

NLRB Rules that Employers Can Bar Union Use of Employer Email Systems¹

In what is clearly a positive development for employers, the National Labor Relations Board has definitively held that an employer may prohibit a union, or employees seeking to solicit or organize for a union, from using company email systems to communicate – an issue that has been subject to debate for a number of years. *Guard Publishing Co. d/b/a Register-Guard & Eugene Newspaper Guild, CWA Local 37194*, 351, NLRB No. 20 (Dec. 16, 2007). Thanks to this decision, employers may now rest easy, knowing that they may lawfully control access to their email systems, and that their own systems cannot be used as a weapon by a union seeking to organize their work force.

The National Labor Relations Act recognizes that employees, and unions, have the right to communicate with each other in order to organize, solicit, and/or bargain collectively. However, this right has limits. The NLRB, for one, has long recognized the basic rule that employees do not have the right to use an employer's "equipment or media" for union communications.

As the use of email has spread throughout the American workplace, the NLRB has wrestled with the application of these "old" rules to this new medium of email communication. Unions have been fighting for the right to communicate with employees via employers' email systems. The unions argued that given the widespread use of email in the workplace and the far-flung nature of many large companies, it places the unions at a huge disadvantage

if they are prohibited from communicating with their members (or prospective members) via email. Unions also argued that companies that allow any non-business use of their email systems should be compelled to allow union use as well. Hence, unions have been asking the Board to overturn years of precedent, and to allow them to use employer email systems for their own purposes. Such a result would have been disastrous.

The first issue confronting the Board in *Guard Publishing* was the legality of the employer's email policy, which prohibited any "non-job-related solicitations" on company email. The employer there had disciplined the union president for sending three union-related communications over company email, one that was informational and two that actively sought support for the union. The union challenged both the policy and the discipline as an unlawful infringement on the employee's Section 7 rights.

The NLRB in the *Guard Publishing* decision did two things that are helpful to employers:

*First, the Board held that *Guard Publishing's* policy, which prohibited non-business use of the company's email system, was lawful.* It reaffirmed that the employer had a "basic property right" to restrict the use of its email system by a union, and that a union should not be able to use an employer's equipment to organize or communicate with employees. Thus, the Board found that the employer had

¹ Associate Jessica Berenbroick assisted in the preparation of this client advisory.

lawfully disciplined the employee for sending the two emails that solicited union support.

Second, the Board held that an employer does not have to prohibit all “non-business” email in order to restrict a union’s use of its email systems. The Board has always had a rule prohibiting “discriminatory” enforcement of no-solicitation policies. Using this theory, the union in *Guard Publishing* argued that since the employer had allowed some personal or non-business email solicitations, it had to allow union emails; otherwise, it was enforcing its policy in a “discriminatory” manner.

Adopting a more realistic (and employer-friendly) standard, the Board recognized that an employer that allows limited personal email solicitations, but still prohibits union solicitations, *has not* engaged in discriminatory enforcement. The Board instructed that employers must give similar treatment to communications of a similar nature. For example, it stated that an employer may lawfully allow employees to send personal emails listing personal items “for sale” or soliciting support for charitable organizations like the Red Cross, while still prohibiting union solicitations, reasoning that these are not similar. On the other hand, the Board cautioned that an employer cannot allow employees to use email to solicit for profit-making ventures, to organize meetings for “clubs” or private organizations, or to promote competing unions. To allow these types of email solicitations, but prohibit “union” emails, would be discriminatory enforcement.

This new standard is helpful to employers, and recognizes the reality of the workplace in 2008. You do not have to try to eliminate all “non-business” solicitation to restrict a union’s access to your email systems. That said, you do have to police your email usage and prohibit those solicitations that could be deemed “similar” to union messages.

What Should You Do?

- *First, review and update your email policies.*

Even if you do not have any unions or any prospect of unionization, take this opportunity to make sure that your email policy is sound. It should put employees on notice that their email is subject to monitoring, and that certain types of email are not appropriate. All personal email need not be banned, but we advise clients to have some method to “vet” charitable or other email solicitations before they are emailed to the workforce.

- *Second, educate your employees.* Employees should be trained that email should be used sparingly for “non-business” communications. It should always be professional in tone and content. Employees should be told they may “solicit,” but only for personal or purely charitable ventures, and only if approved by management. Employees should not use email to “solicit” for commercial ventures, for political causes, or for “groups” or clubs. These could be seen as similar to union solicitations.

- *Third, enforce your policy.* Work with your IT and HR professionals to make sure that employee email is monitored, and that employees are disciplined when they violate your email policy.

Managing employee use of email can be a complex and challenging process. For more information and advice on the implications of the *Guard Publishing* decision, or to review or develop an email policy, please contact:

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