

## Tips for Managers and Owners To Control And Regulate Access to Property

By Dean J. Schaner, Jonathan C. Wilson,  
and Arthur Carter  
Haynes and Boone, LLP

As a property owner or manager, how do you respond when you discover that a third party, such as a union, is seeking to obtain access to your property to conduct demonstrations, handbilling, picketing, or related activity? This article offers a practical question and answer guide on how to handle certain common access, handbilling, and picketing issues that might surface when a union attempts to organize your contractor's employees. It is not intended to be an exhaustive list of all activities to which a property owner could be subjected, and it is not intended to serve as a substitute for legal advice concerning specific fact situations. If you are unsure of the appropriate action to take, you should contact legal counsel with experience in labor and employment matters.

### Access Issues

*Q: Can a property owner limit its own employees' access to its buildings?*

A: Yes, you can limit your off-duty employees' access if you have a narrowly drawn access rule that is disseminated to all employees and applied consistently.

*Q: Can you limit a contractor's employees' access to your buildings and other private property (such as parking lots)?*

A: Yes, but the scope of your right to limit access depends on whether the contractor's employees are "exclusively employed" at your properties, or work at a number of different buildings.

*Q: What does "exclusively employed" mean?*

A: "Exclusively employed" means working solely at the property owner's properties, without intermediate stops at the contractor's premises. If the contractor's employees are exclusively employed at your properties, then they are treated like your employees for purposes of determining access rights. If the contractor's employees are not exclusively employed at your properties, then you may exclude the contractor's employees as trespassers.

*Q: Can the property owner limit the access to its properties by third party non-employees, such as union organizers?*

A: Yes, you can generally exclude them from your buildings and other private property as trespassers, except from common usage areas open to the public such as restaurants, shops, etc.

### Handbilling

*Q: What is handbilling and why is it significant?*

A: Handbilling is the distribution of written material, most often leaflets. Some of the legal rules pertaining to handbilling are different than those for other types of activities, such as picketing and bannering. It may be accompanied by other activities, such as marches, rallies, demonstrations, or picketing. In the context of a union trying to organize your contractor's employees, the handbill may be addressed to any of the following: your employees, tenants, customers, and suppliers; the contractor's employees; the tenants' employees, customers, and suppliers; and the general public.

*Q: What can a property owner do if union organizers call or write a letter containing a threat to engage in handbilling?*

A: Peaceful handbilling, unaccompanied by other activities, is almost always constitutionally protected as pure free speech. As a result, a threat to engage in handbilling is nothing more than a threat to engage in lawful activity and, therefore, cannot be prohibited. The free speech right, however, does not entitle an individual to trespass on private property.

*Q: What can you do if a contractor's off-duty employees are on public property, such as a median across the street from the entrance to a building, handbilling passersby?*

A: If the handbillers are not trespassing on the owner's property or blocking access to or from the property, there is typically no legal remedy. The answer is the same regardless of who is engaged in the handbilling—off-duty employees, a contractor's employees from another building you own, union organizers, or civic leaders.

*Q: What if the handbillers are on the sidewalk in front of your property?*

A: The handbillers are engaged in protected free speech, and assuming the sidewalk is public property, they would not be trespassers. The answer is the same regardless of the identity of the handbillers. Nevertheless, you may have a legal remedy if the handbillers are positioned to block access to and from the building.

*Continued on page 6*

# MEMBER NEWS

## Congratulations to our new

### CPM Candidates:

- Rose Moreno, Today's Management
- Gloria Haney,  
Southampton Management
- Kimberly Barker,  
Commercial Dynamics, Inc.
- Rene Dickens,  
Tripple Net Properties
- Tammy Pizzotola
- Wesley Decontie, ARM,  
Northland Investment Corp.
- Robin Wenzel,  
RS Property Management
- James Froelich, Jones Lang LaSalle
- William Choice,  
First Choice Mgmt. Group
- Margo Nicoletta,  
Tarantino Properties

## Congratulations to our new CPM:

- Camille Wood, CPM, Midway Management

## Welcome to our new

### Associate Members:

- Donald Hickey,  
Mitchell Mortgage Co., LLC
- Robert Kramp, Grubb & Ellis Co.
- Edward Miller, Edward Miller  
Appraisal Services
- David Teehee, Coventry  
Management Systems
- Mike Hewitt, Hewitt & Company  
Realtors

