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E-Mail Use in Unionized Setting

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Insight — 2/8/2008

The National Labor Relations Board ("NLRB") has been criticized recently for its rulings and interpretations of the National Labor Relations Act ("NLRA") that, some believe, demonstrate an increasingly pro-employer bias. The perceived pro-employer bias of the NLRB is seen by some as inconsistent with the NLRB's charge to independently interpret and enforce the provisions of the NLRA and investigate and remedy unfair labor practices of private employers, which may involve union related situations or instances of protected concerted activity.

On December 16, 2007, the NLRB handed down an extremely management-friendly decision in *The Guard Publishing Company, d/b/a The Register Guard*. In a 3-2 ruling, the NLRB held that employees have no statutory right to use an employer's email system for Section 7 purposes and, therefore, an employer's policy that prohibits employee use of the email system for non-job-related solicitations, including union-related communications, was not an unfair labor practice under Section 8 of NLRA.

Section 7 of the NLRA provides employees a wide range of rights to engage in union and collective activities. In addition to organizing, Section 7 protects employees who take part in grievances, on-the-job protests, picketing, and strikes. Section 8 of the NLRA prohibits union unfair labor practices, which include, among other things, Employer interference, restraint, or coercion directed against union or collective activity (Section 8(a)(1)); employer domination of unions (Section 8(a)(2)); Employer discrimination against employees who take part in union or collective activities (Section 8(a)(3)); Employer retaliation for filing unfair-labor-practice charges or cooperating with the NLRB (Section 8(a)(4)); and Employer refusal to bargain in good faith with union representatives (Section 8(a)(5)).

In its opinion in *The Guard Publishing*, the NLRB addressed three issues: (i) whether a policy that prohibited the use of email for all non-job-related solicitations interfered or restrained employees in the exercise of their Section 7 rights and, therefore, violated Section 8(a)(1) of the NLRA; (ii) whether enforcement of the company policy against union-related emails, while allowing some personal emails, was discriminatory under Section 8(a)(1) and (3) of the NLRA; and (iii) whether the Company's insistence on bargaining for a proposal that would prohibit the use of email for union business was a violation of Section 8(a)(5) of the NLRA.

The policy that was at issue in this case was The Register-Guard's Communication Systems Policy that stated:

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. Communication 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.

Employees at The Register-Guard used email regularly for work-related matters and also used email to send and receive personal messages. Evidence revealed that the Company was aware that employees used the email system for such things as ticket requests, party invitations and other announcements, but there was no evidence that employees used email to solicit support for or participation in any outside organization, except for emails that related to an employer-sponsored United Way campaign.

The employee who was the subject of the discipline and policy violation in this case was the union president. Over the relevant period, the union president sent three emails to unit employees using the company email system and addressing the emails to unit employees at their Register-Guard email addresses. Two of the emails sent by the union president were found to be solicitations to support Union activity and one was found not to be a solicitation.

In finding that The Register-Guard did not violate Section 8(a)(1) of the NLRA by maintaining the Communication Systems Policy, the NLRB reaffirmed its previous position that an employer has a "basic property right" to "regulate and restrict employee use of company property." *Register Guard* at p. 5; *citing*, *Union Carbide Corp. v. NLRB*, 714 F.2d 657, 663-664 (6th Cir. 1983). The opinion went on to state that it was well established that Section 7 of the NLRA provides "no statutory right to use employer-owned property, such as bulletin boards, telephones, televisions, and now email, as long the employer's restrictions are nondiscriminatory." *Id*; *citing*, *Mid-Mountain Foods*, 332 NLRB 229, 230 (2000). The NLRB concluded that the Communication Systems Policy did not entirely deprive employees of the right to communicate in the workplace. Accordingly, it was lawful to bar employees' non-work-related use of the employer's email systems, unless the employer acts in a discriminatory manner.

To support its conclusion, and contrary to the dissenting opinion, the NLRB determined that the Communications Systems Policy at issue did not regulate traditional, face-to-face, solicitation and therefore the maintenance of the policy did not require the NLRB to balance the employer's property rights in order to safeguard the employee Section 7 rights. The majority held that employees are not entitled to the most convenient or most effective means of communication for Section 7 purposes, and they have no additional right to use an employer's equipment for Section 7 purposes regardless of whether the employees are authorized to use that equipment for work purposes.

Though the NLRB concluded that the Communication Systems Policy was lawful, it next considered whether enforcement of the policy against union-related emails, while allowing some personal emails, was discriminatory

under Section 8(a)(3) of the NLRA.

