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Client Alert

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NLRB Rules That Employers May Prohibit Employee Use of Company E-mail Systems for Union Organizing

During the final days of 2007, the National Labor Relations Board added yet another significant ruling to a growing list of decisions that already had organized labor crying foul.

In its long awaited decision in *The Guard Publishing Company d/b/a The Register-Guard*, 351 NLRB No. 70 (12.16.07), a sharply divided Board ruled that "employees have no statutory right to use [an employer's] e-mail system for Section 7 purposes." The ruling was consistent with many earlier NLRB decisions, involving bulletin boards, telephones, televisions and copy machines, holding that employees have no right under the National Labor Relations Act to use their employer's equipment or media to communicate about unions, provided that restrictions on use of company property are applied in a non-discriminatory manner. (Proskauer Rose LLP was one of just a few interested parties that were granted permission to file an amicus brief with the NLRB.)

That much should have been expected by anyone following this case, but the Board went much further and adopted an entirely new approach in discriminatory enforcement cases, one that on the face of it seems to enable employers to allow certain personal use of its e-mail (as well as bulletin boards, telephones and other company property) without the risk of the past that the system then would be open to employee use for organizational purposes. This is a significant departure from long-standing precedent.

At issue in the *Register-Guard* case was the newspaper's "Communications Systems Policy," which governed employee use of company e-mail, among other things. The CSP, like many employer policies on the subject, provided as follows:

> 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.

Although the e-mail system was intended for business use only, the employer permitted certain personal use by employees. For example, the newspaper allowed staff to distribute baby announcements, party invitations, ticket offers and occasional requests for services, *e.g.*, dog walking.

Unfair labor practice charges were filed when the employer disciplined an employee (Suzi Prozanski), who was also president of the union, after she used the e-mail system to send several union-related messages. The first of these e-mails concerned a rally held a few days earlier and was in response to misinformation that the managing editor had circulated to employees, *i.e.*, that the police had informed the newspaper that anarchists would be attending the rally and that employees should try to leave work early to avoid confrontation. Prozanski learned that it was the newspaper that had notified the police, not the other way around, about the possibility of anarchists at the rally, and her e-mail was aimed at correcting that misinformation. The message was composed on Prozanski's own time, but was sent from her work station at the newspaper. The other e-mails were sent a

few months later and Prozanski received a warning for them as well. In those messages, which originated from a computer in the union's office but utilizing the employer's e-mail system, Prozanski asked employees to wear green in support of the union during contract negotiations, and to participate in the union's entry in an upcoming local parade.

After extensive analysis of the existing case law, in which the Board repeatedly has recognized an employer's right to control use of its property, the NLRB held that maintenance of the CSP did not violate the Act. While recognizing that e-mail has had a "substantial impact on how people communicate, both at and away from the workplace," the majority nevertheless concluded "that use of e-mail has not changed the pattern of industrial life at the [employer's] facility to the extent that [other] forms of workplace communication . . . have been rendered useless and that employee use of the [employer's] e-mail system for Section 7 purposes must therefore be mandated." Accordingly, the Board ruled that employers "may lawfully bar employees' non work-related use of its e-mail system, unless [the employer] acts in a manner that discriminates against Section 7 activity." The NLRB signaled, however, that a different approach might well be taken in the unusual circumstance where "there are no means of communication among employees at work other than e-mail."

The majority (Chairman Battista and Members Schaumber and Kirsanow) then went on to address the issue of discriminatory application of the CSP against Prozanski's union-related e-mails. In doing so, the Board departed from the analysis that it has followed for decades and adopted a new approach that seemingly will have ramifications extending beyond employee use of the employer's e-mail system, and that may warrant reevaluation of employer policies regarding solicitation in the workplace.

Under the case law predating *Register-Guard*, evidence that the newspaper had permitted employee use of e-mail for a variety of personal messages—i.e., jokes, baby announcements, party invitations, offers of tickets, requests for services and other personal messaging—while denying the right to use the system for union-related purposes, would have been enough to establish an unfair labor practice. That may no longer be the case. Now, "to be unlawful, discrimination must be along Section 7 lines." In other words, the Board will require evidence of "disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status."

Under the new test, "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 would be unlawful for an employer to permit employees to use the e-mail system to solicit support for any outside cause or organization, while at the same time prohibiting employees from using the system to solicit support for a union. But, it appears that it would not be unlawful to prohibit use of e-mail for organizational purposes if the employer merely permitted the sort of personal use allowed by the newspaper, because the activities are not similar in character. In the future, when analyzing claims of unlawful enforcement, the Board said that it will "examine the types of e-mails allowed by the [employer] and ask whether they show discrimination along Section 7 lines."

Applying this new standard to Prozanski's e-mails, the NLRB found that her earliest message, entitled "Setting it Straight," was not a solicitation at all as it did not call for action by the employees to whom it was directed. Rather, it merely clarified facts relating to the union's rally and, as such, was indistinguishable except on Section 7 grounds from the many other non-work-related e-mails that the newspaper permitted. Therefore, it was discriminatory for the newspaper to enforce the CSP against that e-mail and an unfair labor practice to discipline Prozanski. However, the later e-mails, in which Prozanski urged employees to wear green in support of the union during collective bargaining and to participate in the union's parade entry, were in the nature of solicitation. There being no evidence that the employer permitted employees to use e-mail to solicit coworker support for any group or organization, it was not discriminatory for the newspaper to discipline Prozanski for sending those e-mails.

The dissent (Members Liebman and Walsh) rejected the majority's view that e-mail is "just another piece of employer 'equipment'" and would find that "banning all non-work-related 'solicitations' is presumptively unlawful absent special circumstances," which had not been demonstrated by the newspaper. They also would reject the line that the majority drew between permitted and prohibited e-mails—or between permitted and prohibited bulletin board postings, telephone calls or other uses of employer equipment—finding it "completely antithetical to Section 7's protection of concerted activity."

That position ultimately may win out with Chairman Battista's term on the Board now at an end and the prospect of a Democrat in the White House this time next year. It is entirely possible that the last word on employee use of an employer's e-mail system has not yet been spoken by the NLRB.

In the meantime, employers may wish to reexamine their policies regarding use of company e-mail, bulletin boards and other forms of workplace communication insofar as those policies limited use to business purposes only out of concern that by allowing any personal use those channels would be opened up to union-related solicitation. Although the full

implications of the Board's *Register-Guard* decision are as yet unknown, the ruling also would appear to permit employers to expand charitable solicitation beyond the few "beneficent acts" that the Board has previously allowed as an exception to a ban on non-employee solicitation.

Your Proskauer attorney is available at your convenience to discuss this important decision and its possible ramifications for your workplace.

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