*Continued from page 5*

*Q: What if the individuals are handbilling in the street outside a property manager's personal residence?*

A: The property owner/company has no legal remedy against the handbilling itself. There are, however, other measures that the individual property owner could take. For example, an individual property owner has the right to exclude the handbillers or have them arrested as trespassers if they come onto the residential property, but not if the handbillers stay in the street or on the sidewalk. Additionally, handbilling in the street may constitute a violation of a city ordinance, which local law enforcement would enforce. The answer is the same if the handbilling is taking place in the street outside a country club or gym.

*Q: What if the handbillers are standing outside an entrance to your parking garage?*

A: You have no legal remedy for this activity unless the handbillers are blocking access to or from the garage, or have trespassed on private property.

*Q: What if the handbillers are standing inside the parking garage?*

A: If the handbillers are non-employee union organizers, then you can exclude them from the parking garage as trespassers.

If the handbillers are off-duty contractor employees who are not exclusively employed at the property where the parking garage is located, then you can exclude them by using a valid no-access rule that is consistently applied.

If the handbillers are exclusively employed at your property, then they have the same rights as your employees. Their rights will depend on whether an employer has a valid, no-access/solicitation/distribution rule. You can subject any handbillers with access rights to the property to the same security measures (identification, sign-in, etc.) that other individuals must respect.

*Q: What if the handbillers are standing on your open air parking lot?*

A: The answer is the same as it is for parking garages.

*Q: What if the handbilling is taking place inside your building?*

A: You can exclude non-employee union or-

ganizers from your building using a valid no-access/solicitation/distribution policy, assuming you do so in a non-discriminatory manner. Given the complexities of the law underlying no-access/solicitation/distribution policies, you should consult legal counsel before drafting and implementing this policy.

You may prohibit handbilling by off-duty contractor employees who are not exclusively employed at your property under a valid no-access/solicitation/distribution policy that you apply uniformly.

You may not prohibit handbilling by exclusively employed contractor employees, except during work time and in work areas under a valid no-solicitation/distribution policy. Thus, you could not prohibit handbilling by exclusively employed contractor employees in break rooms.

*Q: What is a no-solicitation/distribution policy, and why is it important?*

A: A no-solicitation/distribution policy is a company rule that defines when and where people may solicit participation in outside activities or hand out information. It is important because with a valid policy, which is uniformly enforced, you can limit the activities of individuals, and you can keep third parties off the property.

*Q: What constitutes discriminatory enforcement of a no-solicitation/distribution policy?*

A: If you permit people to sell Girl Scout cookies, raffle tickets, and similar items, permit solicitation of signatures for political petitions, or allow distribution of non-labor materials, then as a general rule you may not prohibit union solicitation and distribution. Otherwise, you engage in discriminatory enforcement of a no-solicitation/distribution policy.

There is some disagreement between the National Labor Relations Board and certain federal courts whether allowing isolated charitable solicitation, such as permitting the Salvation Army to seek donations once a year, while prohibiting union solicitation and distribution, is lawful. Because of the uncertainty, it is better to prohibit all forms of third-party solicitation and distribution.

*Q: Does the message on the handbill matter?*

A: The message on the handbill may serve as evidence of an unlawful secondary intent (to be discussed more fully below in the picket-

ing section). It may also serve as proof of defamation.

## Picketing

*Q: How is picketing defined?*

A: Picketing is traditionally defined as the act of individuals patrolling at or near an employer's entrance while carrying placards or signs attached to sticks. Picketing may be subject to legal regulation, such as limits on the number of picketers and prohibition against blocking ingress and egress to the building.

There is a continuum between pure handbilling and picketing. In general, picketing is speech plus some type of conduct.

*Q: Is bannering (i.e., placing or hanging a sign) on or near the building picketing?*

A: Bannering may be considered picketing when: (1) the banner is large and is misleading in that it identifies only the neutral employer (here, the property owner); or (2) the banner is large, is surrounded by union agents, and is stationed near the property owner's entrance.

