A Timely Analysis of Legal Developments

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Many observers had anticipated a dramatic result after the NLRB's landmark decision in *Register-Guard* was appealed, but, on July 7, 2009, the D.C. Circuit left the pro-employer holding in *Register-Guard* intact. The D.C. Circuit did not decide whether employees have a statutory right under the National Labor Relations Act to engage in union activities over their employer's e-mail systems, but did agree with the union that the employer had discriminatorily enforced its e-mail and communications policy against one of its employees by singling out her e-mails that contained a message about a union.

The D.C. Circuit Reminds Employers of the Perils of Selectively Enforcing Their Solicitation and E-Mail Policies Against Union-Related Activities

By Laurent R.G. Badoux, Jennifer L. Mora and Kathryn E. Siegel

On July 7, 2009, in the ongoing saga involving the ability of employees to use their employer's e-mail systems for union-related activities, the D.C. Circuit Court of Appeals reversed a portion of the National Labor Relations Board's (NLRB) landmark decision in *Register-Guard*[1] and concluded that the newspaper unlawfully discriminated against an employee for sending three e-mails to coworkers that discussed union matters. In *Guard Publishing Co., d/b/a The Register-Guard v. N.L.R.B.*, No. 07-1528 (D.C. Cir. July 7, 2009), the D.C. Circuit agreed with the NLRB's conclusion that an employee cannot be disciplined for merely "communicating" about an organization or a union if the policy only prohibits "soliciting" on behalf of organizations. However, the court squarely rejected the NLRB's finding that the newspaper did not discriminate against the same employee for sending two e-mails that clearly constituted "solicitations" under the newspaper's policy, reasoning that the employer's history of enforcing the policy demonstrated that the discipline was discriminatory.

Although many expected a more dramatic holding from the D.C. Circuit, the decision leaves undisturbed the NLRB's ultimate holding in *Register-Guard* that employers may lawfully establish policies that prohibit or restrict use of their e-mail systems for non-work-related purposes, including union activities, provided that employers do not discriminate against union-related communications. However, because the NLRB's existing pro-employer decision may be short-lived under the Obama Board, employers should tread carefully when implementing, maintaining, and enforcing their communication and e-mail policies.

Background

In *Register-Guard*, the employer, a daily newspaper in Eugene, Oregon, maintained a policy prohibiting employees from using the company's e-mail system "to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations." In May 2000, the newspaper issued a disciplinary warning to the union president, who also was an employee, after she sent an e-mail to employees for the purpose of setting the record straight regarding events that had

transpired at a previously held union rally. Then, in August 2000, the employee received two additional disciplinary notices after she sent e-mails to employees requesting that they wear green to support the union during contract negotiations and separately asking for volunteers to participate in the union's entry in a town parade. The disciplinary notice to the union president for the August e-mails stated that the employee was being disciplined for "dissemination of union information," and reminded her that she previously had been told to "refrain from using the Company's systems for union/personal business." In response, the union filed a charge with the NLRB claiming that the company committed unfair labor practices when it disciplined the union president for sending e-mails about the union.

The Board Holds that Employees Have No Statutory Right to Use E-Mail for Union-Related Communications and Develops a New Standard for Determining Whether Discrimination Has Occurred

A sharply divided Board ruled by a vote of 3-2 that employers may prohibit employee use of a company's e-mail system for non-work solicitations, including union-related solicitations. Although the Board recognized that e-mail has a "substantial impact on how people communicate, both at and away from the workplace," it rejected the argument that e-mails are the equivalent of face-to-face solicitations that occur in the employees' break or lunch room. Rather, the NLRB concluded that an employer's e-mail system is more comparable to other employer-owned communications equipment such as bulletin boards and telephones, the use of which may be restricted. The NLRB reasoned that, like other communications equipment, the employer has a "basic property right" to regulate and restrict use of its e-mail system to protect its property interests by, for example, "preserving server space, protecting against computer viruses and dissemination of confidential information, and avoiding company liability for employees' inappropriate emails." The majority concluded that, "absent discrimination, employees have no statutory right to use an employer's equipment or media for Section 7 communications," which includes communications about and solicitations on behalf of unions.

