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The NLRB Giveth and the NLRB Taketh Away

NLRB Rules That Employees Have No Right To Use Employer E-Mail Systems For Union Organizing Or Mutual Aid And Protection;
But
Employers May Not Discriminate Against Such Communications By Permitting Employees to E-Mail Similar Non-Union Messages.

How Far May Employers Go?

On December 16, 2007, the National Labor Relations Board (the "NLRB" or "Board") issued its long-awaited decision in *Guard Publishing Co., d/b/a The Register-Guard*, (351 NLRB No. 70) (i) determining, in a matter of first impression, that employees have no statutory rights under the National Labor Relations Act ("NLRA" or the "Act") to use employer e-mail systems to communicate with one another regarding union matters and other terms and conditions of employment, and (ii) adopting a new legal standard for evaluating whether an employer has discriminatorily enforced a rule or policy.

The opinion suggests that an employer may establish an e-mail policy that distinguishes permissible from impermissible employee use of e-mail systems along a variety of lines (e.g., permitting (i) promotions or solicitations for charitable organizations but not non-charitable organizations, (ii) announcements for sales of a personal nature, e.g., sale of a car, but not commercial sales of products, (iii) invitations for personal events but not invitations or notices for organizations or (iv) business-related use, but not non-business-related use), however; an employer may not impose a policy that, by its terms, prohibits an e-mail because it relates to union matters or matters for mutual aid or protection of employees. Moreover, an employer must enforce its e-mail policy even-handedly, prohibiting e-mails that relate to union matters or matters for mutual aid or protection of employees only to the extent it prohibits e-mails of a similar character relating to different subjects.

This opinion impacts upon **all** employers, regardless of whether their employees are represented by a union or are involved in union activity and requires employers to carefully craft and enforce their e-mail policies.

Background of the Case

Like many other employers, Guard-Publishing Co., d/b/a The Register-Guard (the "Company") maintained a written communications policy (the "Policy") that applies to the use of the Company's workplace communications systems, including telephones, message machines, computers, fax machines and photocopy machines. Under the heading "General Guidelines" the Policy provides, "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." The General Guidelines further state that "Improper use of Company communication systems will result in discipline, up to and including termination."

An employee of the Company, in her capacity as union president, sent an e-mail from her work computer to approximately 50 co-workers, addressed to their work e-mail addresses. The e-mail concerned a recent union rally. The union president/employee asked a Company supervisor whether she could send the e-mail. The supervisor told the union president to hold off sending the e-mail until human resources approved of it. Two days later, the union president sent it without approval. Several days later, the supervisor issued a written warning to the union president/employee citing her for violating the Company's Policy by sending a union-related e-mail on company equipment.

Several months later, the union president sent another e-mail from the union's office to Company employees. This message, which was also sent to employees at their work e-mail addresses at the Company, requested that employees wear green in a gesture of solidarity in support of the union's efforts to gain a raise for employees and a contract. A few days later, the union president sent another e-mail, this time from the union's office, to the Company's employees at their work e-mail addresses, urging them to participate with the union in a local parade. A few days afterward, the Company's Director of Human Relations issued a second written warning to the union president for sending the two union-related e-mails to employee workstations in violation of the Policy.

Three years after the Company issued the second warning to the union president, during negotiations for a new collective bargaining agreement, the Company proposed the following language be included in the next contract: "Electronic Communications Systems -- The electronic communications systems are the property of the Employer and are provided for business use only. They may not be used for union business."

The union filed charges with the NLRB, accusing the Company of bargaining in bad faith, an unfair labor practice ("ULP"), by "insisting" upon this proposal, which the union characterized as an illegal restriction on employees' rights to communicate. Moreover, the union alleged that the Company committed additional ULPs by, *inter alia*, (i) maintaining an overbroad policy regarding use of electronic communication systems, which the union claimed infringed upon employees' rights to solicit and/or distribute information regarding the union, and (ii) enforcing the Policy in a discriminatory manner against the union president. The union's claim of discriminatory enforcement was based upon evidence that employees routinely sent and received personal e-mail messages such as jokes, baby announcements, party invitations, and occasional offers of sports tickets or requests for services such as dog walking.

The NLRB's Regional Director agreed and issued a Complaint. Following an evidentiary hearing, an NLRB Administrative Law Judge ("ALJ") found that (i) the employer's e-mail system was akin to communication equipment such as employer bulletin boards, telephones, public address systems, video

equipment systems and for this reason, under the Act the employer had the right to restrict employee use of the e-mail system to the same extent it could restrict their use of those other types of communications equipment; (ii) the employer's policy restricting use of communications systems and equipment to business purposes only was not facially overbroad as a no solicitation or no distribution rule, as was alleged in the Complaint, but rather the policy was a valid restriction on the use of the Company's communications equipment; (iii) the employer committed an ULP by disciplining an employee who sent union-related non-business e-mails, while not disciplining employees who used the Company's e-mail system for other non-work related purposes; and (iv) the employer bargained in bad faith and committed an ULP by proposing and insisting upon a contract provision to the effect that the electronic communications systems are the property of the employer and were not to be used for union purposes.

