

IRI INTELLIGENCE BRIEFING

NEWS AND DEVELOPMENTS AFFECTING THE WORKPLACE

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Access Denied?

The NLRB overturned a 38-year precedent related to unions accessing employer sites. Learn what that means for you.

In June of 2019, the National Labor Relations Board (NLRB) overturned a 38-year precedent that gave union representatives broad access to private employer sites. The case, *UPMC, 368 NLRB No. 2*, has important consequences for employers, giving them more leeway in prohibiting union organizing activities on their properties.

HOW DOES THE NEW NLRB RULING DIFFER FROM PRIOR PRECEDENT?

According to the prior precedent established in *NLRB v. Babcock & Wilcox Co.*, the Supreme Court's leading union access case, an employer could prevent union representatives from distributing materials on the employer's private property when:

- The employer had a policy prohibiting it;
- The employer enforced its policies in a consistent and non-discriminatory way; and
- The union had other means of communicating with employees.

The employer could not, however, prevent union representatives from discussing union issues with employees anywhere considered a *public* space on the employer's property unless the employer could prove that the union representatives were being disruptive. This, of course, is particularly challenging for healthcare facilities that are largely accessible to the public at all times.

In *UPMC*, the NLRB ruled that an employer could prohibit union solicitation in its public spaces as long as there was no evidence of discriminatory enforcement. This decision allows an employer to more freely enforce its policies with regard to union organizing on its property.

SO, WHAT LED TO THE UPMC RULING?

In 2013, two representatives of the Service Employees International Union (SEIU) were meeting in the University of Pittsburgh Medical Center (UPMC) Presbyterian's cafeteria with several hospital employees. The union representatives were sitting at tables with union pins and flyers and discussing union issues with the employees. A security guard asked them to leave, stating that the cafeteria was only to be used by hospital patients, their families and visitors, and employees.

In response, the SEIU representatives pointed out that there was at least one other non-employee in the cafeteria waiting to eat lunch with a friend who worked at the hospital – and that this individual was not asked to leave. On this basis, SEIU filed a lawsuit for unfair labor practice, citing *NLRB v. Babcock & Wilcox Co.*

WHY DID THE NLRB CHANGE ITS POSITION?

Initially, in 2014, an NLRB administrative law judge ruled in favor of SEIU on its charge of unfair labor practice in the UPMC case. However, the University of Pittsburgh Medical Center appealed the decision, and the ruling was ultimately overturned in June of this year.

In the revised ruling, the NLRB held that, because there was no evidence that the medical center permitted any solicitation or promotional activity in its cafeteria – and in fact, had a practice of removing all non-employees engaged in solicitation or promotional activities in or near the cafeteria – the medical center was within its rights to have the union representatives removed.

The NLRB also rejected the argument of discrimination because the non-employee who was not asked to leave was using the cafeteria to eat lunch, not to solicit or distribute information.

WHAT DOES THIS MEAN FOR YOUR HOSPITAL?

Most hospitals are private entities that have a plethora of quasi-public locations, including courtyards, gift shops, waiting rooms and cafeterias. These locations are on a hospital's private property but, at the same time, are largely open to the public. Your hospital can benefit from the new NLRB ruling by taking the following steps:

- 1. Confirm that your hospital has an existing solicitation and distribution policy in place.**
- 2. Review your hospital's policy with Human Resources and Legal.** Ensure that the policy is in compliance with the new NLRB ruling and that the policy's rules regarding visitor conduct in public spaces are written in broad terms. In other words, the policy should apply to all solicitation and distribution activities by non-employees and should not be written to target union organizing activities specifically.
- 3. Take steps to consistently and fairly enforce the policy across your organization.** This includes educating leaders on the policy and how it affects their departments and employees. It also means ensuring all staff, including security personnel, are properly trained on the correct procedures for carrying out the policy.



...we find that an employer does not have a duty to allow the use of its facility by nonemployees for promotional or organizational activity. The fact that a cafeteria located on the employer's private property is open to the public does not mean that an employer must allow any nonemployee access for any purpose. Absent discrimination between nonemployee union representatives and other nonemployees...the employer may decide what types of activities, if any, it will allow by nonemployees on its property."

– 368 NLRB No. 2