

What Are An Employer's Rights Relating to Non-Employee Union Representatives On Their Premises?

September 23, 2024 – Dorsey Work Watch

by Nisha Verma and Erica Haggerty Chen



Related People

- Nisha Verma
- Erica Haggerty Chen

Related Capabilities

- Labor & Employment

Although employers are welcome to support their employees' ability to meet with their union representatives, they are not required to grant nonemployee union representatives access to their property to do so.

In *NLRB v. Babcock & Wilcox Co.*, the Supreme Court held that while employers may not restrict the right of employees to discuss self-organization amongst themselves, no such obligation is owed to nonemployee organizers. The Court found no issue with an employer's posting on his property against nonemployee distribution of union literature, subject to narrow exceptions concerning inaccessibility and discrimination.

For decades, however, employers have been subject to a "public space" exception. Board decisions had consistently held that nonemployee union representatives were permitted to enter and solicit union support and activities within private property, so long as the space in which they did so was one the public was invited to enter and they were not disruptive. This is no longer the case following the NLRB's 2019 decision in *UPMC Presbyterian Hospital*.

One such space that had been subject to the "public space exception" was hospital cafeterias. Therefore, this issue arose when two nonemployee union representatives were escorted out of a University of Pittsburgh affiliated hospital after meeting with a group of employees to discuss union and organization-related matters in the facility's cafeteria, which is open to the public. The hospital had consistently, up to that point and afterward, implemented a practice of removing nonemployees engaging in any form of solicitation or promotional activity.

The NLRB, when confronting this case, set forth a new standard that dispelled any confusion on whether a "public space" exception grants nonemployee union representatives unfettered access to such places on an employer's premises. It stated that the National Labor Relations Act "does not require employers to permit the use of its facility for organizational activities when other means are readily available." The fact that a space, such as a cafeteria, on an employer's private property was open to the public does not mean a nonemployee must be allowed access for any purpose. To the extent that any previous Board law had created an exception, in addition to those created by the Court in *Babcock* that "requires employers to permit nonemployees to engage in promotional or organizational activities in public cafeterias or restaurants," that decision was overruled.

The Board, however, did make a note of the exceptions provided by the Supreme Court's decision in *Babcock & Wilcox Co.* There, the Court provided two very limited exceptions for when an employer may not restrict a nonemployee union representative from

accessing their property: inaccessibility and discrimination.

The first exception arises when a union representative cannot access employees through any other reasonable means. Thus, when there is no other avenue through which a nonemployee representative may communicate its message with employees, an employer's property right must give way.

The second exception arises when an employer exercises his property rights in a discriminatory way. An employer may not restrict property access to a particular nonemployee union representative(s) when it does so for other nonemployee union representatives or permits similar conduct by others in similar relevant circumstances. For example, an employer may not grant access to other types of solicitations that are "similar in nature" while simultaneously denying access to nonemployee organizers. Note that another 2019 Board decision held that granting access to charitable or civic associations (i.e., Girl Scout cookie sales) would not open the door to allowing non-employee union representatives on the property.

Notably, the Board has since clarified that its decision in *UPMC Presbyterian Hospital* does not allow employers to restrict the access of nonemployee union representatives if the union representatives have "a contractual right to access the employer's property." *Hilton Anchorage*, 2020 NLRB LEXIS 99, 117 (N.L.R.B. March 4, 2020).