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Critical developments in labor and employment law

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Executive Branch/Administration

National Labor Relations Board —Employer property rights

In a release dated November 15, the Board announced that it will reconsider the legal standard to determine whether an employer has violated the National Labor Relations Act by denying non-employee union agents access to its premises while allowing other individuals, groups, and/or organizations to use its premises for various activities. *Roundy's Inc.*, 356 NLRB No. 27 (November 12, 2010). The Board seeks responses to the following questions:

In cases alleging unlawful employer discrimination in nonemployee access, should the Board continue to apply the standard articulated by the Board majority in *Sandusky Mall Co.*, 329 NLRB 618, 623 (1999), enf. denied 242 F.3d 682 (6th Cir. 2001)?

If not, what standard should the Board adopt to define discrimination in this context?

What bearing, if any, does *Register Guard*, 351 NLRB 1110 (2007), enf. denied in part, 571 F.3d 53 (D.C. Cir. 2009), have on the Board's standard for finding unlawful discrimination in nonemployee access cases?

The Supreme Court addressed access to an employer's private property in the context of union efforts to physically contact employees in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) and held that property rights prevail over nonemployee access unless the employees are isolated and beyond the reach of reasonable efforts to contact them. However, there is also the issue of an employer's discrimination in granting access. In *Sandusky Mall Co.*, 329 NLRB 618 (1999), enf. denied, 242 F.3d 682 (6th Cir. 2001), the Board reasoned that permitting any outside group, e.g., charitable or civic groups, physical access precludes an employer from denying physical access for union representatives or non-employees attempting to organize an employer's employees. Notably, this broad concept of discrimination has been rejected by several appellate courts.

More recently, in *Register Guard*, 351 NLRB 1110 (2007), enforced in part on other grounds, 571 F.3d 53 (D.C. Cir. 2009), the Board adopted a refined interpretation of “unlawful discrimination” as consisting of *disparate treatment* of activities or communications of a similar character because of their union organizing or concerted activity purposes.

The Board’s invitation in *Roundy’s Inc.* provides an opportunity for employers to argue that the disparate treatment focus of *Register Guard* should and must be adopted in cases involving physical access to private property so that employers may allow some groups access for fund raising and other purposes yet deny access to union organizers or other persons for organizing purposes. Amicus briefs from interested parties must be filed on or before December 13, 2010.

For further information on the content of this alert, please contact your Nixon Peabody attorney or:

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