

## Advice Memorandum

DATE: August 30, 2012

TO: Olivia Garcia, Regional Director  
Region 21

FROM: Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: Cellco Partnership d/b/a Verizon Wireless 512-5012-0125-0000  
Cases 21-CA-062535, 21-CA-077154, 512-5012-0133-5000  
32-CA-077244, 32-CA-077269 512-5012-1737-0000  
512-5012-6735-0000  
512-5012-8320-0000

The Region submitted these Section 8(a)(1) cases for advice as to whether “No Solicitation” signs posted on or near the employer’s retail store entrances interfere with employees’ Section 7 rights where the employer also maintains a facially lawful no-solicitation policy in its employee Code of Conduct.<sup>1</sup>

We conclude that where there is a readily accessible and facially lawful no-solicitation policy in the employee Code of Conduct, employees will reasonably understand that the “No Solicitation” signs posted at the store entrances are directed at the general public rather than employees, and thus do not interfere with their Section 7 rights. Accordingly, Region 21 should withdraw its complaint and all charges should be dismissed, absent withdrawal.

### FACTS

Cellco Partnership d/b/a Verizon Wireless (Employer) provides wireless telecommunications services and operates retail stores throughout the country. Several of the Employer’s stores located in greater Los Angeles and Oakland maintain a two-word “No Solicitation” sign on a glass door or window at or near the main

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<sup>1</sup> Region 21 issued complaint in Case 21-CA-062535, involving similar signs, on November 30, 2011. However the trial has been indefinitely postponed and no complaint has issued in Case 21-CA-077154, pending guidance from Advice, in light of Region 32’s recommendation that similar charges in Cases 32-CA-077244 and 32-CA-077269 be dismissed.

entrance used by both customers and employees.<sup>2</sup> Communications Workers of America (Union) representatives observed the signs as early as 2010. The signs face outward but are observable to individuals inside the store because they are imprinted onto the glass. At the Oakland area stores, the “No Solicitation” signs are adjacent to information such as store business hours.<sup>3</sup>

The Employer maintains a no-solicitation policy in Section 1.6 of its employee Code of Conduct. The policy states, in relevant part, “Solicitation during working time...is prohibited.” The Union does not challenge the facial validity of that no-solicitation policy. The Employer states that the Code of Conduct is provided to every employee and signed to acknowledge the employee’s receipt. The policy is also available on the Employer’s intranet site. No employee has been disciplined under the policy for engaging in Section 7 solicitation.

There are no active Union organizing campaigns taking place at any of the Employer’s stores. No employee has made any formal complaint to the Employer or provided any affidavit testimony; the sole witnesses are Union representatives who walked by the stores and noticed the “No Solicitation” signs.

#### ACTION

We conclude that, under the circumstances of this case, employees would reasonably construe the “No Solicitation” signs as applying to the general public rather than employees. Accordingly, the Employer is not violating Section 8(a)(1) because the “No Solicitation” signs, coupled with the Employer’s lawfully maintained and enforced no-solicitation policy, do not interfere with employees’ Section 7 rights.

No-solicitation policies are evaluated under the balancing scheme first enunciated in *Republic Aviation v. NLRB*.<sup>4</sup> Rules that ban employee solicitation

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<sup>2</sup> The Santa Clara and Union City stores in the greater Oakland area also have rear entrance doors that are not made of glass and do not have signs posted on them; the “No Solicitation” signs are only posted at the main front entrances. The Employer states that the rear door is the primary entrance/exit for employees at the Santa Clara store. Employees also use the rear door at the Union City store but it is unclear whether the employees use it as their primary entrance/exit.

<sup>3</sup> It is unknown whether information such as store business hours appears adjacent to the “No Solicitation” language at the Los Angeles-area stores.

<sup>4</sup> 324 U.S. 793, 798 (1945) (indicating need for “an adjustment between the undisputed right of self-organization assured to employees...and the equally undisputed right of employers to maintain discipline in their establishments”).

during nonwork time are “an unreasonable impediment to self organization...in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline.”<sup>5</sup> Thus, an employer’s no-solicitation policy is presumptively lawful where it prohibits employee solicitation only during “working time.”<sup>6</sup> However, when a presumptively lawful rule is accompanied by other employer signage, language, or conduct that creates an ambiguity, the employer nonetheless violates Section 8(a)(1) if employees may “reasonably construe” the rule as prohibiting them from exercising their Section 7 rights.<sup>7</sup>

In *Smithfield Packing Co.*, the Board held that the employer violated Section 8(a)(1), notwithstanding a facially lawful no-solicitation policy in its employee handbook, when the employer, in the midst of a union organizing campaign, posted a sign at the parking lot entrance stating, “*All persons...entering/departing [the property] are subject to search. Solicitation...is prohibited.*”<sup>8</sup> The Board found that employees would reasonably understand that the parking lot sign applied to them, in addition to nonemployees, because it said “All persons,” and because the employer had failed to follow the facially lawful no-solicitation policy in the employee handbook by threatening to discipline and discharge employees who solicited during non-work time.<sup>9</sup>

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<sup>5</sup> *Id.* at 803.

