NLRB: Employers May Restrict Employee Use of Office E-mail for Union Solicitation and Other Employee Organizational Activity

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E-mail and text-messaging have become the primary means of communicating at work, having replaced telephones, bulletin boards, and face-to-face communication. Although an employer’s right to regulate the use of its telephones, bulletin boards, and working time is well-established, the revolution in communications technology has created new issues for employers. In The Guardian Publishing Company d/b/a The Register-Guard & Eugene Newspaper Guild, CWA 37194, 36-CA-8743-1 (Dec. 16, 2007), the National Labor Relations Board addressed the extent to which an employer can restrict its employees’ use of the employer’s e-mail system without violating the National Labor Relations Act (“NLRA”). The Board held that employees have no statutory right to use the employer’s e-mail system for union matters, so long as the employer has a properly drafted policy which it enforces in a non-discriminatory manner. In arriving at that conclusion, the Board, by a vote of 3 to 2, also announced a new definition of what constitutes “discrimination” in the enforcement of policies restricting solicitation.

Although the Register-Guard decision specifically addressed issues in a unionized workplace, the rules at issue regulate the manner and degree to which union and non-union employers may limit employee communication by e-mail, in person, or by telephone about wages and benefits. Whether you have a union or not, the ruling in Register-Guard is an important one, but only for employers who are familiar with it and who act upon it.

Facts

The employer, a newspaper, implemented a “Communications Systems Policy” (“e-mail policy”) governing employees’ use of the employer’s communications systems, including e-mail. The policy stated:

Company communications systems and the equipment used to operate the communication system are owned and provided by the Company to assist in conducting the business of The Register-Guard. Communications systems are not to be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations.

As is true for almost every employer, the newspaper’s employees often used e-mail for personal business. Employees sent and received personal messages including baby announcements, party invitations, offers of sports tickets, and requests for services such as dog-walking. Employees did not, however, send e-mails to solicit support for outside causes or organizations, other than the United Way, for which the employer had conducted charitable campaigns. In May and August 2000, the employer disciplined the union president for sending union-related e-mails from company computers and through the company’s e-mail system. The union filed an unfair labor practice charge against the employer.

Policies Banning Non-Work-Related E-mails

Whether employees have a right under the NLRA to use an employer’s e-mail system for union solicitation or other “concerted, protected activity” was an issue of first impression for the Board. In deciding the issue, the Board analogized the use of e-mail to previous Board decisions addressing employees’ use of other forms of
employer communications systems and property, such as bulletin boards, telephones, and televisions. Because an employer’s e-mail and computer systems, like bulletin boards and telephones, are the employer’s property, the Board concluded that employees have no statutory right to use their work e-mail for union communications. Policies restricting the use of e-mail for non-work purposes are therefore permissible under the NLRA as a reasonable regulation of the use of employer property.

Addressing the argument that e-mail has become the modern “gathering place” for employee communications, the Board majority found that e-mail has not changed the workplace to such an extent that employees can no longer communicate face-to-face about union issues. As has been true since Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945), employees may engage in oral solicitation (telephonic or in-person) during nonworking time (breaks and meal periods) on an employer’s premises. Because employees retain such traditional ways of exercising their organizational or other protected rights, the Board saw no reason to compromise an employer’s property rights by forbidding an employer from establishing policies limiting non-work-related e-mails.

Enforcement of E-mail Policies

In cases involving solicitation policies, there are typically two issues: the first issue is whether a policy is lawful as written, and the second issue is whether the policy, even if permissible on its face, is enforced in a discriminatory manner. Having found the employer’s e-mail policy lawful as written, the Board then addressed whether the employer’s enforcement of the policy had been discriminatory.

