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Recent NLRB decisions have wide-ranging impact on employer personnel policies and day-to-day employment practices.

Do union representatives (i.e., non-employees) have the right to engage in union activity on employers' private property that is otherwise open to the public?

In Kroger Mid-Atlantic (Sept. 6, 2019), an Administrative Law Judge ("ALJ") initially ruled that Kroger violated the National Labor Relations Act ("the Act") by prohibiting non-employee union representatives from petitioning customers in a Kroger store parking lot in Portsmouth, Virginia. The union representatives were soliciting customer support for a consumer boycott in connection with the union's protest of Kroger's decision to close the store and to relocate union-represented employees to another store 25 miles away.

The NLRB, however, overruled the ALJ's decision, concluding that employers may lawfully ban non-employee union representatives from accessing private property that is otherwise open to the public, e.g., shopping centers, malls, and public parking lots. This decision overturned decades of NLRB precedent to the contrary.

Under the new legal standard established in Kroger Mid-Atlantic, employers may lawfully ban non-employee union representatives from entering private property otherwise open to the public for the purpose of engaging in union activity, while providing access to non-employees for the purpose of engaging in "charitable, civic or commercial activities." The NLRB ruled that employers may do so, provided they also ban "comparable organizational activities" by groups other than unions.

The NLRB reached a similar conclusion in University of Pittsburgh Medical Center (June 14, 2019), where it ruled that a hospital employer lawfully prohibited non-employee union representatives from speaking with off-duty employees, i.e., union activity, inside the hospital cafeteria, which is otherwise open to the public. Again, this decision overruled NLRB precedent to the contrary.

Do off-duty employees have the right to engage in union activity on private property that is otherwise open to the public?

In Bexar County Performing Arts Center Foundation d/b/a Tobin Center for the Performing Arts (August 23, 2019), union-represented musicians held approximately 80% of their rehearsals at the Tobin Center for the Performing Arts, which was not their employer; the San Antonio Symphony Orchestra was their employer. This case arose from the Tobin Center's decision to ban non-employee musicians from engaging in informational leafleting aimed at the general public on the sidewalk in front of the Tobin Center. The NLRB framed the issue as follows: "Specifically, we address whether the Tobin Center for the Performing Arts had the right to prohibit off-duty employees of one of its licensees, the San Antonio Symphony, from accessing a sidewalk located on Tobin Center private property for the purpose of engaging in informational leafleting to the general public."

Overruling precedent, the NLRB concluded as follows:

> [W]e hold that a property owner may exclude from its property off-duty contractor employees seeking access to the property to engage in Section 7 activity unless (1) those employees work both regularly and exclusively on the property and (2) the property owner fails to show that they have one or more reasonable non-trespassory alternative means to communicate their message.

* * * *

Under this standard, which we apply retroactively to all pending cases, the off-duty Symphony employees were not entitled to access the Respondent's property to engage in Section 7 activity. The Symphony employees indisputably did not work exclusively on the Respondent's property, and their employer, the Symphony, did not regularly conduct business or perform services there because it only used the property for performances and rehearsals 22 weeks of the year. Moreover, the Symphony employees had a reasonable alternative non-trespassory channel of communicating their concerns to the theater-going public by leafleting on public property directly across the street from the Tobin Center, where they distributed several hundred leaflets. They also had access to their target audience through mass and social media. Accordingly, the Respondent lawfully denied the Symphony employees access to its property, and we will dismiss the complaint.

May employers lawfully implement mid-CBA changes when there is no evidence of a "clear and unmistakable waiver" of the union's right to request bargaining over such changes?

In MV Transportation, Inc. (Sept. 10, 2019), the NLRB framed the issue as follows: "It is well established that an employer does not violate the Act if the [CBA] does, in fact, grant the employer the right to take certain action unilaterally (i.e., without further bargaining with the union). The question presented in this case concerns the standard the Board should apply to determine *whether* a [CBA] grants the employer that right. As noted, the Board currently applies the 'clear and unmistakable waiver' standard, under which the employer will be found to have violated the Act unless a provision of the collective-bargaining agreement 'specifically refers to the type of employer decision' at issue 'or mentions the kind of factual situation' the case presents." [Emphasis in original.]