<sup>6</sup> *Our Way, Inc.*, 268 NLRB 394, 395 (1983).

<sup>7</sup> *Pontiac Osteopathic Hospital*, 284 NLRB 442, 465 (1987) (finding no-solicitation rule overly broad). *See also Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999) (employer violated Section 8(a)(1) by maintaining work rules that would “reasonably tend to chill employees in the exercise of their Section 7 rights”).

<sup>8</sup> 344 NLRB 1, 3 (2004) (emphasis added).

<sup>9</sup> *Id.* at 3. *See also Naum Bros., Inc.*, 240 NLRB 311, 314 (1979), *enforced*, 637 F.2d 589 (6th Cir. 1981). In *Naum*, the employer, which did not have a no-solicitation policy in place, violated Section 8(a)(1) when it responded to a union organizing campaign by posting signs on doors primarily used by employees stating “No soliciting” or “No solicitation.” *Id.* The Board stated that the employer violated the Act in the absence of any clarification that the prohibition was limited to nonemployees. *Id.*

On the other hand, in *Mediaone of Greater Florida*, the Board found no violation where an employee handbook contained a facially lawful no-solicitation provision, even though the handbook's table of contents contained a brief, but facially unlawful description of the rule stating that "[y]ou may not solicit employees on company property."<sup>10</sup> The Board found that employees reasonably would disregard the brief description as incomplete and understand that the referenced fuller provision represented the employer's policy.<sup>11</sup> The Board majority rejected the argument that the handbook contained two conflicting rules that created an unlawful ambiguity.<sup>12</sup> Similarly, in *Webco Industries*, the Board did not disturb the ALJ's ruling that outward-facing signs posted at the facility's gate did not violate Section 8(a)(1) even though the signs contained a blanket prohibition on solicitation.<sup>13</sup> The ALJ found that the employee handbook contained a presumptively lawful no-solicitation provision; there was no evidence that the employer had ever characterized or applied that provision in an overbroad manner; and, under the circumstances, employees would not reasonably construe the signs as being applicable to employees, even though a manager made "inartful, clumsy" statements that suggested they were.<sup>14</sup>

In the present case, the Employer's "No Solicitation" signs do not violate Section 8(a)(1) because employees would reasonably construe the signs as applying to the general public rather than employees. The outward-facing "No Solicitation" signs are located at the storefront doors or windows, a location customarily used to communicate with the general public. And, at least at the Oakland stores, the signs are positioned adjacent to information clearly aimed at the general public, e.g., the store's business hours. Furthermore, the Employer's Code of Conduct, which is distributed to all employees and made available on the Employer's intranet site, contains a presumptively lawful no-solicitation rule specifically applicable to employees. Unlike in *Smithfield*, the "No Solicitation" signs here contain no additional language that would lead employees to reasonably believe that they applied to "all persons," including employees. Moreover, unlike in *Smithfield* and *Naum Bros.*, the signs were not posted in response to any Union organizing campaign and no employees have been disciplined for soliciting during nonwork time in

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<sup>10</sup> 340 NLRB 277, 277, 278 (2003).

<sup>11</sup> *Id.* at 278.

<sup>12</sup> *Id.* at 278 n.4.

<sup>13</sup> 327 NLRB 172, 183 (1998), *enforced*, 217 F.3d 1306 (10th Cir. 2000).

<sup>14</sup> *Id.* at 183-84. *Cf. Tri-County Medical Center*, 222 NLRB 1089, 1089 n.1 (1976) (employer cured its overly broad no-solicitation rule by explaining to all employees that the rule did not prohibit solicitation during non-working time).

contravention of the facially valid Code of Conduct provision. Under all of the circumstances, as in *Mediaone* and *Webco*, employees would not reasonably construe the “No Solicitation” signs as restricting them from soliciting during nonwork time.<sup>15</sup>

Accordingly, Region 21 should withdraw the complaint in Case 21-CA-062535, and all of the charge allegations regarding the “No Solicitation” signs should be dismissed, absent withdrawal.

/s/  
B.J.K.

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<sup>15</sup> The Union also alleges that the Employer’s “No Solicitation” signs interfere with the Section 7 rights of employees of other employers—such as vendors, suppliers, and other invitees—who it asserts are entitled to engage in solicitation at the Employer’s stores. The Union relies on *New York New York, LLC*, 356 NLRB No. 119 (2011), on remand from *New York New York, LLC v. NLRB*, 313 F.3d 585 (D.C. Cir. 2002), to support the allegation. However, the Board’s narrow holding in *New York New York* addressed only the situation where a property owner seeks to exclude (or prohibit solicitation by) “off-duty employees of a contractor who are *regularly employed on the property in work integral to the [property] owner’s business.*” *New York New York*, 356 NLRB No. 119, slip op. at 13 (emphasis added). Thus, the Union’s reliance on *New York New York* is misplaced because vendors, suppliers, and other invitees who may enter the Employer’s store are not “regularly employed on the property” nor are they engaged “in work integral to the...business.” Therefore, we agree with Region 21 and 32 that the allegation pertaining to employees of other employers should be dismissed, absent withdrawal.