



NLRB Reinstates Broad Property Access Rights for Third-Party Contractors

Insights
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The National Labor Relations Board just overruled a key Trump-era decision that had narrowed property access rights for off-duty contractor employees, eliminating a powerful tool for employers to combat unwanted solicitation on their premises. In doing so, the December 16 decision returned to an Obama-era rule that now once again precludes property owners from excluding off-duty contractor employees engaging in activity protected by Section 7 of the National Labor Relations Act in the absence of evidence that those activities significantly interfere with use of that property. What do employers need to know about this latest blow in the area of labor relations law?

Dispute at Symphony Reaches National Stage

Generally, employees working on the property of their own employer property enjoy broad access rights for purposes of engaging in Section 7 activity during non-work time and in non-work areas. Until recently, however, property owners could generally deny access to third-party union organizers and other non-employees.

The issue in *Tobin Center for the Performing Arts* concerned a third category: employees of a contractor who actually work on property owned by a separate entity. Union-represented musicians employed by the San Antonio Symphony had contracted to provide 22 weeks of performances at the Tobin Center. In a cost-cutting measure, the employer made a decision to switch from live to recorded music for ballet performances, which reduced the number of paid performances for the musicians.

The musicians responded by distributing leaflets at the Tobin Center protesting the recorded music. The Tobin Center barred them from the premises and demanded they move to a public sidewalk. Local 23 filed an unfair labor practice charge.

Under the Board's 2011 *New York New York* decision, a third-party property owner could not deny access to contractor employees who are "regularly employed on the property" unless it could establish that the activity substantially interfered with use of its property. Applying that standard, the administrative law judge found the musicians had a right to engage in leafleting on Tobin Center property.

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In 2019, the Trump-era Board reversed this ruling. It instead held that a property owner could exclude contractor employees from its property unless they work “regularly and exclusively on the property” and the owner is unable to show “one or more reasonable alternative means to communicate their message.” Applying its new rule, the Board found the contractor musicians had no right of access for the purposes of leafletting.

The union appealed to the U.S. Court of Appeals for the District of Columbia Circuit, and in 2021 the court remanded the case back to the Board. By this time, there had been a change in administrations – which meant a big change in the composition of the NLRB. When it came time to take a fresh look at the issue, the majority of Board members in charge of the decision were Democratic appointees. So it came as little surprise that the standard shifted once again.

On Friday of last week, the Board overruled the original decision and returned to the test initially articulated in *New York New York*. The Board noted that it is critical for employees to freely engage in Section 7 activity at their workplace and that “a large and increasing percentage of employees in the American workforce are employed by onsite contractors.”

What Does This Mean for You?

As a result, property owners may no longer automatically bar off-duty employees who regularly work for an onsite contractor from their premises while engaged in Section 7 activity. To be able to do so, you would need to be able to show that the activity significantly interferes with your use of the property or are otherwise justified by a legitimate business reason, such as the need to maintain production and discipline.

While this decision may have limited application in the area of labor relations, it confirms NLRB General Counsel Jennifer Abruzzo’s stated intention to expand property access rights for unions and employees alike, while generally expanding Section 7 rights. You can expect similar decisions from this agency in an effort to extend the expansion of access rights in other settings in the near future. As a result, you should ensure that your employment – and labor relations – decisions take the Board’s ongoing pendulum swing into account. Work with your labor counsel to make sure you are considering the trajectory of these decisions into your employment and labor relations plans for 2023.

For further assistance, contact your Fisher Phillips attorney, the author of this Insight, or any member of the firm’s Labor Relations Practice Group. We will continue to monitor further activity from the NLRB and provide updates as warranted, so make sure you are subscribed to Fisher Phillips’ Insight system to gather the most up-to-date information.

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