



Labor Board Further Tightens Union Access To Employer Property

Insights

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In yet another ruling that levels the labor relations playing field, the National Labor Relations Board ruled on Friday that employers could rightfully eject outside union representatives soliciting petition signatures from a shared shopping center parking area. When read in conjunction with [a June decision conferring greater rights to limit on-premises union activity](#), by abolishing the “public space” exception, and a more recent ruling extending greater latitude when it comes to excluding contractor employees, the Board has significantly restricted union access to private employer property. These rulings have supplied employers with powerful tools to combat prohibited solicitation on their premises. What do you need to know about this latest decision?

Prior Decisions Led Union To Believe Its Actions Were Permissible

In April 2014, a Kroger supermarket in Portsmouth, Virginia responded to reports of on-premises solicitation activity by calling the police and barring two union representatives from the parking area adjacent to its store. One of the union representatives was collecting customer signatures for a petition protesting the transfer of union employees.

The parking area was part of a shared shopping center, leading the union to believe the activity was permissible. Moreover, although the store maintained an “unofficial” policy prohibiting such solicitation, its managers had previously permitted charity organizations and other groups to assemble in the same area to solicit donations and distribute literature.

These factors led an administrative law judge to conclude that the company violated the National Labor Relations Act (NLRA) when it ejected the union representatives from the parking area. She ruled that Kroger had enforced its unofficial policy in a way that illegally discriminated against the union, citing the agency’s Clinton-era decision *Sandusky Mall Co.* In the 20 years since that ruling was handed down, the NLRB has reaffirmed this standard on several occasions, leading the union to believe that its solicitation activity was protected in this case. On appeal, however, a 3-1 NLRB majority overturned the judge’s decision on September 6.

NLRB Says Prior NLRA Applications Were Incorrect

In overruling the judge, the NLRB first harkened back to the seminal 1956 Supreme Court case *NLRB v. Babcock & Wilcox Co.*, which held that an employer may not discriminate against a union distributing literature on its property while allowing other forms of third-party distribution. In last

week's ruling, the Board concluded that the agency had improperly extended the *Babcock & Wilcox* doctrine, concluding that the *Sandusky Mall* ruling "improperly stretched the concept of discrimination well beyond its accepted meaning in a manner that finds no support in Supreme Court precedent."

The new interpretation? The Board ruled that discrimination only violates *Babcock & Wilcox* where the facts show unequal treatment of activities that are "similar in nature." In undertaking such an analysis, the Board will now look beyond the activity itself (e.g., handbilling) to consider the underlying "purpose of the activity."

In the *Kroger* case, the union activity at issue bore little resemblance to the charitable information and solicitation drives that had previously been permitted. "We hold that protest and boycott activities are not sufficiently similar in nature to charitable, civic, or commercial activities to warrant a finding of discrimination based on disparate treatment of such conduct," the Board majority said, "regardless of the amount of charitable, civic, or commercial activities permitted."

What Does This Mean For Employers?

Under the Board's new legal framework, you may now bar non-employees from your property if they are engaging in picketing, boycotts, or similar solicitation activities even if you allow charitable groups or other community members on your premises. You may also bar non-employees from your property while overtly engaging in union organizing activity, so long as you prohibit comparable organizational activities by other third parties.

You should also read this ruling in concert with two other recent decisions from this same agency, both of which also enhance an employer's ability to restrict third-party activities on premises. In June's UPMC ruling, the NLRB found that employers may enforce no-solicitation policies to exclude non-employee union organizers so long as those policies are enforced on a non-discriminatory basis and the organizers have other reasonable means of communicating with employees – which, in most cases, they do. Consequently, you are no longer required to permit outside union representatives with access to public areas of your property merely because it is a "public space" and the representatives are not being disruptive.

And on August 23, the Board set a new test on when you can bar your contractor employees from staging labor protests on your property, concluding that you have the right to eject them unless they work "regularly and exclusively" on your property and they have no "reasonable non-trespassory alternative" for delivering their message (*Bexar County Performing Arts Center Foundation*). That decision came down against union musicians who worked for the symphony group performing at the San Antonio facility and who wanted to protest the use of recorded music inside the arts center. Besides concluding that the musicians didn't use the facility enough to warrant such protests, the Board found that they had reasonable alternatives – such as handing out fliers on public property near the facility, using social media, or working with local media outlets.

Of course, employers must still comply with the Supreme Court's *Babcock & Wilcox* doctrine prohibiting patently anti-union discrimination. In other words, you still cannot treat groups differently because of their union or other NLRA-protected status. For example, you cannot permit solicitation by one union but not another, or permit protest activity by a civic or community group but bar unions from protests. Last week's *Kroger* ruling narrows the scope of that restriction, however, conferring greater rights to protect your private property.

Employers are encouraged to coordinate with labor counsel to explore whether it now makes business sense (from both a practical and legal perspective) to adjust your third-party property access policies and practices to leverage the benefits of these rulings. Should you need any assistance in that regard, please do not hesitate to contact your Fisher Phillips attorney or any member of the firm's [Labor Relations Practice Group](#).

We will continue to monitor any further developments from the NLRB as they become available, so make sure you are subscribed to [Fisher Phillips' alert system](#) to gather the most up-to-date information.

This Legal Alert provides an overview of a specific federal labor board decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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