

*United States Government*  
*National Labor Relations Board*  
OFFICE OF THE GENERAL COUNSEL  
**Advice Memorandum**

DATE: April 11, 2013

TO: Mori Rubin, Regional Director  
Region 31

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

SUBJECT: Hyatt Hotels Corp. d/b/a Hyatt Regency Century  
Case 31-CA-088555

512-5012-1725  
512-5012-1725-1133  
512-5012-6712-3300

This case was submitted for Advice as to whether the Employer, Hyatt Hotels Corp., d/b/a Hyatt Regency Century: 1) violated Section 8(a)(1) of the Act by prohibiting off-duty employees from distributing Union leaflets in its Lobby Court & Patio, or 2) orally modified its solicitation and distribution policy in violation of Section 8(a)(1) by telling the off-duty employees that they were not allowed to distribute Union literature inside the hotel. We conclude that the Lobby Court & Patio is a work area such that the Employer could lawfully prohibit distribution within its confines. We further conclude that the Director of Security's instruction that employees could distribute outside the hotel, but not inside, was not an oral modification of its longstanding policy of allowing distribution in nonwork areas.<sup>1</sup>

Under *Republic Aviation* and its progeny, employees enjoy a presumptive right to solicit on their employer's premises during nonwork time and to distribute literature on their employer's premises during nonwork time in nonwork areas.<sup>2</sup> But employers may presumptively prohibit employees from engaging in Section 7 solicitations during

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<sup>1</sup> Inasmuch as the Employer's prohibition of distribution in work areas is lawful, we find it unnecessary to determine whether its actual practice is an unwritten modification of its written Solicitation and Distribution Policy.

<sup>2</sup> *Republic Aviation v. NLRB*, 324 U.S. 793, 803-04 (1945); *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 621 (1962).

work time and from engaging in Section 7 distributions of literature during work time and in work areas.<sup>3</sup>

The Board has addressed the meaning of “work areas” in several cases dealing with hotels and casinos.<sup>4</sup> For example, in *Santa Fe Hotel & Casino*, the Board concluded that a hotel unlawfully prohibited off-duty employees from leafleting in the public areas outside the hotel-casino’s front and side entrances.<sup>5</sup> In affirming the ALJD, the Board held that an employer may only identify an area as a work area if the work performed there is part of the employer’s primary function.<sup>6</sup> In that case, the Board found that the areas just outside the entrances were nonwork areas because the work that took place there—including gardening, maintenance, and security—was incidental to the hotel/casino’s main business of lodging and entertaining guests.<sup>7</sup> The employer, therefore, could not lawfully prohibit its employees from distributing union materials in those areas.<sup>8</sup> In a similar case, the Division of Advice concluded that a hotel violated the Act when it enforced a no-solicitation/no-distribution policy against employees who were distributing union literature in front of the hotel’s main entrance.<sup>9</sup> Advice reasoned that under *Santa Fe*

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<sup>3</sup> *Stoddard-Quirk Mfg. Co.*, 138 NLRB at 621–22. It is important to note that the Board distinguishes between solicitation and distribution. Employers do not have the same latitude to ban employee solicitation in work areas that they do to ban employee distribution. *Id.* at 621. *See also, e.g., Harold’s Club*, 267 NLRB 1167, 1167 (1983) (employer violated Section 8(a)(1) by prohibiting off-duty employee’s solicitation in casino bar), *enforced sub nom Hughes Properties, Inc. v. NLRB*, 758 F.2d 1320 (9th Cir. 1985); *Barney’s Club*, 227 NLRB 414, 414, 417 (1976) (adopting ALJD that found unlawful employer rule prohibiting off-duty employee solicitation in casino bar and restaurant), *enforced as modified sub nom NLRB v. Silver Spur Casino*, 623 F.2d 571 (9th Cir. 1980).

<sup>4</sup> *See, e.g., Santa Fe Hotel & Casino*, 331 NLRB 723, 730 (2000) (holding impermissible ban on distribution in entranceways; entrances to hotel-casino found not to constitute “work area”); *Double Eagle Hotel & Casino*, 341 NLRB 112, 113 (2004) (rule banning discussion of employee issues within “public areas” of hotel unlawful “at least to the extent that it bars discussion in places outside the gaming area such as, for example, restrooms, public bars, and restaurants, sidewalks and parking lots”), *enforced* 414 F.3d 1249 (10th Cir. 2005).

<sup>5</sup> 331 NLRB 723, 723.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *See Sheraton Hotel & Tower*, Case 13-CA-046004, Advice Memorandum dated October 29, 2010.

*Hotel & Casino*, the space immediately outside the hotel entrance was not a work area because any work performed there was only incidental to the hotel's primary function of providing lodging.<sup>10</sup>

The Employer here has a written policy that permits employee distribution on nonwork time. Although the written policy is silent as to where employees can distribute, the Employer historically has permitted distribution in all nonwork areas and prohibited distribution in all work areas. Therefore, it explicitly permits its employees to distribute Union materials in the area immediately outside its entrances. However, it deems its Lobby Court & Patio a work area and prohibits all distribution there.<sup>11</sup> At issue, then, is whether the Employer properly designated its Lobby Court & Patio as a work area such that its refusal to allow any distribution in this area is lawful.

We conclude that the Lobby Court & Patio is a work area and the Employer is within its rights to prohibit distribution within this area. The Lobby Court & Patio serves multiple functions that are integral to the Employer's core purpose of providing lodging and guest services. The Lobby Court is an open restaurant, bar, and entertainment zone comprising the entire hotel lobby. The patio is only accessible through the lobby and serves as an outdoor extension of the Lobby Court. In both areas, guests may order from a menu of appetizers, salads, pizzas, burgers, small entrees, beer, wine, and cocktails. The entire area is equipped with bar and lounge seating, couches, and televisions. The Employer presents free live entertainment in the Lobby Court three evenings per week and often uses the space to host gatherings. On the day at issue, for example, the Employer was using the Lobby Court & Patio to host a celebration for guests who had just completed the three-day California bar exam, held at the hotel. Moreover, even during times when there are no special events taking place, guests and visitors visit the lobby in order to check into the hotel and to request concierge services. Thus, we conclude that the Lobby Court & Patio is a work area where the work performed is essential to the Employer's core purpose.

We further conclude that the Employer did not orally modify its policy of allowing distribution in all nonwork areas, whether indoors or out, when its Director of Security informed employees distributing Union literature in the Lobby Court that

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<sup>10</sup> *Id.* at 4–5.

<sup>11</sup> The Employer consistently has refused all requests to solicit or distribute in this lobby and patio area, including requests to sell Girl Scout cookies and requests by outside vendors to distribute materials. Thus, there is no indication that this policy was discriminatorily adopted to prevent Union solicitation and/or distribution, nor is it enforced discriminatorily. *See, e.g., Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2005) (holding that a rule that doesn't explicitly restrict Section 7 activity on its face will still violate the Act if it was enacted to discourage Section 7 activity).

they could not distribute the flyers inside the hotel. As noted above, the Employer has always allowed employees to distribute materials in indoor nonwork areas such as employee break rooms. And on the day in question, the Employer explicitly permitted employees to stand directly outside its main entrance and distribute Union materials to the Employer's guests. Under these circumstances, no reasonable employee would interpret the Director of Security's instruction to mean that future distribution in indoor nonwork areas would be prohibited.

Accordingly, we agree with the Region that the charge is without merit. The Region should dismiss the charge, absent withdrawal.

/s/  
B.J.K.