

Employer Off-Duty Access Rule Roadmap (Kinda): NLRB Approves Off-Duty Access Rule But Finds Discrimination In Employer Application Of That Rule

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In *Marina Del Ray Hospital*, 31-CA-029929 (Oct. 22, 2015), the NLRB upheld a hospital's off-duty access policy as lawful on its face, but then concluded that the hospital applied the policy in a discriminatory manner by permitting social events while barring meetings with union representatives. Relying upon *Tri-County Medical Center*, 222 NLRB 1089 (1976), the NLRB confirmed that employers may maintain off-duty employee access policies so long as they are "limited to the interior of the facility, clearly disseminated to all employees, and apply to off-duty access for all purposes, not just union activity." In the case at hand, the hospital's policy restricted off-duty employees from entering the hospital except for visiting a patient, receiving medical treatment, or hospital-related business as follows:

- Off-duty employees may access the Hospital only as expressly authorized by this policy. An off-duty employee is any employee who has completed or not yet commenced his/her shift.
- An off-duty employee is not allowed to enter or re-enter the interior of the Hospital or any Hospital work area, except to visit a patient, receive medical treatment, or conduct hospital-related business. "Hospital related-business" is defined as the pursuit of an employee's normal duties or duties as specifically directed by management.
- An off-duty employee may have access to non-working, exterior areas of the Hospital, including exterior building entry and exit areas and parking lots.
- Any employee who violates this Policy will be subject to disciplinary action up to and including termination.

The NLRB majority concluded the policy was identical to a policy upheld in *Sodexho America LLC*, 391 NLRB 97 (2014), and was therefore lawful. But, (and this is the cautionary tale to this post) the NLRB majority also concluded that because the hospital used the off-duty access policy to prevent employees from meeting with union representatives, while permitting access for social events such as retirement parties, the hospital's actions discriminated against union activity in violation of Section 8(a)(1) of the NLRA. The dissenting member agreed the off-duty policy was lawful, and that the hospital applied it discriminatorily, but differed in his reasoning. He argued the majority was misinterpreting *Tri-County*. *Saint John's Health Center*, 357

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NLRB No. 170 (2011) concluded that under *Tri-County*, any exception to an off-duty restriction was enough to invalidate the policy, and subsequent cases, such as *Sodexho*, had to create "exceptions" to the rule. Instead, the dissenting member argued, the *Tri-County* rule should be read merely as prohibiting policies directly restricting union access, and allowing policies which contained reasonable exceptions "unrelated to union or other protected concerted activity." For that reason, instead of the Board-related exceptions in *Sodexho*, the hospital's policy was lawful. This case demonstrates the terms of an enforceable off-duty access policy, but also points out the significant practical challenges employers face in enforcing even facially legal policies of this type.