

CLIENT ALERT: Notable Recent Activity from the NLRB - By Nicholas DiGiovanni and Alexandra Pichette

In addition to the recent landmark decision *MV Transportation, Inc.*, 368 N.L.R.B. No. 66 (2019), in which the National Labor Relations Board ("the Board") overruled longstanding doctrine about an employer's ability to make unilateral changes to terms and conditions of employment, [summarized here](#), the Board has engaged in other notable activity this month.

Employers can lawfully exclude nonemployee union agents even if they allow certain charitable, civic and commercial activities

In another employer-friendly reversal, on September 6, 2019, the Board ruled in *Kroger Mid-Atlantic*, 368 N.L.R.B. No. 64 (2019), that employers can lawfully exclude nonemployee union agents from their premises even if they allow access to other, nonemployee groups engaged in "a wide range of charitable, civic, and commercial activities," as long as the activities of the permitted group are not "similar in nature" to the excluded union activities. The Board expressly overruled *Sandusky Mall Co.*, 329 N.L.R.B. No. 618 (1999), enf. denied in relevant part 242 F.3d 682 (6th Cir. 2001), which held that an employer violated the National Labor Relations Act by discriminating against union activity but allowing other people or groups to engage in solicitation.

Supreme Court precedent has established that the National Labor Relations Act generally does not require an employer to allow *nonemployee* union agents access to its property. See *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 533 (1992); *NLRB v. Babcock & Wilcox, Inc.*, 351 U.S. 105, 112 (1956). There are two notable exceptions to this general rule. First, *Babcock & Wilcox* and *Lechmere* both endorsed access for nonemployee union agents in the rare settings where employees are inaccessible to the union by normal means of communication.

Second, starting as early as *Babcock* in 1956 the Supreme Court and the Board have declared that an employer may not "discriminate" against nonemployee union agents by banning them while allowing "other distribution" on the property. In *Sandusky Mall*, the Board interpreted this discrimination exception broadly, holding that an employer was required to allow nonemployee union agents access to its premises because it had permitted "access for other commercial, civic, and charitable purposes."

In *Kroger Mid-Atlantic* an administrative law judge applied the discrimination principle to find an unfair labor practice when Kroger ousted union agents who were distributing protest materials in the parking lot about a union-management dispute. Kroger had previously allowed many groups to engage in civic, charitable or promotional activities on its property, including local fire departments, the Lions Club, the Salvation Army, the Girl Scouts, and the Red Cross, which had run a mobile blood drive. The judge, applying *Sandusky Mall*, held that because Kroger allowed these other groups access to its property, it had unlawfully discriminated by prohibiting the nonemployee union agents from distributing protest materials in the same parking lot. Kroger appealed to the full Board.

In a 3-1 decision, the Board held that Kroger had not discriminated against the union, overruling *Sandusky Mall* and stating that an employer discriminates within the meaning of the *Babcock* discrimination exception only “when it treats nonemployee activities that are similar in nature disparately,” and that the Board “may not find discrimination when the nonemployee activities permitted by an employer on its property are not similar in nature to those that it had prohibited.” The Board drew a distinction between protest-based and organization-based activities, noting that boycott and protest activities are not “similar in nature” to charitable, civic, or commercial activities.

The Board also offered further instruction about the kinds of nonemployee access that might be “similar in nature” to nonemployee union activities. An employer banning nonemployee union organizational activities might discriminate by allowing “comparable organizational activities by non-labor groups, such as membership drives by fraternal societies and religious organizations.”

Board invites comment on standards to evaluate offensive workplace speech

In a notice filed September 5, 2019, the Board invited the public to file amicus briefs about whether to reconsider the Board’s standards for evaluating profane outbursts and offensive statements of a racial or sexual nature in the workplace. Specifically, the Board is inviting briefing about whether it should “adhere to, modify, or overrule” the standards applied in previous cases, where profane or racially offensive language was found to be protected by the National Labor Relations Act, including *Plaza Auto Center*, 360 N.L.R.B. No. 972 (2014), *Pier Sixty, LLC*, 362 N.L.R.B. No. 505 (2015), and *Cooper Tire*, 363 N.L.R.B. No. 194 (2016).

The Board’s invitation follows an administrative law judge’s recent findings in *General Motors LLC*, Case Nos. 14-CA-197985 and 14-CA-208242. The judge applied the foregoing case law and the Board’s four-factor test set forth in *Atlantic Steel*, 245 N.L.R.B. 814, 816 (1979) — evaluating (1) the location of the discussion, (2) the subject matter of the discussion, (3) the nature of the employee’s outburst, and (4) whether the outburst was provoked by the employer’s unfair labor practices.

In the September 5 notice the Board acknowledged that cases in which “extremely profane or racially offensive language” did not lose the protection of the Act, had been criticized by Federal judges and “within the Board,” as morally unacceptable and inconsistent with other workplace laws such as Title VII. In particular, the Board invited comments with regard to some or all of the following:

1. Under what circumstances should profane language or sexually or racially offensive speech lose the protection of the Act? ... Are there circumstances under which the “nature of the employee’s outburst” factor should be dispositive as to loss of protection, regardless of the remaining *Atlantic Steel* factors? Why or why not?
2. The Board has held that employees must be granted some leeway [for bad language and behavior] when engaged in [protected activity] because “[t]he protections Section 7 affords would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses.” [internal citations omitted]. To what extent should this principle remain applicable with respect to profanity or language that is offensive to others on the basis of race or sex?

3. In determining whether an employee's outburst is unprotected, the Board has considered the norms of the workplace, particularly whether profanity is commonplace and tolerated. [internal citations omitted]. Should the Board continue to do so? If the norms of the workplace are relevant, should the Board consider employer work rules, such as those that prohibit profanity, bullying, or uncivil behavior?
4. Should the Board adhere to, modify, or abandon the standard the Board applied in, e.g., [*Cooper Tire, supra, Airo Die Casting*, 347 N.L.R.B. No. 810 (2006), *Nickell Moulding*, 317 N.L.R.B. No. 826 (1995), enf. denied sub nom. *NMC Finishing v. NLRB*, 101 F.3d 528 (8th Cir. 1996), and *Calliope Designs*, 297 N.L.R.B. No. 510 (1989)], to the extent it permitted a finding in those cases that racially or sexually offensive language on a picket line did not lose the protection of the Act? To what extent, if any, should the Board continue to consider context — e.g., picket-line setting — when determining whether racially or sexually offensive language loses the Act's protection? What other factors, if any, should the Board deem relevant to that determination? Should the use of such language compel a finding of loss of protection? Why or why not?
5. What relevance should the Board accord to antidiscrimination laws such as Title VII in determining whether an employee's statements lose the protection of the Act? How should the Board accommodate both employers' duty to comply with such laws and its own duty to protect employees in exercising their Section 7 rights?

NLRB Member Lauren McFerran dissented from the invitation for briefs. Amicus briefs are due on or before November 4, 2019.

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