

— Labor & Employment Client Alert —

NLRB Upholds Employers' Ability to Limit Use of E-mail Systems for Union Organizing and Solicitations

Decision Also Sets New Standard for Evaluating Claims of Discriminatory Enforcement of Employer Policies

By Jonathan R. Nadler, Esq. and Joel S. Barras, Esq.

+1 215 241 7982 · jnadler@reedsmith.com • +1 215 241 7990 · jbarras@reedsmith.com

In a long-awaited decision, the National Labor Relations Board has ruled that employers may lawfully limit the use of their e-mail systems for various non-work purposes, including union-related solicitations and organizing, so long as such policies do not discriminate against protected activity under the National Labor Relations Act (“Act”). Recognizing that e-mail systems are the property of the employer, the Board’s decision makes clear that employees have no statutory right derived from the Act to use employer e-mail as a means to communicate about union-related matters.

The Board’s decision in *The Guard Publishing Company, d/b/a The Register-Guard*, 351 NLRB No. 70 (released Dec. 20, 2007), also sets an important new standard for evaluating claims of discriminatory enforcement of employer policies under Section 8(a)(1) of the Act, which will allow employers more flexibility in permitting charitable and personal solicitations while prohibiting organizational solicitations, including union solicitations.

The employer policy at issue in *Register Guard* prohibited the use of e-mail for “non-job-related solicitations.”* In practice, the employer permitted use of the e-mail system for various personal communications, such as occasional baby announcements, party invitations, offers of sports tickets, and requests for services such as dog walking. However, there was no evidence that employees were permitted to use e-mail for solicitations for any outside cause or organization, other than for periodic employer-sponsored United Way campaigns.

Addressing an issue of first impression, the Board explained that although the Act permits employees to discuss union matters in the workplace on their own time (and to distribute union-related materials on nonworking time in nonwork areas), there is no statutory right to use the employer’s equipment to engage in that activity. Rather, an employer has a “basic property right” to regulate the use of its equipment, such as bulletin boards, telephones, and copy machines, and that principle applies with equal force to an employer’s e-mail system. The Board recognized that while e-mail has had a substantial impact on how people communicate, it had not eliminated the pre-existing ability of employees to engage in face-to-face communication about union-related matters on nonworking time. Therefore, an employer is entitled to limit use of its business e-mail system as with other employer property, so long as the limitations do not discriminate against activity protected under the Act.

The Board also announced a new, more flexible standard for evaluating claims of discriminatory enforcement of employer policies under Section 8(a)(1) of the Act. This aspect of the Board’s decision does, in fact, change years of contrary precedent. Under existing precedent, the Board essentially had applied an “all or nothing” approach. For example, an employer policy limiting the use of communications equipment was not valid unless it was written and applied to limit virtually all personal and nonwork-related communications. If it was shown that the employer permitted use of its equipment for some nonwork related purposes, but not those related to union activity, the employer would violate Section 8(a)(1) of the Act regardless of its motive or rationale.

In overruling those cases and borrowing from various court decisions, the Board emphasized that the essence of unlawful discrimination is “unequal treatment of equals.” Therefore, the Board held that “unlawful discrimination consists of disparate treatment of activities or communications *of a similar character* because of their union or other Section 7-protected status.” (emphasis added). Under this standard, the Board explained, employer policies now may distinguish between communications that are not of a similar character, such as:

- Invitations for an organization and those of a personal nature
- Charitable and noncharitable solicitations
- Solicitations of a personal nature and those for the commercial sale of a product
- Solicitations and mere talk
- Business-related use and non-business related use

For example, an employer may lawfully maintain a rule that allows solicitations for the Red Cross or Salvation Army, but that prohibits solicitations for noncharitable organizations such as Avon or a union. However, an employer may not discriminate against union-related solicitations or communications in the manner it applies such rules.

In light of the NLRB’s clarification of these issues, employers should review their existing policies regarding employee use of e-mail and other employer equipment, as well as enforcement of these policies under the Board’s new standards. However, given the stinging dissent, including the characterization that the Board has become the “Rip Van Winkle of administrative agencies,” this case is surely headed for court review.

Employers may well want to make changes or issue policy clarifications now, subject to these caveats: (1) it may not be wise to do so if a union organizational campaign is in progress; and (2) if a union currently represents certain employees, the policy changes as to them will have to be negotiated.

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* The policy at issue reads as follows:

Company communication 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.