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## NLRB Opens the Door for Off-Duty Employees to Engage in Organizing Activity

By John Doran, Carie Torrence, and Sarah Green

Many employers maintain policies prohibiting off-duty employees from accessing their facilities. Since its *Tri-County Medical Center* decision more than 35 years ago, the National Labor Relations Board has found such policies to be lawful so long as the policy: (1) limits access solely to the interior of the facility and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the facility for any purpose and not just to those engaging in union activities. In the last year, however, the Board has relied on the third prong's "for any purpose" language to chip away at an employer's ability to implement and enforce off-duty access policies.

In *Saint John's Health Center*, the Board – in one of its last decisions before the expiration of Craig Becker's recess appointment – invalidated a hospital's off-duty access policy, finding the policy violated *Tri-County's* third prong because it permitted off-duty access "to attend Health center sponsored events, such as retirement parties and baby showers." The hospital enforced the policy against an employee campaigning on behalf of a union, as well as an employee who was on the hospital's premises simply to retrieve his wallet. Notwithstanding this non-discriminatory enforcement of the policy, the Board found that, because the policy allowed access for hospital-sponsored events, the hospital failed to satisfy the third prong's "for any purpose" language.

In its recent *Sodexo America LLC* ruling, 358 NLRB No. 79 (July 3, 2012), the Board again relied on *Tri-County's* third prong to invalidate another hospital's off-duty access policy. In *Sodexo*, USC University Hospital maintained a policy prohibiting off-duty employees from entering the interior of the hospital or any work area outside the hospital, except to visit a patient, receive medical care or conduct hospital-related business. The hospital occasionally allowed an off-duty employee to enter the facility to pick up a paycheck. When four off-duty employees entered the facility for non-work related reasons other than visiting patients or receiving medical care, they were disciplined.

In response to the discipline, the National Union of Healthcare Workers filed an unfair labor practice charge against Sodexo and the hospital. The Acting NLRB General Counsel argued that the hospital violated *Tri-County's* third prong because its policy allowed off-duty employees to access the hospital to visit patients, receive medical care and for other hospital-related business. The Administrative Law Judge rejected the Acting General Counsel's position and concluded that the policy did not violate the Act.

## Majority Decision

On appeal, the Board majority held that the hospital's "hospital related business" exception, which was defined by the policy as "the employee's normal duties or duties as specifically directed by management," was overly broad. The Board dismissed the hospital's testimony that the policy only applied to employees who were at the hospital to work an extra shift and concluded that the policy violated the Act because it gave the hospital "free rein to set the terms of off-duty employee access."

The Board rejected the Acting General Counsel's argument that the exceptions for visiting patients or seeking medical care violated the third prong, making clear that exceptions permitting off-duty employees to visit patients or seek medical care would not run afoul of *Tri-County's* third prong.

## The Dissenting View

As he did in the *Saint John's* decision, Member Hayes dissented from the majority's "unduly restrictive interpretation" of *Tri-County's* test. Member Hayes stated that, under the majority's interpretation, an employer cannot maintain a valid off-duty access policy if it permits activities as innocuous as allowing employees to pick up paychecks or complete employment-related paperwork. For its part, the majority noted that Section 7 activity is protected "whether or not innocuous."

## Expansion of Rights to Off-Duty Employees of On-Site Contractors

The *Sodexo* case continues a trend of the Board expanding access to an employer's facilities by employees of an on-site contractor. In another case decided last year, the Board created a new type of access right for off-duty employees of contractors seeking access to engage in organizing activity. In *New York New York LLC d/b/a New York New York Hotel & Casino*, 356 NLRB No. 119 (2011), the casino contracted with a restaurant group to provide food services to its guests. As part of an organizing drive, the contractor's employees, while off-duty, entered the casino property to distribute handbills at the casino entrance and in front of two restaurants inside the casino. The casino summoned the police who issued citations and removed the handbillers from the casino property.

The casino argued that the individuals were not employees and relied on *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), a U.S. Supreme Court decision which held that non-employee organizers are only entitled to access private property when they have no other reasonable alternative to communicate with employees. In its *New York New York* decision, the Board majority (Liebman, Becker and Pearce) concluded that an employer could violate the Act even in the absence of an employer/employee relationship, and, therefore, the casino was prohibited from violating the rights of its contractor's employees. The Board further held that on-site contract employees are permitted to handbill at their own workplace unless the property owner demonstrates their activity "significantly interferes with his use of the property or where exclusion is justified by another legitimate business reason, including, but not limited to, the need to maintain production and discipline."

## What These Decisions Mean

The access rights available to off-duty employees, including the off-duty employees of a contractor, affect when and where organizing activity can take place. Although the *Saint John's* and *Sodexo* cases did not reverse *Tri-County*, it is evident that the Acting General Counsel and the Board will continue to rigidly interpret the third prong's "for all purposes" language. Accordingly, these cases, in conjunction with the *New York New York* decision, limit the ability of employers and property owners to regulate or restrict access to off-duty employees and the off-duty employees of an on-site contractor, paving the way for union organizing efforts.

Employers must carefully review their off-duty access policies to ensure that the policies uniformly prohibit access for all purposes. Any exception, no matter how narrowly tailored, will likely be deemed overly broad by the Acting General Counsel and Board if challenged. Employers may consider limiting the applicability of off-duty access policies to normal work areas as opposed to entire facilities in an effort to avoid an overbroad finding from the Board. For example, a hospital could limit applicability of its off-duty policy to patient care areas. This would allow off-duty employees to access support services, such as human resources, to pick up paychecks or complete necessary paperwork without violating the policy.

Employers must also clearly disseminate the policy to all employees and ensure that supervisors and managers are adequately trained on the policy. Finally, employers must consistently apply the policy in all situations. Allowing off-duty access, even for innocuous purposes such as picking up a paycheck, subjects the employer to the risk of an unfair labor practice charge and potential adverse finding by the Board.

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