Legal Update Article

Third-Party Access to Employer Property Under Court Scrutiny

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When assessing whether a private employer must allow others access to its private property for union organizational purposes, the National Labor Relations Board's (NLRB) precedent often has hinged on whether the person seeking access is an employee, a third-party union organizer, or an onsite contractor's employee.

This summer, the U.S. Supreme Court and the U.S. Court of Appeals for the District of Columbia have issued two separate decisions on the intersection of employer private property rights and the rights of third parties to access such property.

Supreme Court *Hassid*

The case before the Supreme Court, ***Cedar Point Nursery v. Hassid***, No. 20-107 (June 23, 2021), involved a California state regulation that granted labor organizations a right to access an agricultural employer's property to solicit support for unionization. The Supreme Court held the access regulation grants labor organizations a right to invade the agricultural employer's property, and therefore, constituted an unconstitutional *per se* physical taking of the employer's property.

While *Hassid* did not directly involve the National Labor Relations Act (NLRA) because the agricultural industry is not regulated by the NLRA, the Supreme Court clarified that, under its NLRA precedent, the law "did not require employers to allow organizers onto their property, at least outside the unusual circumstance where their employees were otherwise beyond the reach of reasonable union efforts to communicate with them."

D.C. Circuit on NLRA

Onsite non-employee contractors under the NLRA was the subject of the case before the District of Columbia Circuit. In ***NLRB v. Local 23, American Federation of Musicians***, No. 20-1010 (D.C. Cir. Aug. 31, 2021), non-employee musicians wanted to distribute leaflets at a performing arts center where they performed and rehearsed for 22 weeks each year.

The NLRB's test for when an onsite contractor's employees have a right to access a private employer's property has been subject to change and challenge over the years. In the musician's case, the NLRB's test broadened the circumstances under which a private employer can deny an onsite contractor's employees' access to the property for labor organizing activity. Under this test, an employer could exclude off-duty contractor employees, unless those employees worked regularly and exclusively on the employer's property and the employer failed to show the employees have one or more reasonable alternative means to communicate their message.

The test did not survive the District of Columbia Circuit's review. It ruled the NLRB acted arbitrarily in adopting the test, including by failing to adequately define what it means to work "regularly" and "exclusively" on the employer's property. It sent the case back to the NLRB to decide whether to proceed with a version of the test it announced and

sought to apply in the musician's case or to develop a new test altogether. Employers are waiting to learn what path the NLRB will ultimately choose.

These cases have significance for challenges to when the government can and will grant a third party the right to access employers' private property. Employers should consult with employment counsel to determine whether and how their particular situations are affected by these decisions. Please reach out to the Jackson Lewis attorney with whom you regularly work with questions about these developments.