

PICKETING GUIDELINES FOR NACS MEMBERS

In recent months, a number of social rights groups (often referred to as “workers centers”) have been collaborating with labor unions to stage public demonstrations from coast to coast. While the ultimate aims of these organizations are not always clear, the themes often revolve around wages, benefits and other working conditions. Thus far, these groups have directed most of their activities at the fast food industry, but it is fair to assume that our industry is a potential target as well.

Whether you operate a unionized store or one that remains union-free, you have the right to prepare for and respond to informational picketing or related activity from these groups. Should you receive reports that a workers center or any other third party plans to stage such activity nearby, it is important to keep in mind that their *primary* dispute is probably with someone other than you. That means that you are deemed to be a “*neutral employer*” in that dispute.

Identifying the Activity

The nature of the activity will typically determine the extent of your rights as a neutral employer. For example, if it is confined to *leafleting or handbilling* outside of your property (including sidewalks, public lots, etc.), then it is generally presumed to be a form of protected speech, absent evidence of blatant vandalism, violence, trespass, or other indications of unlawful activity.

Should the activity extend to *bannering* (placing a large banner nearby and protesting the actions of another business), then the activity will in all likelihood be protected as well, absent evidence of unlawful confrontational activity (threatening or physically accosting customers or employees as they enter or leave the premises, etc.).

Picketing (through the assembly of participants carrying picket signs) is subject to greater regulation, as it is typically viewed as more than speech to the extent it contains an element of confrontation or coercion. Consequently, some messages that may lawfully be expressed through handbills or banners are not permitted if the communication involves picketing. If confronted with this tactic, it may become important to capture evidence (typically in the form of video or photography) depicting the exact wording on the picket signs themselves (see attached checklist).

General Ground Rules

1. Pickets may NOT block entries, exits, or other accesses.
2. Pickets may NOT use violence or threats, nor may they commit overt acts of intimidation.
3. Pickets normally may NOT go onto private property unless invited by an owner or occupant.
4. The number of pickets may NOT be excessive, as this results in unlawful “mass picketing.”
5. Picketers normally may NOT target the homes of employees or management personnel.

Protecting Your Property Rights

In most states, third parties are *not* permitted to access your private property to engage in these activities. The fact that members of the public are invited onto the premises for one purpose (e.g., to purchase products, fuel their vehicles, etc.) does not change that rule. While protesters may be permitted to lawfully air their disputes on public property, they generally do *not* have the right to use your private property to carry out their objectives. Accordingly, it is a good idea to plan ahead by:

- Determining what your property rights are within your state;
- Ascertaining where your property lines begin and end; and,
- Marking your property lines where appropriate.

If demonstrators encroach on your property or block access to it, legal avenues may be pursued. Local law enforcement should be consulted at the first indication of potential infractions. In close consultation with legal counsel, civil court injunctions or other relief may also be available.

In addition to trespass laws, some forms of picketing violate the National Labor Relations Act, in which the NLRB may have the power to enjoin it. Evidence regarding the intentions of the demonstrators (including language on the picket signs) is crucial to establishing an illegal motive.

Communicating With Your Customers and Employees

While picketing and related activity threatens to disrupt virtually any business, there are steps that can be taken to reassure employees and customers alike. For example, the following points can lawfully be made under virtually any circumstance:

- We are an independent business with no direct ties to the business subject to this activity.
- To our knowledge, the participants have no dispute with our operation or with you.
- Peaceable public demonstrations are generally lawful when properly conducted.
- Nonetheless, we will not allow any unlawful interference with your right to come to work each day or obtain the high level of service you have come to expect, as the case may be.
- If you are physically threatened or intimidated in any way, please advise any of our managers so that we can take appropriate action to protect you.

Responding to the Participants Themselves

If the protesters do show up, the best advice is to remain calm. It is important to remember that the protest is ostensibly directed against someone else. Therefore, any statements you wish to direct at protesters will have no effect on their initial objective. Because the end objective is to stage an emotionally charged media event, however, any number of participants may attempt to provoke you or your managers into an emotional reaction that may end up recorded for future use.

Moreover, demonstrating is typically a dull affair, and it is in your best interests to keep it that way. Managers and employees may have strong feelings about the demonstrators, but venting frustrations will only serve to stoke the fire. If the demonstration is conducted in a legal manner, business as usual should be the order of the day. That may not be easy to carry out, but will help to guard against your becoming a feature story on the 10 O'clock News.

For further information concerning the guidelines set forth within this memo, please feel free to contact Steve Bernstein with the Tampa offices of Fisher & Phillips LLP, at (813) 769-7500. Steve can also be reached at the following e-mail address: sbernstein@laborlawyers.com