

## The NLRB Provides Relief for Employers' Property Rights

Most of our clients are non-union and pay little attention to what the National Labor Relations Board (NLRB) does. Its recent ruling, however, is an important vindication of property rights for non-union and union employers alike.

### Previous Standard

In 2011 the NLRB ruled that off-duty contractor employees may access an owner's property to engage in protected concerted activity. This applied to non-union employers as well as union shops. Examples of protected concerted activities include distributing union materials, soliciting others to join a union, and more. The NLRB held that an employer could not prohibit these activities unless it could show that the activity would significantly interfere with the use of its property or its ability to maintain production or discipline. The fact that contractor employees had a legal right to access an employer's private property came as a shock to most employers let alone non-union ones.

### August 2019

In [\*Bexar County Performing Arts Ctr. Found. d/b/a Tobin Ctr. for the Performing Arts\*, 368 NLRB No. 46 \(Aug. 23, 2019\)](#), the NLRB determined that the previous standard did not properly balance a property owner's rights with Section 7. Section 7 rights arise from the National Labor Relations Act and they are not limited to union shops. As a result, the NLRB ruled that "[p]roperty owners may exclude from its property off-duty contractor employees seeking access to the property to engage in Section 7

activity unless (i) those employees work both regularly and exclusively on the property and (ii) the property owner fails to show that they have one or more reasonable non-trespassory alternative means to communicate their message.” This new shows the proper respect for private property rights.

In the *Bexar* case, the Tobin Center for Performing Arts (the Center) prevented off-duty musicians from passing out leaflets on the Center’s private sidewalks. The leaflets protested a resident ballet company’s decision not to use live music during its performances. The Center consistently enforced its rule prohibiting all solicitation on its property, including the sidewalks. The musicians attempting to pass out leaflets were not employees of the Tobin Center.

The NLRB found that because the Section 7 rights of the non-employee musicians infringed on private property rights, the employer was entitled to exclude the non-employees.

### ***Private Property Rights Prevail***

In *Bexar*, the NLRB noted that property owners are afforded fundamental property rights derived from common law and protected by the 5<sup>th</sup> and 14<sup>th</sup> amendments of the United States Constitution. In prior cases, the NLRA held that off-duty employees of a contractor enjoyed essentially the same rights as employees of the property owner. *Bexar* changed that.

The NLRB in *Bexar* held that a property owner may exclude from its property off-duty contract employees who seek to engage in Section 7 activity unless those contractor employees work regularly on the property and they have no reasonable non-trespassory, alternative means to communicate their message.

### **Employer Takeaway**

Section 7 of the NLRA impacts non-union employers in a variety of ways but many employers don't realize this. The *Bexar* case is a welcome correction to a situation where employers were being legally forced to accommodate trespassers. Anytime employees gather together and want to discuss wages, hours, or terms and conditions of employment, an employer should be alert to the Section 7 implications regardless of whether that employer is unionized or not.

### **Ross Molho Speaking on the Impact of Legal Recreational Marijuana on November 6th**

CCM has 10 free lunch spots for a presentation on [Recreational Marijuana in the Workplace](#), Wednesday, November 6, 11-2 p.m. at Belvedere Banquets, 1170 West Devon, Elk Grove Village 60007. If you would like to attend this function, please email Angie Burza at [burza@ccmlawyer.com](mailto:burza@ccmlawyer.com) or call her at 630-871-2602.

---

Ross I. Molho  
Clingen Callow & McLean, LLC  
2300 Cabot Drive, Suite 500  
Lisle, Illinois 60532  
[www.ccmlawyer.com](http://www.ccmlawyer.com)  
(630) 871-2614

*The author, publisher, and distributor of this CCM Alert is not rendering legal or other professional advice or opinions on specific facts*

*or matters. Under applicable rules of professional conduct, this communication may constitute Attorney Advertising.*

© 2019 Clingen Callow & McLean, LLC. All rights reserved.

ccmlawyer.com

Clingen Callow & McLean, LLC