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## NLRB Finds Hospital's No-Access Policy for Off-Duty Employees Unlawful

Lately, a very active National Labor Relations Board (NLRB) has been finding that many [seemingly innocuous employer policies violate the National Labor Relations Act \(NLRA\)](#). Continuing in this vein, the NLRB very recently found a hospital's no-access policy covering off-duty employees unlawful. *Sodexo America LLC*, 358 NLRB No. 79 (July 3, 2012).

In *Sodexo America LLC*, the USC University Hospital maintained a policy that forbade both its off-duty employees and its contractors' off-duty employees from entering or reentering the interior of the hospital or any other work area outside the hospital, but provided for three exceptions: (1) to visit a patient, (2) to receive medical treatment, and (3) to conduct hospital-related business. The NLRB found that the first two exceptions did not violate the NLRA because access pursuant to these exceptions is unrelated to the employees' employment and because such employees seek access as members of the public, not as employees. As a matter of public policy, the NLRB did not want to require a health care provider to ban access to its facility for medical care just so that its no-access policy complies with the NLRA.

The issue arose with the third exception to the no-access rule (hospital-related business), which the NLRB examined pursuant to the standard it developed in a decades-old decision, *Tri-County Medical Center*, 222 NLRB 1089 (1976). The NLRB restated its holding in that case, i.e. that a no-access policy for off-duty employees "is valid only if it [1] limits access solely to the interior of the facility, [2] is clearly disseminated to all employees and [3] applies to off-duty access for all purposes, not just union activity." The first two elements of this test were not at issue in *Sodexo America LLC*.

In analyzing the third element of its test, the NLRB examined the hospital's rule without regard to its application or the hospital's intent behind the rule. In fact, the NLRB found no evidence that the employees who had breached the hospital's rule were in any way engaged in protected activity. Rather, the NLRB found the policy unlawful because the policy's exception for "hospital-related business" allowed the employer "unlimited discretion to decide when and why employees may access the facility." The NLRB dismissed the fact that the rule itself limited the exception to the "pursuit of the employee's normal duties or duties as specifically directed by management." A strong dissenting opinion questioned the breadth of the majority's

holding, concluding that the majority would find unlawful a rule that permits an employer to allow employees access to pick up a paycheck or complete employment-related paperwork.

This holding further demonstrates the NLRB's focus on shaping employer policies, even if the employer has not applied its policy to prohibit "just union activity" and even if no actual protected activity has occurred. Under this NLRB precedent, a no-access policy that seemingly permits any employer discretion in its application could be invalid. In light of the NLRB's recent activism, employers may wish to review their existing policies to ensure that they comply with the NLRA.

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To receive additional information regarding the NLRB's recent decision concerning employer policies or how to respond to an allegation that a policy violates the NLRA, please contact one of the following [labor relations](#) attorneys:

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