

July 31, 2009

Employers Beware: Unions Win Battle In War Over E-Mail Use

With the advent of information technology, union supporters have frequently used employer e-mail systems to solicit support during union organizing campaigns. Recognizing the difficulty in monitoring these activities, the National Labor Relations Board (NLRB), in *Register-Guard*, concluded that employees have no statutory right to use an employer's e-mail system for union-related activities. The NLRB also ruled that Register-Guard had not applied its e-mail policy in a discriminatory manner. In a decision that potentially paves the way for unions to use employer e-mail as a powerful tool for organizing activities, the D.C. Circuit overruled the NLRB's decision regarding the use of an employer's e-mail system. This means that employers must (i) carefully craft lawful e-mail policies and monitor employee e-mail use; and (ii) revisit e-mail policies they currently have in place.

The Underlying NLRB Holding

In December 2007, a sharply divided NLRB held that Register-Guard acted lawfully in disciplining an employee, who also served as union president, for violating the company's e-mail policy because she sent e-mails soliciting co-worker support for the union. The company's policy prohibited the use of its communications systems "to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job related solicitations." The NLRB decided that Register-Guard did not violate the National Labor Relations Act by implementing a policy that barred employee non-work use of its e-mail system; moreover, the NLRB, reasoned, the company's discipline of the employee was lawful because her union-related e-mails constituted solicitations in violation of the company's policy.

Nevertheless, Register-Guard had tolerated a number of *personal* employee e-mail messages. The NLRB, however, observed that no evidence existed to warrant a finding that Register-Guard permitted employees to use e-mail to solicit other employees to support any *group or organization*. Accordingly, the NLRB determined that Register-Guard's discipline did not discriminate against the union president because of her union status.

D.C. Circuit Analysis

The D.C. Circuit disagreed with the NLRB's distinction between tolerance of employee personal use of employer e-mail versus employee solicitations on an organization's behalf. Register-Guard's attempt to draw this distinction, the appeals court opined, was a "post hoc invention." Indeed, in admonishing an employee for sending certain e-mails, Register-Guard management reminded the employee that she was not to use company e-mail for "union/personal business"; however, management did not distinguish between group and individual solicitation. Moreover, Register-Guard's policy language mentioned solicitation for "outside organizations" as one example under the larger umbrella of a prohibition against all "non-job related solicitations."

With this framework in mind, the D.C. Circuit concluded that the employer had allowed employees to use its e-mail system for personal solicitation of other employees, such as the selling of sports tickets, and, therefore, the employer's disciplinary action against an employee because of union solicitation constituted a discriminatory application of its policy.

The appeals court was not asked to consider, and explicitly did not consider, the lawfulness of a company policy barring union access to e-mail on a neutral basis.

Practical Effects for Employers

The Court of Appeals *Register-Guard* decision leaves open the possibility that an employer may create a limited e-mail policy prohibiting solicitation on behalf of organizations. The decision, however, demonstrates that policy language regarding limitations on the use of a company's e-mail system must be explicit and applied in a consistent, non-discriminatory manner. The D.C. court's holding, however, is relatively narrow; it deals only with a specific instance of discriminatory enforcement of an e-mail policy. The more global issue is whether it will remain lawful for an employer to apply a neutral ban on personal e-mail use to prohibit unions from using employer e-mail for solicitations. The new Obama-appointed NLRB will likely review this issue in the near future and, given the NLRB's current political makeup, we expect that the Board will find a neutral ban to be presumptively unlawful. Under that scenario - which is something that employers must prepare for - a lawful e-mail policy, as applied to union solicitation, would only ban union solicitation during work time and in work areas.

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