In its consideration of this issue, the NLRB adopted the holding of the United States Court of Appeals for the Seventh Circuit in two cases, *Fleming Co.*, 336 NLRB 192 (2001), enf. denied 349 F.3d. 968 (7th Cir. 2003) and *Guardian Industries*, 313 NLRB 1275 (1994), enf. denied 49 F.3d 317 (7th Cir. 1995). In these two Seventh Circuit opinions, the Court of Appeals denied enforcement holding that employers may control the activities of their employees in the workplace because the employer owns the property and because, as a matter of contract, employees agree to abide by the employer's rules as a condition of employment. *See Fleming* at 349 F.3d at 968; *Guardian* 49 F.3d at 317. Importantly, however, the Seventh Circuit went on to state that in enforcing its rules, the employer may not discriminate against Section 7 activity. *Id*.

In adopting the Seventh Circuit analysis and overturning prior Board precedent -- that employers violated the NLRA by prohibiting union use of company bulletin boards while other non-business use had been permitted -- the NLRB stated that the focus must be on whether there was a disparate treatment of activities or communications of a similar character because of their union or other Section 7 protected status.

The NLRB then applied this standard and concluded that the evidence revealed that The Register-Guard tolerated personal employee email messages concerning social gatherings, jokes, baby announcements, and other occasional ticket sales solicitation, but there was no evidence that solicitations by employees to other employees to join groups or organization was permitted, the sole exception being an employer-sponsored United Way campaign. The NLRB then reviewed the content of the union president's emails. In this regard, the NLRB determined that one of the emails was not a solicitation that called for action -- it simply clarified facts surrounding a union rally the day before. The other two emails were emails that called for employees to take action to support the union.

The NLRB determined that the first of the emails, as it did not call for action to support the union, was similar in kind to the other personal email messages permitted by The Register-Guard, while the other two emails were not personal in nature and were solicitations. As such, the NLRB held that The Register-Guard's enforcement of the Communication Systems Policy, as it related to the first email, was discriminatory along Section 7 lines and thus violated Section 8(a)(1); whereas, the other two emails were properly barred by the policy, and, thus, application of the policy as to these two emails was not in violation of Section 8(a)(1).

The two dissenting Board members would have concluded that banning all non-work related solicitations is presumptively unlawful, absent special circumstances. The dissent reasoned that email systems should not be treated like bulletin boards, telephones, and use pieces of scrap papers (which can be regulated in the workplace under the NLRA). Rather, the dissenters indicated that email communications were better analogized to oral solicitations that can be limited for the purpose of maintaining production, but only during an employee's working time.

Finally, the NLRB addressed whether The Register-Guard's insistence on bargaining for a proposal that would prohibit the use of email for union business was a violation of Section 8(a)(5) of the NLRA. The NLRB determined that, while a party will violate its duty to bargain in good faith by insisting on an unlawful proposal, *see Register Guard* at p. 11, *citing*, *Teamsters Local 20 (Seaway Food Town)*, 235 NLRB 1554, 1558 (1978), a party does not violate the NLRA simply by proposing or bargaining about an unlawful subject. *Id*; *citing Sheet Metal Workers Local 91 (Schebler Co*.), 294 NLRB 766, 733 (1989); enfd. in part 905 F2d 417 (D.C. Cir. 1990). In other words, the NLRA prohibits the insistence, as a condition precedent of entering into a collective bargaining agreement, that the other party agree to an unlawful provision. In its review of the evidence, the NLRB concluded there was insufficient evidence to show that The Register-Guard *insisted* on the proposal, so it need not reach whether the proposal itself was unlawful.

While this opinion is noteworthy because it addresses important issues related to employee-protected activity under Section 7 and enforcement of employer policies and bargaining, it will be known more for the conclusion that employers have the right to implement policies that prohibit all non-business use of their email system, or even policies that permit certain varieties of personal email, while prohibiting others. Just how the NLRB will deal with the increasing emergence of new technologies in the work place remains uncertain for the future. Though traditionally set up to be a non-partisan, neutral ground for disputes between labor and employers – and to provide a fair hearing of differing points of view -- the NLRB's bias can be dictated by who is nominated by the President to serve on the Board.

What is clear from this opinion is that employers that permit their employees to use electronic communication systems, including email, PDAs, instant messaging systems or other devices or means to communicate with one another (even perhaps blogging during work hours) must be careful to implement policies that prevent abuses and prohibit excess personal use, but do not unreasonably interfere with protected activity. Employers who decide to implement such policies must be sure that they are drafted carefully so as not to discriminate against protected Section 7 activity and violate Section 8(a)(1).

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depending on the jurisdiction or circumstances. If you have specific questions as to the application of the law to your activities, you should seek the advice of your legal counsel.