Both sides appealed by filing Exceptions to the ALJ's findings. The NLRB's General Counsel appealed the ALJ's decision to the extent that it found the Company could have lawfully restricted employees' use of the Company's e-mail system to prevent non-business solicitations. The Company appealed the ALJ's decision, challenging the ALJ's determinations that the Company enforced its Policy in a discriminatory manner, and that by insisting upon contract language protecting the rights of the employer to decide how its property (the e-mail system) could be used, it had bargained in bad faith.

The Board, recognizing the significance of this case, not only for the parties involved, but also for employers and workplaces throughout the country that maintain e-mail systems for employees' use, heard oral arguments by the parties and considered briefs by the parties and interested organizations as amici to determine the proper analysis for evaluating employer rules regarding e-mail systems and the practical concerns regarding the varied approaches suggested by the parties in this case.

The Board's Decision

In its decision, the Board considered four issues:

(1) Whether a policy prohibiting the use of e-mail for all "non-job-related solicitations" violates Section 8(a)(1) of the Act by interfering with, restraining or coercing employees in the exercise of their Section 7 rights to form, join and assist labor organizations;

(2) Whether the employer violated Section 8(a)(1) of the Act by discriminatorily enforcing that policy against union-related e-mails while allowing some personal e-mails;

(3) Whether the employer violated Sections 8(a)(1) and 8(a)(3) of the Act (which prohibits discrimination to encourage or discourage membership in a labor organization) by disciplining an employee for sending union-related e-mails;

(4) Whether the employer violated Sections 8(a)(1) and 8(a)(5) of the Act (which require employers to bargain in good faith with unions that represent their employees) by proposing a contractual term prohibiting the use of the employer's e-mail for "union business."

First, the Board held that the Company's rule prohibiting use of the e-mail system for all "non-job-related solicitations" did not per se violate the Act. To reach that conclusion, it concluded, in a matter of first impression , that employees do not have statutory rights under the Act to use employer e-mail systems to

communicate with one another regarding union matters and other terms and conditions of employment. The Board majority analogized e-mail systems to other types of employer-owned communications equipment like bulletin boards, telephones, public address systems, and video equipment systems, for which it has long held employers may restrict employee use, so long as they do so in a non-discriminatory manner.

Next, in addressing the second and third issues above, the Board majority adopted a new legal standard for evaluating whether an employer has discriminatorily enforced such a rule or policy. In prior decisions, the Board found that an employer discriminately enforced its communication or solicitation rules if it permitted employees to communicate or solicit for non-work-related purposes, while prohibiting communications or solicitations about unions.

The Board, adopting the reasoning of the United States Court of Appeals for the Seventh Circuit precedent in *Guardian Industries, Inc. v. NLRB*, 49 F.3d 317 (7th Cir. 1995) and *Fleming Corp. v. NLRB*, 349 F.3d 968 (7th Cir. 2003), held that "unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or Section 7 protected status." Accordingly, employers may ban e-mails soliciting for all outside non-charitable organizations including unions, but may not ban union solicitation if it allowed solicitation for other outside non-charitable organizations.

The majority held that "an employer may draw a line between charitable solicitations and non-charitable solicitations, between solicitations of a personal nature (e.g., a car for sale) and solicitations for the commercial sale of a product (e.g., Avon products), between invitations for an organization and invitations of a personal nature, between solicitations and mere talk, and between business-related use and non-business related use." Thus it appears that an employer may ban communications or solicitations via e-mail for non-charitable, outside organizations including unions, while permitting use for charitable solicitations, invitations of a personal nature, and employer business-related use, so long as it implements and enforces the rules not merely to limit its employees in the exercise of their Section 7 rights.

Applying this standard to the facts in Guard Publishing, the Board noted that there was no evidence that the Company had permitted e-mails that solicited employees' support for any non-charitable outside group or organization, and thus, the Company could lawfully prohibit e-mails such as the union president's messages urging employees to wear green to support the union and to participate with the union in a parade. Significantly, the Board held that the Company's failure to discipline employees for personal e-mails concerning social gatherings, jokes, baby announcements and the occasional offer of sports tickets or similar personal items was not determinative because those e-mails did not urge support for outside non-charitable organizations.

However, the Board found that the union president's e-mail that simply clarified the facts surrounding the union's rally the previous day was not a solicitation calling for employees' action or support and thus was similar to personal e-mails of the type that the employer typically did permit. Thus, the Board held that because the Company's rule prohibited only "non-job-related solicitations," the Company violated Section 8(a)(3) of the Act by issuing a warning disciplining the union president for sending such a message while permitting employees to send non-solicitation e-mails about a panoply of non-business-related subjects. Accordingly, if an employer permits e-mail solicitations on behalf of outside organizations (except charities), it would violate the Act by banning e-mail solicitation by unions, and, if the employer allows e-mail use for purposes of personal communication, it cannot bar union supporters from using the e-mails merely to report on an union-related event or communicate on such subjects.

