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# NLRB Reverses Precedent to Permit Property Owners to Prohibit Off-Duty Access for Section 7 Activity

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On August 23, 2019, the National Labor Relations Board reversed precedent and rebalanced the rights of property owners versus the Section 7 rights of employees in a labor dispute. In *Bexar County Performing Arts Center Foundation d/b/a Tobin Center for the Performing Arts*, 368 NLRB No. 46 (2019), the Board held that a property owner not involved in an underlying labor dispute may prohibit leafletting and similar protected activity by off-duty employees of a licensee or contractor performing work on the property owner's premises.

By way of background, the Board with the approval of the Supreme Court of the United States has long held that a property owner's own employees generally have a right to engage in Section 7 activities during non-work times and in non-work areas, including a right of access during off-duty times (with some limitations). In so doing, the Board and Court have balanced employees' Section 7 rights against property owners'/employers' managerial (rather than property) rights. Nevertheless, with rare exception, a property owner has been free to exercise its property rights to deny access to its property to non-employees (such as third-party union organizers).

In Bexar County, the Board was faced with a different scenario—specifically, the access rights of off-duty employees of a contractor or licensee who work on the premises of a third-party property owner. The property owner in this case operates the Tobin Center for the Performing Arts, which is used by the San Antonio Symphony. In connection with a labor dispute, off-duty employees of the symphony sought to

engage in informational leafletting to the general public on the privately held sidewalk areas outside the performing arts center. The property owner prohibited the activity.

In prior cases, including *Simon DeBartolo Group*, the Board had held that off-duty employees of a contractor enjoyed essentially the same rights as employees of the property owner. Expressly reversing these prior decisions, the Board majority in *Bexar County* held that “contractor employees are not generally entitled to the same Section 7 access rights as the property owner’s own employees.” [Emphasis added.] Rather, the Board reasoned, “the contractor employees’ right to access the property is derivative of their employer’s right of access to conduct business there.” As such, “[o]ff-duty employees of a contractor are trespassers and are entitled to access for Section 7 purposes only if the property owner cannot show that they have one or more reasonable alternative nontrespassory channels of communicating with their target audience. If there is at least one such channel . . . the property owner will be free to assert its fundamental property right to exclude without conflicting with Federal labor law.”

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*Bexar County Performing Arts* is another in a growing line of cases in which the Trump Board continues to recalibrate the balance of employer and union (as well as employee and third-party) rights under the National Labor Relations Act. Chairman John F. Ring and Members Marvin E. Kaplan and William J.

decision. Member Lauren McFerran dissented.  
November 17, 2022

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