SHUTTING THE DOOR ON THE UNION AGENT – WHY YOU CAN'T HAVE YOUR GIRL SCOUT COOKIES AND EAT THEM TOO

In all likelihood, your company has a policy restricting unwanted solicitations or distributions on its property. A typical "no-solicitation no-distribution" policy, if well-drafted: (a) prohibits the distribution of advertisements, handbills or other literature in working areas at all times, (b) prohibits employee-to-employee solicitations in working areas during working time, and (c) prohibits solicitation or distribution by non-employees anywhere on company property at any time (including parking lots, sidewalks, etc.). One of the benefits of having such a strict policy in a union-free company is that it preserves an employer's ability to prevent outside union organizers and picketers from disrupting the workplace.

But consider this: Over this past holiday season, did your company sponsor a United Way drive or other charitable event? Did you sponsor a blood drive with the Red Cross, or perhaps allow the Salvation Army to solicit your employees or customers? Or maybe you simply allowed the girl scouts to sell a few cookies on company property (those thin mints are delicious!).

You might not expect that the occasional allowance of a *charitable* solicitation would have any bearing on whether or not you could apply your no-solicitation / no-distribution policy to prevent *union* picketing or organizing efforts on company property. But if you answered yes to any of the above questions, the National Labor Relations Board (NLRB) could order your company to allow equal access to the union organizer or union picketer. In other words, if you operate a retail business, for example, and you didn't send the girl scouts packing when they came calling, you may not be able to prevent an outside union agent from picketing on your property with a "do not patronize" message, or from pestering your employees as they come and go between shifts.

The reasoning goes like this: Under section 8(a)(1) of the National Labor Relations Act, it is an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in exercising their right to self-organization, to form, join, or assist labor organizations." Therefore, even though employers have a generally recognized right to exclude outsiders from their property, including union organizers or picketers, an exception to this right is that it is unlawful to *discriminate* against union activity (and thereby unlawfully interfere with the employees' rights) by allowing other groups to solicit employees or distribute materials. This is known as the "discrimination exception."[1]

The discrimination exception is nothing new. Yet it has long been understood that a company could engage in at least a limited level of charitable activity – referred to as "isolated beneficent acts" – without waiving its right to exclude other, less friendly,

[1] See NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956); Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992).

outsiders. Many federal courts understand that there is a significant difference between solicitations by a charitable or civic organization and solicitations by a union. A union's "do not patronize" message, for example, directly undermines the company's business purpose. Why should an employer who chooses to allow charitable or community groups to use its property, whether for purely altruistic reasons or to cultivate good will, thereby be compelled to grant access to an organization that seeks to harm the business?[2]

But this point is lost on the current NLRB. And it is the NLRB, not the courts, which would prosecute and initially adjudicate a charge of anti-union discrimination. The current NLRB – a five member body sitting in Washington D.C. – is pro-labor on balance, being comprised of President Clinton appointees over his past two terms in office. Similarly, the NLRB's General Counsel, who has final authority on behalf of the Board to investigate charges, prosecute complaints and seek injunctions, is also a Clinton appointee. The result is that while the NLRB is supposed to fairly "evaluate the quantum of incidents involved [i.e., the permitted charitable or civic activity]"[3] when considering a charge that a company has applied its no-solicitation policy in a discriminatory manner, in reality there seems to be a predisposition towards finding unlawful discrimination.

A few of the Board's recent decisions highlight the problem for employers:

In Be-Lo Stores, (decided in 1995),[4] the NLRB found unlawful discrimination where an employer applied its no-solicitation rule to confine non-employee union picketers and handbillers to public sidewalks outside 16 of its stores. The union had been picketing the stores after losing a representation election, and the company asked the protesters to leave the premises pursuant to a longstanding corporate-wide no-solicitation policy. The Board found the employer's conduct discriminatory given that other groups and individuals had been given access to the property, including Muslims regularly selling oils and incense, Jehovah's Witnesses occasionally distributing magazines at one store, a local Lions Club solicitation at one store, Lyndon Larouche followers occasionally handing out literature at two stores, a person selling cookbooks inside one store, and the occasional sale of Girl Scout cookies and greeting cards inside one store. The NLRB claimed it could not discern a difference between the union's "message" and that of the other tolerated solicitations. In addition to a "cease and desist" order, the Board ordered the employer to reimburse the Union for all its legal expenses, plus interest, incurred in connection with litigating state court injunction cases brought by the company to enforce its private property rights. On appeal, however, the 4th Circuit Court of Appeals refused to enforce the order, disagreeing with the Board's finding of discrimination.

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[2] See e.g., Cleveland real Estate Partners v. NLRB, 95 F.3d 457 (6th Cir. 1996); NLRB v. Pay Less Drug Stores Northwest, Inc., No. 94-70279, 1995 WL 323832 (9th Cir. May 25, 1995) (unpublished disposition); Riesbeck Food Markets, Inc. v. NLRB, Nos. 95-1766, 95-1917, 1996 WL 405224 (4th Cir. July 19, 1996) (unpublished disposition); Be-Lo Stores v. NLRB, 126 F.3d 268 (4th Cir. 1997).