Stationary banners, coupled with handbilling, but no other activities, do not constitute picketing. Conversely, signs in the bed of a pickup truck that is patrolling near the entrance of the property owner's premises constitute picketing.

This is a very fact intensive inquiry. Therefore, you need to gather as much specific information about the activities as possible, including: the banner's size; whether the banner is stationary or being moved; where it is placed; the message on the banner; and whether any individuals are posted next to or near the banner.

*Q: Is a threat to banner unlawful?*

A: No, there is no legal remedy for a threat to engage in bannering.

*Q: Is a threat to picket the neutral property owner unlawful?*

A: A direct threat to picket a neutral employer is lawful when the threat assures that the picketing will be conducted lawfully. However, it is unlawful when the threat does not contain assurances that the union will conduct the picketing lawfully.

*Q: What can you do if off-duty contractor employees are picketing on a median across the street from the entrance to your property?*

A: In this situation, the picketers are not trespassing on your property or blocking access to or from the property. Therefore, there is no legal remedy. The answer is the same regardless of who is engaged in the picketing—off-duty employees, contractor employees from another building you own, union organizers, or civic leaders.

*Q: What if the picketers are on the sidewalk in front of your property?*

A: Again, if the sidewalk is public property and the pickets are not blocking access to or from the building, either by physical force or threats, there are no trespass remedies. The answer is the same regardless of the identity of the picketers. However, you may have a legal remedy, both under state law and the National Labor Relations Act ("NLRA"), if the picketers are positioned in a way to block access to or from the building, or if the sidewalk is private property.

*Q: What if the individuals are picketing in the street outside a property manager's personal residence?*

A: You usually will not have a legal remedy. The manager has the right to exclude the picketers or have them arrested as trespassers if they come onto his property, but not if the picketers stay in the street or on the sidewalk. If the conduct clearly involves picketing and is narrowly focused on one house, the manager might obtain an injunction in state court that limits the picketing by creating a buffer zone around the residence in which individuals may not engage in picketing. Moreover, picketing in the street may constitute a violation of a city ordinance, which local law enforcement enforces. The answer is the same if the picketing is taking place in the street outside a country club or gym.

*Q: What if the picketers are standing outside an entrance to your parking garage or parking lot?*

A: You have no legal remedy for this activity, unless the picketers are blocking access to or from the garage or lot. If the picketing blocks access, it may constitute a violation of NLRA and state law.

*Q: What if the picketers invade your property, such as by entering an office building lobby?*

A: You probably have a state law trespass remedy against the picketers. The picketers'

invasion will also serve as strong evidence of an unlawful secondary intent and, thus, a violation of the NLRA.

*Q: What should you say and do to picketers on your private property?*

A: The existence of a sufficient private property interest under state law allows you to exclude the picketers from your property: you can ask the picketers to move to public property, exclude them from your property, threaten to have them arrested, and actually have them arrested. If the picketers do not respond to a request to move to public property, then you should contact local law enforcement.

If, however, you do not actually have a sufficient private property interest under state law to exclude the picketers, then excluding the picketers may, under the particular circumstances, constitute a violation of the NLRA. You will also likely commit a second, related violation of the NLRA by threatening arrest or actually having the picketers arrested if you do not have a sufficient property interest to exclude them.

*Q: Regardless of the location of picketing, do you have residual remedies if the picketing turns violent or disruptive?*

A: If the picketing is violent or disruptive, you may pursue an injunction in state court to limit the picketing to lawful behavior.

*Q: Do you have any remedies against other activities, such as the use of bullhorns, causing traffic jams, horn honking, etc.?*

A: Issues of public disturbance, like the blocking of traffic and excessive noise, should be reported to local law enforcement so that they may handle the matter. To the extent that the elevated noise does not have any discernible message (such as loud static over audio speakers), then it may lose its protected character under the NLRA. Finally, these activities may serve as evidence in state law injunction proceedings.

Schaner, Wilson and Carter are Partners in the Haynes and Boone, L.L.P. Labor and Employment Practice Group. Haynes and Boone's Houston office is located at One Houston Center 1221 McKinney Street Suite 2100 Houston, Texas. If you have any questions or comments, you can contact the authors at (713) 547-2000 [Schaner] or (214) 651-5000 [Wilson and Carter].