded to comply with federal labor law while still protecting operational needs. Remember, you forfeit any right to implement lawful off-duty access rules once organizing activity has commenced, especially in light of the activist nature of the current NLRB. Don't maintain access rules that are predicated solely on manager discretion.

For more information contact the author at BGarrett@laborlawyers.com or 949.851.2424.

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