

NLRB Strengthens Property Rights, Employers May Limit Off-Duty Access by Contractors' Employees

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The National Labor Relations Board (NLRB) has ruled that a property owner lawfully may exclude off-duty contractor employees from engaging in leafletting and other Section 7 activity on its property, unless: (1) the contractor employees work “regularly” and “exclusively” on the property; and (2) the property owner fails to show the contractor’s employees have one or more reasonable non-trespassory alternative means to communicate their message. *Bexar County Performing Arts Ctr. Found. d/b/a Tobin Ctr. for the Performing Arts*, 368 NLRB No. 46 (Aug. 23, 2019).

A group of off-duty musicians engaged in informational leafletting on the privately held sidewalk owned by the Tobin Center for Performing Arts in protest of a resident ballet company’s refusal to use live music during its performances. The musicians were employed by a symphony that also performed at the Center as a contractor. The property owner contacted police to remove the protesters, and the musicians later filed an unfair labor practice charge, alleging the center violated their Section 7 rights under the National Labor Relations Act (NLRA) by ejecting them from the property.

The NLRB held in favor the property owner and expressly overruled its previous standard in *New York New York Hotel & Casino*, 356 NLRB 907, 916 (2011), *enf’d*, 676 F.3d 193 (D.C. Cir. 2012), *cert. denied*, 133 S. Ct. 1580 (2013), which stated that off-duty contractor employees may access an owner’s property to engage in protected concerted activity, unless the owner can show the activity would “significantly interfere” with the use of its property or its ability to maintain production or discipline. In so doing, the NLRB noted that the former standard set forth in *New York New York* failed to properly balance the property owner’s property rights with the Section 7 access rights of non-employees.

Applying the new test, the NLRB held that a property owner may assert its private property rights and lawfully may exclude off-duty employees of a contractor if it can show they have one or more reasonable alternative non-trespassory channels of communicating with their message.

The NLRB’s decision in *Bexar County* is one of several issued by the Trump NLRB that strengthens private property rights. Jackson Lewis attorneys are available to discuss this case and the NLRB.

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