

# NLRB's Marina Del Rey Decision Provides a Primer on Keeping Employees out of the Workplace After Hours

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In the day and age when employees are working longer hours than ever, would an employer want to ban employees from workplace premises after their shift is over? Marina Del Rey Hospital did, and implemented a policy preventing employees from accessing the hospital “only as expressly authorized by this policy.” The policy allowed “expressly authorized” entry only if the employee was visiting a patient, receiving medical treatment, or conducting hospital-related business, which included an employee’s “normal duties” as directed by management.

But can the hospital lawfully do this? Yes and no. The NLRB recently said yes, an employer may prevent off-duty employees from accessing their worksite, but reprimanded the employer for doing so in an unlawful way.

In *Marina Del Rey Hospital*, hospital employees complained that the hospital’s off-duty access policy prevented them from union organization, and therefore violated Section 8(a) of the NLRA. The employees claimed that on at least two occasions, Marina Del Rey had specifically applied the policy to “prevent or curtail” off-duty employees from meeting in the hospital cafeteria with union representatives. The employees challenged the rule, and their case went all the way to the NLRB.

To decide the issue, the NLRB looked to its own 1976 decision in *Tri-County Medical Center*. The *Tri-County* board had held that if an employer prevents an off-duty employee from entering its facility, that rule is only lawful if it: (1) is limited 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.

Using the *Tri-County Medical Center* analysis, the *Marina Del Rey* Board held that Marina Del Rey’s policy was facially lawful because it was “for all relevant purposes the same” as *Tri-County*’s. Additionally, the Board reasoned that the policy’s exception for “hospital-related business” was actually a clarification—not an exception—that employees who are not on their regular shifts but are under the direction of management may access the facility.

That, however, is where Marina Del Rey's favor with the board ended — while the Board held that the policy was lawful on its face, it also found that Marina Del Rey had applied that policy in a manner that discriminated on the basis of union activity. Specifically, Marina Del Rey allowed employees to enter the hospital for activities like picking up paystubs, submitting scheduling requests, applying for job transfers, and attending social events. On at least two occasions, however, Marina Del Rey applied its off-duty access policy to “prevent or curtail” employees from meeting with union representatives, and thereby violated of Section 8(a). In the end, the Board did not require Marina Del Rey to rescind the policy. It merely prohibited Marina Del Rey from applying the policy in a discriminatory way.

So what does this mean for employers?

First, this decision should help employers feel comfortable implementing well-designed off-duty access policies. The Board, given the chance to overrule prior cases and change course, declined to do so. Second, you've heard it before and you'll hear it again: no matter how hard you work to draft policies that are neutral on their face for your workplace, the *application* of the policy matters. Make sure your managers are not using policies to restrict union activity, no matter what form it's in.

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