At the same time, the NLRB made clear that in prohibiting or restricting non-work-related e-mails, employers may not discriminate against union-related communications. In undertaking the discrimination analysis, the NLRB overturned its prior precedent, which held that if an employer allows employees to use its communications equipment for any non-work-related reason, the employer cannot discriminate by prohibiting the use of its equipment for union-related purposes. The NLRB instead adopted the Seventh Circuit Court of Appeals' narrower definition of "discrimination," which requires "unequal treatment of equals." Under this analysis, union-related communications must be compared to non-work-related communications of a similar character, such as communications pertaining to other non-charitable groups or organizations or employees' anti-union communications, rather than to personal communications such as baby announcements. As a result, an employer is permitted to choose what categories of communications to allow and disallow, provided the distinction is not motivated by animus against Section 7 communications. For example, an employer is entitled to allow solicitation for charitable organizations while banning solicitation for non-charitable organizations, like unions. Similarly, an employer can lawfully draw the line between personal solicitations (*e.g.*, vacation rentals) and commercial solicitations (*e.g.*, Avon products). However, an employer may not use this line-drawing as a subterfuge for suppressing union-related communications.

The NLRB then analyzed whether the company had engaged in unlawful discrimination by prohibiting union-related e-mail solicitations while also allowing employees to use the e-mail system for personal messages involving such things as baby announcements, party invitations, and the occasional offer of sports tickets or request for services such as dog walking. In this regard, the Board concluded that the newspaper could lawfully maintain a policy prohibiting employees from using its e-mail to urge support for the union, while allowing the other forms of solicitation, and also held that the newspaper acted within its right in disciplining the employee for the two e-mail communications requesting employees to wear green and to participate in a parade in support of the union. The NLRB accepted the argument that it in disciplining the employee for these e-mails, the newspaper did so based on a distinction between e-mail solicitations sent on behalf of an individual rather than an organization.

However, the Board agreed with the union that the disciplinary action for using the e-mail to communicate the union's perspective on facts concerning a union rally was discriminatory. According to the NLRB, the e-mail was an informational communication rather than a solicitation and, therefore, was not prohibited under the company's policy. Additionally, because the newspaper permitted a variety of

non-work-related e-mails that were not solicitations, it could not prohibit the union president's e-mail merely because it discussed union activity.

The D.C. Circuit Court of Appeals Holds that Register Guard Discriminated Against the Employee By Singling Out Her Union-Related E-Mails

On appeal, the union did not ask the D.C. Circuit to review the portion of the NLRB's opinion holding that an employer has a "basic property right" to regulate the use of its e-mail system and that employees do not have a statutory right to use their employer's equipment or media to engage in union activities. Rather, the court was tasked with determining whether the newspaper discriminated against its employee by disciplining her for all three of the e-mails that she sent. The D.C. Circuit concluded that all of the disciplinary actions against the employee related to her union e-mails were discriminatory.

First, the court upheld the NLRB's conclusion that the newspaper discriminated against its employee for the May 2000 e-mail in which she attempted to convey to employees the union's version of events at a recent rally. As the Board noted, the e-mail was purely informational in nature and could not be considered a solicitation. Because the newspaper's policy did not prohibit "communications," but only prohibited "solicitations," the employer could not discipline the employee for sending an e-mail that was designed solely to clarify some perceived confusion about the events at the rally. Having allowed employees to send a variety of non-work-related e-mails that were not solicitations, the newspaper could not single out the union president's e-mail on the basis that it contained a message about union activity.

However, the D.C. Circuit refused to enforce the NLRB's decision regarding the employee's August e-mails, even though they were clearly within the policy's definition of a forbidden solicitation as they "called for employees to take action in support of the Union." In doing so, the court did not find that the company's policy was discriminatory on its face, but instead that the company discriminatorily enforced it. The court rejected the NLRB's holding that the e-mails did not violate the policy "because they were solicitations on behalf of an organization rather than an individual." Rather, the D.C. Circuit concluded that this argument was a "post hoc invention" because the company had not used this as a justification for the discipline prior to the NLRB filing its complaint against the company. Indeed, nothing in the e-mail policy distinguished between solicitations for groups and for individuals, and the NLRB itself described the policy as "prohibiting the use of e-mail for *all* 'non-job-related solicitations.'"

In addition, the disciplinary warning issued to the union president did not mention the organization-versus-individual distinction. In fact, the warning expressly admonished her to "refrain from using the Company's system for union/*personal* business." The D.C. Circuit reasoned that the reference to "personal" made it clear that her offense was not based on whether an organization was involved. The Court concluded that, "in practice the only employee e-mails that had ever led to discipline were the union-related e-mails at issue here." As a result, the court set aside the NLRB's determination in favor of the newspaper and held that the discipline for the August e-mails was discriminatory and, therefore, an unfair labor practice.