In deciding the issue of discriminatory enforcement, the Board majority modified existing Board law regarding workplace solicitation by unions, or by non-union employees engaged in “concerted, protected activity,” under the NLRA. Historically, the Board has said that an employer who allows employees to use employer property, such as a bulletin board, for personal, non-work-related postings (wedding announcements, birthday cards, “swap-and-shop” postings and the like) must also allow employees to post union literature on the bulletin board. The same is true for face-to-face solicitations – if the employer allowed employees to solicit for Avon or Tupperware during work time, it could not lawfully prohibit union solicitation during work time. In other words, under the prior standard, if an employer allowed one type of non-work-related solicitation, the employer had to allow union-related solicitation in order to avoid a claim of discriminatory enforcement in violation of the NLRA.

In Register-Guard, the Board re-defined what constitutes discriminatory enforcement under the Act. The Board majority concluded that solicitations from outside organizations (e-mails encouraging union-related activities, e-mails asking for donations to certain organizations, e-mails advertising the sale of Avon products) fall into one distinct category, while communications sent on behalf of individual employees (personal postings for cars for sale, babysitting services, or invitations to employee parties) fall into a different category. An employer may not permit one outside organization to use its e-mail system to solicit employees while prohibiting other outside organizations from soliciting employees. An employer may, however, allow solicitations from individual employees while prohibiting solicitations for outside organizations, because of the different nature of the two solicitations.

Applying that new standard to the facts in Register-Guard, the Board majority decided that the employer had lawfully disciplined a union president for soliciting union support via e-mail, but had unlawfully disciplined the union president for sending a different e-mail that contained only factual assertions, and thus was not a solicitation at all.

Effect of the Ruling

Although the Register-Guard decision authorizes employers to limit non-work-related e-mail, decisions of the Board – especially 3-2 decisions – are often subject to reversal following changes in the Board’s composition, and in this particular case, the dissenting Board members (both Democrats) vehemently (and correctly) argued that the 3-Republican majority decision departs from past precedent. The dissenters chided the majority, saying that “only a Board that has been asleep for the past 20 years could fail to recognize that e-mail has revolutionized communication both within and outside the workplace,” then echoing the Seventh Circuit’s 1992 observation that the Board has become the “Rip Van Winkle of administrative agencies.” In short, Register-
Guard is likely just the “first shot” in the battle over employee use of employer e-mail for union purposes.

Accepting Register-Guard as the operative standard, employers should, at a minimum revisit their e-mail policies to ensure that they contain restrictions on access by outside organizations. Only a policy with such a clearly delineated distinction is likely to pass muster under the Register Guard standard.

More risk-averse, cautious employers, however, might want to draft their e-mail policies by adopting the more limited restrictions that even the two dissenting Board members acknowledged would be permissible, such as limiting the size of non-work-related e-mails, particularly large attachments; limiting non-work-related e-mails based on server capacity, or limiting non-work-related e-mails to non-working time. A restriction based on evidence of a negative effect to the system itself is more likely to be enforced.

Employers should keep in mind that “solicitation” under the NLRA applies to more than union-related communications. Section 7 of the Act applies to “concerted, protected activity,” which would include e-mails or other communications between employees regarding wages, benefits, safety, or other terms and conditions of employment. For example, e-mail communications between employees agitating for changes to an employer’s health insurance, 401(K) plan, or safety rules could constitute “concerted, protected activity.”

Although the Board’s decision focuses on discrimination in e-mail solicitations, the redefinition of “discrimination” would appear to apply to employer bulletin boards, telephones, and in-person solicitation at work. Employers who, in the past, wished to limit union-related communications were expected to guard against other non-work related communication through those same media. The goal of lawfully limiting such communications was often undone because the employer allowed employees’ use of bulletin boards or other means to communicate on personal non-work-related matters, such as baby-sitting or sales of personal items. Under Register-Guard, employers may not need to be as rigorous in maintaining such limits on personal non-work-related communications, so long as they consistently prohibit solicitations by or on behalf of external organizations, keeping in mind (again) that the Register-Guard’s “shelf life” may be limited to the next election.

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