

**LABOR BOARD RULING ALLOWS EMPLOYERS TO
BAN UNION SOLICITATION IN THEIR PUBLIC FACILITIES**

On June 14, 2019, a three-member majority of the National Labor Relations Board (“NLRB”) ruled that employers may ban union representatives who are not employees from promoting their union in public spaces within the employer’s facilities. The case before the NLRB involved union representatives who entered a public cafeteria in the University of Pittsburg Medical Center (“UPMC”) Presbyterian Hospital and met with hospital employees, eating lunch with the employees, discussing union organizational campaign matters, and displaying flyers and pins. A manager ordered the union representatives to leave, stating that the cafeteria was only for patients, their families and visitors, and employees. The union representatives were eventually escorted out of the building by six police officers.

Prior to the decision in *UPMC*, the NLRB had regularly applied precedent established by *Montgomery Ward & Co.*, a 1981 Board decision that allowed nonemployee union representatives to utilize the public areas of an employer’s workplace, such as public eating areas, to solicit for or promote their union membership, as long as they used the facilities in a manner consistent with their intended use and were no disruptive. Since that decision, the Board has consistently held that an employer violates the National Labor Relations Act (“NLRA”) when it enforces a rule restricting public cafeteria access for nonemployee union organizers engaged in non-disruptive solicitation.

In *UPMC*, the Board majority overturned nearly 38 years of precedent and eliminated this “public space” protection for union solicitation, concluding that the employer’s ejection of non-employee union organizers did not violate the NLRA. After the *UPMC* decision, it is still unlawful for an employer to discriminate against only union solicitation. For example, if an employer allows for commercial solicitation in its public spaces by any other non-employees – such as allowing Girl Scouts to sell cookies in their lobbies, or allowing Salvation Army volunteers to collect donations in a cafeteria – then the employer cannot prohibit non-employee union representatives from soliciting in those spaces. The union argued in *UPMC* that the hospital’s rules were discriminatory against union activity, since the hospital actually allowed individuals who were not employees and were not patients or their families or visitors to access its cafeteria (as long as they were not union representatives talking about the union). The Board majority rejected this argument and instead focused on the fact that the hospital had a rule in place that prohibited *any* kind of commercial solicitation on its property, even though that rule was not invoked against the union organizers in this case, and even though there was no evidence that the non-employee union organizers had actually engaged in solicitation activities.

Board Member Lauren McFerran, the sole Democrat member on the Board, dissented from the decision. She criticized the Republican majority of the Board for overturning longstanding precedent without any compelling justification; without submitting the issue to the public for comment and briefing; and without even finding a case that had a factual record that supported the new rule. Member McFerran noted that this ruling effectively allows employers to bar union organizers from their cafeteria simply for talking about the union.

The decision in *UPMC* is a win for management-side advocates, who have argued that an employer's property rights – even in areas that are open to the public – should trump employees' Section 7 rights to engage in concerted activity for mutual aid and protection relating to their working conditions. This new standard deals a blow to union organization efforts in industries such as hospitals, restaurants, hotels, and casinos, where public spaces are often utilized by organizers to solicit union membership. However, because an employer still cannot discriminate solely against *union* solicitation, this new rule may be difficult for employers to enforce where the employer has allowed any other solicitation in its public spaces.

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Dated: June 21, 2019

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