With the Pendulum Shifting Back Toward a Pro-Labor Board, Employers Are Advised to Proceed with Caution

Left undisturbed is the NLRB's holding in *Register-Guard* that an employer can have a policy prohibiting and restricting their employees' use of its e-mail and communications systems so long as the policy is enforced in a nondiscriminatory manner. Unfortunately, the future of this holding is uncertain under the new Obama Board. The dissenters in *Register-Guard*, including Wilma Liebman, who was recently appointed as Chairman of the NLRB, strongly disagreed with the majority's conclusion that an e-mail system should be treated in the same manner as other communication devices, like 'bulletin boards." Instead, the dissent advocated a return to the United States Supreme Court's analysis in *Republic Aviation Corp. v. NLRB*[2] and argued that banning all non-work-related solicitation through an employer's e-mail systems should be presumptively unlawful and should only be enforced if the employer can prove the existence of "special circumstances" that warrant the complete ban. According to the dissent, an employer might be able to justify a complete ban by

proving that its server capacity cannot handle high volumes of e-mail, or it could justify limited restrictions on non-work-related e-mails, such as prohibiting e-mails with audio or video files, by demonstrating that the messages would interfere with the e-mail system.

The dissent also argued that the Seventh Circuit's "unequal treatment" reasoning adopted by the majority has no place in the context of Section 7 rights, and that any analysis of whether an employer's conduct is unlawful should focus on interference with the employee's rights, rather than on discrimination. According to the dissent, in contrast to federal employment discrimination statutes, such as Title VII and the Age Discrimination in Employment Act, the National Labor Relations Act grants to employees "the affirmative right to engage in concerted group action for mutual benefit and protection." The dissent argued that the majority's holding "that an employer need only avoid 'drawing a line on a Section 7' basis is a license to permit almost anything but union communications, so long as the employer does not expressly say so."

A future challenge to the content and application of similar types of policies is likely. In fact, although the union did not actually challenge the lawfulness of the company's policy as written, it maintained that the policy was unlawful insofar as it prohibited e-mail use for all "non-job-related solicitations." Thus, if the Obama Board, under the leadership of Chairman Liebman (comprised of three Democrats and two Republicans if the current package of nominees are confirmed) has an opportunity to revisit the Bush Board's holding in *Register-Guard*, it is possible that employees will thereafter be allowed to use their employer's e-mail system to engage in union-related activities, including soliciting on behalf of a union, unless the employer can demonstrate that "special circumstances" exist to justify a limitation on employee use of the employer's e-mail system. It also is possible that the Obama Board will return to the pre-*Register-Guard* days when the focus was on "interference" rather than "discrimination." Regardless, many believe that the core holding in *Register-Guard* may not survive re-examination by an Obama Board.

Although the core holding in the original *Register-Guard* decision may be short-lived, it is possible for employers to ensure that their solicitation and e-mail usage policies are ready for future developments. Employers should review their existing policies to ensure that they are consistent with the holding in *Register-Guard*, and, if not, revise the policies accordingly. Any new or revised policy should be implemented soon, as the NLRB may consider a policy that has been promulgated upon the signs of (or in the midst of) a union organizing campaign to be discriminatory.

Even if employers have a properly drafted e-mail and communications policy, employers must ensure that they consistently and strictly enforce their e-mail policy. It is quite possible that unions may encourage their supporters to send to their coworkers other types of non-union e-mails that would otherwise violate the employer's e-mail policy to test whether the employer will enforce the policy or enforce it uniformly. If the employer turns a blind eye to a non-union-related e-mail that violates its communications policy, but later disciplines an employee for sending an e-mail discussing union issues, the employer faces an increased risk that an unfair labor practice charge will be filed with the NLRB. Finally, before disciplining an employee for violating the e-mail policy, employers must ensure that the content of the e-mail actually violates the existing policy. As the D.C. Circuit confirmed, if the policy only prevents "solicitations," employees cannot be disciplined for "communications" that do not call for others to support the union.

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[1] *Guard Publ'g Co. d/b/a The Register-Guard*, 351 NLRB No. 70 (2007). For a more detailed analysis of the NLRB's holding in *Register-Guard*, see *NLRB Rules that Employers May Implement a Corporate E-Mail Policy that has the Effect of Barring Union-Related Communications* (Dec. 2007).

[2] 324 U.S. 793 (1945).