On this question, the NLRB concluded as follows:

After careful consideration, we decide today to abandon the "clear and unmistakable waiver" standard and to adopt the "contract coverage" standard. * * * *

Under contract coverage, the Board will examine the plain language of the collective-bargaining agreement to determine whether action taken by an employer was within the compass or scope of contractual language granting the employer the right to act unilaterally. For example, if an agreement contains a provision that broadly grants the employer the right to implement new rules and policies and to revise existing ones, the employer would not violate Section 8(a)(5) and (1) by unilaterally implementing new attendance or safety rules or by revising existing disciplinary or off-duty-access policies. In both instances, the employer will have made changes within the compass or scope of a contract provision granting it the right to act without further bargaining. In other words, under contract coverage the Board will honor the parties' agreement, and in each case, it will be governed by the plain terms of the agreement.

On the other hand, if the agreement does not cover the employer's disputed act, and that act has materially, substantially and significantly changed a term or condition of employment constituting a mandatory subject of bargaining, the employer will have violated Section 8(a)(5) and (1) unless it demonstrates that the union clearly and unmistakably waived its right to bargain over the change or that its unilateral action was privileged for some other reason. Thus, under the contract coverage test we adopt today, the Board will first review the plain language of the parties' [CBA], applying ordinary principles of contract interpretation, and then, if it is determined that the disputed act does *not* come within the compass or scope of a contract provision that grants the employer the right to act unilaterally, the analysis is one of waiver.

[Emphasis in original.]

May employers lawfully implement mid-CBA changes based on an established past practice of making similar unilateral changes?

In Raytheon Network Centric Systems (Dec. 15, 2017), the NLRB ruled that employer actions do not constitute a unilateral change if they are similar in kind and degree to an established past practice consisting of comparable unilateral actions. The Board ruled that the employer's changes to employee healthcare benefits in 2013 were a continuation of its past practice of making similar unilateral changes, i.e., changes made at the same time each year from 2001 to 2012. Under these circumstances, the NLRB ruled that the employer's unilateral healthcare changes in 2013 were lawful, despite the fact that the employer failed to give the union advance notice and opportunity to bargain before making such changes.

The NLRB applied the same reasoning in Mike-Sell's Potato Chip Company (Dec. 16, 2019), in which the employer, a producer and distributer of snack foods, had a history of selling unprofitable delivery routes to independent contractor drivers. The employer did so many times between 1998 and 2011 without objection or bargaining request by the union representing the employer's delivery drivers. In 2016, the employer sold another delivery route to an independent contractor, announced its intention to sell three more routes to independent contractors, and then rejected the union's request for relevant information and bargaining. The NLRB concluded that the employer carried its burden of establishing a past practice defense because over a span of 17 years, the employer sold 51 delivery routes to independent contractors without union objection or bargaining request. The NLRB found this evidence "sufficient to establish a past practice of such regularity and frequency that employees would expect and recognize that the contested 2016 route sales as a continuation of that established operational process."

May employers lawfully prohibit use of the employers' email system to engage in union activity?

In Caesers Entertainment d/b/a Rio All-Suites Hotel and Casino (December 16, 2019), the NLRB overruled its 2014 decision in Purple Communications, which held that if an employer permits employees to use the employer's email system, the employer cannot prohibit such employees from using the email system to engage in union activity. The NLRB ruled that the employer's written policy lawfully banned employee use of the employer's email system for any "non-business" reason or purpose. The NLRB emphasized that employers have a valid and important property right to restrict employee use of its email system, and reasoned that in Purple Communications, the NLRB "improperly discounted employers' property rights in their IT resources while overstating the importance of those resources to Section 7 activity."

May employers lawfully enforce blanket confidentiality rules in connection with pending workplace investigations?

In Apogee Retail, LLC d/b/a Unique Thrift Store (December 16, 2019), the NLRB ruled that a blanket work rule requiring employees to maintain confidentiality during a pending workplace investigation is presumptively lawful, thereby overruling precedent to the contrary. The NLRB ruled that such cases require application of the 3-part test announced in Boeing Co. (December 14, 2017), and concluded that such investigative confidentiality rules, when applied only to current incomplete investigations, are categorically lawful under Boeing. However, the NLRB also ruled that if the employer's investigative confidentiality rule is not limited on its face to the duration of the investigation, the policy falls under Boeing Category 2, which requires a determination whether the employer has a legitimate justification for the rule that outweighs the potential chilling effect on employees' exercise of Section 7 rights.

If you have any questions, please contact a member of our Labor and Employment Law Practice Group.

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