[3] See Hammary Manufacturing Corp., 265 NLRB 57 (1982).

[4] Be-Lo Stores, 318 NLRB 1 (1995).

In Four B. Corp. d/b/a/ Price Chopper, (decided November 8, 1997),[5] the NLRB found that an employer had unlawfully prohibited union representatives from soliciting off-duty employees on the sidewalks and parking lots outside some of the company's retail stores. Although the employer had also excluded numerous other outside groups from soliciting on its property, the NLRB found the union's ejection to be discriminatory in light of the "extensive" charitable and civic solicitations that had been permitted in the past. The company had allowed solicitations by the Salvation Army at two of the stores between Thanksgiving and Christmas, by the Shriners and Cub Scouts, and by a community group selling tickets to a pancake supper. The Board accorded no weight to the fact that all of these groups, as opposed to the union, had sought permission from the company prior to soliciting, and also rejected the argument that such charitable solicitations were different because they were directed at *customers*, as opposed to employees. The Board further noted that the company's policy did not expressly address the parking lots and sidewalks at issue. In the end, despite the fact that the company amended its policy to prohibit solicitations by *any* outside group, the NLRB ordered it to allow union representatives to communicate with its off-duty employees on its sidewalks and parking lots for a 60-day period.

In Sandusky Mall Co. (September 30, 1999)[6] – the Board's most recent decision on the topic – the NLRB again found discriminatory enforcement of a no-solicitation policy. In this case, a mall property manager applied a no-solicitation policy to eject union agents who were handbilling in front of one of the mall's tenant stores, asking people not to patronize the store. Despite the fact that the union was directly attempting to harm the business of one of the mall's tenants, and despite the fact that the mall had denied access to other groups whose message was controversial or who were in competition with mall tenants, the NLRB found unlawful discrimination due to the charitable and civic solicitations which the mall had permitted. For example, the mall had allowed access to the Salvation Army, an American Red Cross Bloodmobile, a United Way Donation thermometer, etc. The Board found that "[t]he frequency and variety of permitted activities far exceeds the 'tolerance of isolated beneficent solicitation.'"

Unfortunately, other than revealing a proclivity to find discrimination, the NLRB has given employers little practical guidance as to where the line is drawn between "isolated beneficent acts" and unlawful discrimination. In the recent Sandusky, decision one of two dissenting Board members, J. Robert Brame III, wrote a dissenting opinion that expresses the typical employer's frustration:

> *[T]he parameters of the Board's application of the so-called "discrimination exception" . . . are so vague that the Board too must resort to subjective, "I know it when I see it" criteria to decide whether its requirements have been met, thus leaving employers without fair notice of what they may lawfully do.*

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[5] Four B. Corp. d/b/a/ Price Chopper, 325 NLRB No. 20 (November 8, 1997).

[6] Sandusky Mall Co., 329 NLRB 62 (September 30, 1999).

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> *Under [the discrimination exception], an employer may be found to have engaged in discrimination . . . if it denies union access to its property while allowing comparable activities by other non-employee entities. Delineating the scope of this discrimination exception is crucial to providing employers with practical guidance for rules, which they have every right to promulgate, that would limit non-employee access to their property. Thus far . . . the Board's efforts to provide decisional rules have failed.*

Board Member Brame concluded his chastising of the majority by declaring, *"In short, to paraphrase an old advertising jingle, 'What's an employer to do?'"*

The unfortunate result of the NLRB's failure to give employers concrete guidance, combined with its propensity to find discrimination, is that out of caution employers may begin to significantly curtail or perhaps even eliminate altogether their allowance of charitable or civic solicitations. At least one federal court, the 6th Circuit Court of Appeals, has questioned the wisdom of the NLRB's approach, noting: "no relevant labor policies are advanced by requiring employers to prohibit charitable solicitations in order to preserve the right to exclude non-employee distribution of union literature when access to the target audience is otherwise available."[7]

But again, it is the NLRB, not the courts, which will at least initially decide upon the issue of alleged discrimination, and every indication is that the NLRB will continue its lack of tolerance for charitable solicitations or distributions. And although Board decisions are ultimately subject to appeal in federal court, it is not clear how the First Circuit Court of Appeals (covering Massachusetts) would rule on the issue. Consequently, until more specific guidance is provided, employers seeking to preserve their right to exclude outsiders from their property are well advised to closely monitor their level of property access to charitable or civic groups, and to consult with labor counsel to ensure that their policies and practices remain legally valid and enforceable.

It's enough to take all the joy out of eating those thin mints . . .

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[7] Cleveland Real Estate Partners, *supra*.