Finally, the Board found that the Company did not "insist" on its bargaining proposal concerning the e-mail systems. For that reason, the Board chose not to decide whether insisting on such a term would violate the Act. Advancing an illegal proposal, said the majority, does not violate the Act, only insisting on an illegal clause "as a condition precedent of entering into a collective bargaining agreement" violates the Act.

Two dissenting Board members would have ruled that where "an employer has given employees access to e-mail for regular, routine use in their work . . . banning all non-work-related 'solicitations' is presumptively unlawful absent special circumstances." In the view of the dissenters, e-mail systems should not be treated in the same manner as bulletin boards, telephones, pieces of scrap papers and oral solicitations, which may be banned in the workplace under the Act. Instead, the dissenting Board members took the position that e-mail solicitations should be considered under the Board's precedents concerning oral solicitations, that is, an employer may prohibit an employee from engaging in oral solicitation to maintain production, but only during an employee's working time.

Analysis

As employers increasingly permit employees to use company e-mail systems, personal digital assistants, instant messaging systems and other devices and systems to communicate with each other, they have naturally become concerned about employees potentially abusing these systems and devices and using them for their own personal benefit rather than for their employers' business. Many employers have implemented rules and policies to prevent abuses of communication privileges on these devices or systems, including excessive personal use.

Based upon the Board majority's construction and analysis of the issues, unionized and non-unionized employers now have more stable footing for promulgating and enforcing e-mail system policies that distinguish and permit some but not all personal use of the systems without infringing upon their employees' Section 7 rights under the Act. The majority opinion confirms that employers may prohibit employees from soliciting via e-mail for any outside organizations and that they may lawfully distinguish between permissible e-mails and impermissible e-mails. Significantly, it also suggests that employers may no longer be found to have discriminatorily enforced such e-mail policies where they make exceptions for use of the systems for charitable and personal solicitations.

As much as the opinion guides employers concerning the general parameters they may use in forming e-mail system rules and policies, the decision still leaves open a number of questions about how the Board will evaluate those parameters. For example, it is not clear how the NLRB will distinguish (i) "charitable" from "non-charitable" solicitations, (ii) solicitations of a "personal nature" versus those for the commercial sale of a product, (iii) invitations for an "organization" versus invitations of a "personal nature", (iv) "solicitations" and "mere talk", or (v) "business-related" use and "non-business related use."

Moreover, the Board's analysis of the Guard Publishing's enforcement of its prohibition against "non-job-related *solicitations*" creates additional questions for further consideration. The Board found that the employer committed an unfair labor practice in disciplining a union official for "clarifying" what took place at a union meeting, but in future cases where an employer has a policy barring "solicitations" it may be possible for a union to argue that reporting facts about a union or employee group meeting where employees were exhorted to organize for the union, to sign cards, or to protest employer practices was not "solicitation" for the union.

Another significant issue for an employer in the wake of this decision is deciding how to police the use of its e-mail system. Most employers announce that the use of emails is not private and that the employer will

monitor e-mails and discipline employees for violations of its otherwise lawful e-mail rules. In practice it is often impossible or uneconomical to monitor all e-mails. Problems may arise if, for example, an e-mail promoting an outside nonunion organization is sent and the sender is not disciplined while a union organizer is disciplined for promoting a union via e-mail. This is especially troublesome if a supervisor knows of the outside nonunion organization e-mail but does not report it or warn the sender, while the employer disciplines the union organizer. Thus, it will be important to train all supervisory personnel to be vigilant and all Human Resources decision makers to enforce even-handed discipline for violations of the e-mail policies.

In addition, as indicated above, the decision in *Guard Publishing* was not unanimous. Should the composition of the Board change, and the views of the two dissenting Members become the majority view, the Board's analysis of what e-mail or e-mail systems are, what rules an employer may impose on employees' use of e-mail and e-mail systems, and what constitutes discriminatory enforcement of such rules may change dramatically. We will keep you aware of the new developments, and what changes in your policies that you may want to make as the Board refines or changes its analysis of e-mail systems.

Conclusion

Regardless of how the Board refines or changes its analyses, employers must maintain and apply whatever e-mail policies they promulgate in a consistent and nondiscriminatory fashion, prohibiting or permitting employees' e-mail system actions without regard to the employees' concerns or interests for unions.

At this juncture, it is important for employers that have e-mail policies to review them to ensure that they do not violate the Act. Employers that wish to establish new e-mail policies or revise current policies should consider what restrictions, permissible under the Guard Publishing decision, they want to impose. They should also consider, in reviewing and revising their e-mail policies whether they can reasonably and non-discriminatorily enforce any such policy.

The full text of the NLRB's decision in *Guard Publishing Co., d/b/a The Register-Guard* is available online from the NLRB's website: http://www.nlrb.gov/shared_files/Board%20Decisions/351/V35170.pdf

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If you have any questions regarding this significant decision or its potential impact on your workplace, please contact Steven M. Swirsky at (212) 351-4640 or sswirsky@ebglaw.com, or Peter M. Panken at (212) 351-4840 or ppanken@ebglaw.com in EBG's New York office. Terence H. McGuire, an Associate in EBG's New York office, assisted with the preparation of this Client Alert.

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