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NLRB Expands Rights to Handbill on Private Property

The National Labor Relations Board (“NLRB” or “Board”) recently expanded the right of workers to engage in organizing activity in public areas of their worksite. In a 3-1 decision, the NLRB determined that a private property owner violated the National Labor Relations Act by prohibiting a contractor’s off-duty employees from handbilling on the owner’s premises. *New York, New York Hotel and Casino*, 356 N.L.R.B. No. 119 (2011).

The New York, New York Hotel and Casino (“NYNY”) contracts with independent companies to provide food service in its hotel and casino. One of the contractors is Ark Las Vegas Restaurant Corporation (“Ark”). Under its contract with NYNY, Ark operated three restaurants, a food court, the hotel’s room service and banquet facilities, and an employee dining room. Ark employees working on NYNY’s premises began an organizing campaign in an effort to obtain union representation. As part of the effort, off-duty Ark employees distributed handbills at three different locations within the NYNY complex—a covered sidewalk and driveway just outside the NYNY’s main entrance and directly in front of two Ark-operated restaurants in the hotel. On each occasion, NYNY informed the Ark employees that they were trespassing and were not allowed to distribute handbills on private property. After the Ark employee’s refused to leave, NYNY contacted police and had the Ark employees escorted off the property and cited for trespassing. Unfair labor practice charges were filed against NYNY claiming that excluding Ark employees violated the National Labor Relations Act.

Under previous Supreme Court decisions, an employer’s ability to prohibit access to property it owns depended on whether the person was an employee or non-employee (i.e. union organizer). An employer cannot prohibit employees from distributing handbills during non-working time in non-working areas, but may prohibit such activity by non-employees (e.g. outside union organizers). However, “rather than simply fitting the Ark employees into some preexisting category” the Board “sought a nuanced resolution” and determined that the prior decisions did not control the result in *New York, New York* because Ark employees were neither employees of the property owner nor non-employee outside organizers.

The NLRB limited its nuanced resolution to the “narrow” situation where “a property owner seeks to exclude, from nonworking areas open to the public, the off-duty employees of a contractor who are regularly employed on the property in work integral to the owner’s business, who seek to engage in organizational handbilling directed at potential customers of the employer and the property owner.” The Board determined that a property owner may prohibit such conduct only if (1) it can demonstrate that activity of the contractor’s employees “significantly interferes” with the owner’s use of the property; or (2) there is another legitimate business reason to justify the exclusion (e.g. the need to maintain production and discipline). Because NYNY failed to show significant interference or a legitimate business reason for its actions, prohibiting Ark employees from distributing handbills on its premises violated Section 8(a)(1) of the National Labor Relations Act.

As a consequence of this ruling, we want to remind employers that not only must they be careful to avoid violating the National Labor Relations Act when dealing with their own employees’ on-site handbilling activities, but as a result of the Board’s decision in *New York, New York*, they also must be careful when dealing with workers employed by contractors.

If you have any questions regarding this E-News Bulletin, please contact your Butzel Long attorney or the authors of this E-news Bulletin.

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