CLIENT ALERTS & INSIGHTS

NLRB Rules that Employers Can Prohibit Access of Off-Duty Employees of Contractors for Section 7 Rights

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A property owner generally has the right to control access to its property, including the rights to restrict hours of access, to prohibit certain activities when access is granted, and exclude or prevent access. These rights were affirmed by the National Labor Relations Board ("NLRB") in a recent decision Friday. *Bexar County Performing Arts Center Foundation*, 3668 NLRB 46 (2019). Generally, the property owner must balance its managerial interests with its own employees' Section 7 rights under the National Labor Relations Act ("NLRA"). However, access by nonemployees involves a different analysis. The Supreme Court previously recognized a "distinction 'of substance' between the union activities of employees and nonemployees." *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 537 (1992). In *Bexar County*, the NLRB was specifically determining the property owner's rights relative to off-duty employees of a licensee who are neither employees of the property owner or nonemployees.

In *Bexar County*, the NLRB overruled its prior decision in *New York New York Hotel & Casino*, 356 NLRB 907 (2011), which gave the licensee's nonemployees the same rights as the property owner's own employees, essentially ignoring the property owner's right to exclude from the property. The NLRB also overruled *Simon DeBartolo Group*, 357 NLRB 1887 (2011), which expanded the *New York New York* standa to contractor employees who worked regularly, but not exclusively, on the property owner's property. The decision to overrule these precedents was based on those decisions' failure to accommodate the property owner's rights, including the right to exclude.

Instead, the NLRB held that contractor employees do not receive the same Section 7 access rights as the property owner's own employees. In light of that reasoning, the NLRB held that a property owner may exclude from its property off-duty employees of a contractor seeking to engage in Section 7 activity unless (1) the contractor employees work both regularly and exclusively at the property and (2) the property owner fails to show that they have one or more reasonable nontrespassory alternative means to communicate their message with their target audience. If there is another channel, the NLRB will not require the property owner to permit the contractor's employees from infringing upon the property owner's rights. Instead, the property owner will be permitted to exclude the off-duty contractor employees from the property without violating the NLRA.

Furthermore, contractor employees only work "regularly" on the owner's property if the contractor regularly conducts business or performs services there. Contractor's employees work "exclusively" on the owner's property if they perform all of their work for that contractor on the property.

In *Bexar County*, San Antonio Symphony employees (the contractor employees) sought to leaflet the general public at the Tobin Center for the Performing Arts (the property owner) regarding the Ballet San Antonio's decision to use recorded music instead of the Symphony. The Symphony only used

the property for performances and rehearsals for 22 weeks of the year, which the NLRB found did not constitute “regular” business. The Symphony also did not “exclusively” use the Center.

For more information, contact a member of the firm’s Labor & Employment Practice Group.

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