



Electronic Dispatch

Labor and Employment Law Information Memo

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THE NATIONAL LABOR RELATIONS BOARD FINDS EMPLOYER REGULATION OF E-MAIL PERMISSIBLE AND NARROWS THE SCOPE OF ITS NON-DISCRIMINATION RULE UNDER THE NATIONAL LABOR RELATIONS ACT

In a much-anticipated decision, the National Labor Relations Board (the "Board") recently ruled that employees have no statutory right under the National Labor Relations Act ("NLRA") to use their employer's e-mail system for union organizing, union communications, or other concerted, protected activity. The Board concluded that "business use only" e-mail policies and other similar restrictions do not violate the NLRA in the absence of discriminatory intent or enforcement.

The Board also announced a more favorable standard for determining whether employers' policies (including e-mail and use of employer equipment policies), and policy enforcement are discriminatory under the NLRA.

This information memorandum summarizes the Board's decision, *Guard Publishing Co.*, 351 N.L.R.B. No. 70 (December 16, 2007), and discusses what employers can do to ensure that their policies meet the new NLRA standards for e-mail communications and non-discrimination.

Factual Background

In *Guard Publishing*, the employer maintained a policy prohibiting employees from using the employer's e-mail system for non-business-related solicitations. While the policy was broadly worded to prohibit all non-business-related solicitations, the employer had allowed a variety of personal e-mails such as jokes, party invitations, and offers for sports tickets. The employer, however, had not allowed any employee to use its e-mail system to solicit support for any outside organization.

The dispute arose when Guard Publishing disciplined an employee for sending three union-related e-mails to employees at their company e-mail addresses. Two of the e-mails solicited support for union activities; the third sought to clarify the union's position in a dispute with the employer. The employee sent the first e-mail from her company computer while she was on a break. She sent the other e-mails from a computer at the union's office while she was off-duty. The employer disciplined the employee for all three e-mails.

The Legality of E-Mail Policies

The primary issue before the Board was framed by two well-established, but competing, legal principles under the NLRA. The Board and the courts have long recognized that employees have no statutory right to use employer equipment, such as telephones, bulletin boards, and copy machines. As such, an employer may lawfully restrict the non-business use of this equipment, and these restrictions can apply to union activity and other Section 7 activity (e.g., employee solicitations to establish a union, or petitions to oppose a new benefit policy in a union or non-union setting), provided that the policy is applied in a non-discriminatory manner. On the other hand, the Board and the courts have recognized that, in certain circumstances, there must be a balancing between the employer's right to regulate the use of its property, and the employees' rights to communicate to effectuate Section 7 rights. For example, in *Republic Aviation v. NLRB*, 324 U.S. 793 (1945), the U.S. Supreme Court affirmed the Board's ruling that, absent special circumstances, an employer could not prohibit employees from soliciting for a union on the employer's property during non-working time under this balancing of interests test.

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In *Guard Publishing*, a narrow majority of the Board concluded that e-mail systems are like other employer equipment. As such, employees have no statutory right to use the employer's e-mail system, and employers may lawfully restrict employee use of their e-mail systems by maintaining a business-use-only policy, or applying other non-discriminatory restrictions. The Board majority rejected the argument that e-mail has so revolutionized communications as to warrant a balancing of competing interests. Instead, the Board recognized that the traditional avenues of face-to-face solicitation on non-working time, and distribution of literature on non-working time and in non-work areas, are available to employees. These avenues are sufficient to protect the exercise of Section 7 rights without further eroding the employers' property and managerial interests.

New Discrimination Standard

In applying the new e-mail rule, the Board narrowed the definition of discrimination that it applies to assess whether policy enforcement against union-related activity is discriminatory under the NLRA. This new standard significantly allows employers more leeway to regulate the use of e-mail and other employer equipment.

Relying on Board precedent, the Administrative Law Judge had held that, if an employer allowed employees to use its communications equipment for any non-work-related purposes, it could not lawfully prohibit employee use of the equipment for Section 7 communications. The Board majority in *Guard Publishing* rejected this approach in favor of a narrower standard. Under the new standard, discrimination only occurs when an employer engages in disparate treatment of activities or communications of a "similar character" to the prohibited Section 7 conduct, even if it allows the equipment to be used for other non-work-related activities that are not of a similar character. For example, the Board stated that it would clearly be discriminatory to allow e-mail solicitations for one union but not another union, or to allow anti-union e-mail from an employee, but bar pro-union e-mail from another employee.

On the other hand, employers can lawfully differentiate between different types of non-work-related communications based on other grounds, such as:

- permit solicitations for charities, but prohibit non-charitable or commercial solicitations;
- permit solicitations of a personal nature (e.g., contributions for a retirement gift), but not solicitations of a commercial nature;
- permit personal invitations, but not invitations on behalf of an organization;
- permit only business-related communications, and prohibit non-business-related communications; or
- prohibit non-business-related solicitations, but permit other communications including non-business-related messages, as in *Guard Publishing*.

In *Guard Publishing*, the Board found that the employer lawfully disciplined the employee for two e-mails soliciting for the union, because the employer had barred solicitation for other outside organizations. In contrast, the employer unlawfully disciplined the employee for sending an e-mail clarifying prior union statements, because it was not a solicitation, and the employer had permitted other types of informational e-mails. The fact that some of the e-mails were sent from the union's office was irrelevant. So long as the e-mails were received by the employees through the employer's e-mail system, they were subject to regulation by the employer.

The Board also noted that the employer's motive could be an issue, even if the ban were facially neutral. If the policy were drafted for an anti-union purpose, or if the policy restriction effectively prohibited all Section 7 communications and were not based on any reasonable employer interest, the Board may infer a discriminatory motive.

Significantly, the Board applied its new standard distinguishing among non-business-related communications, even though the employer's policy on its face prohibited all non-business solicitations. Further, the Board's reasoning placed the burden of proof on the General Counsel to show that solicitations of a similar character to the Section 7 activity had been permitted by the employer. In the absence of such proof, there is no basis to find a violation of the NLRA.

Practical Considerations in Drafting Electronic Communications Policies

The *Guard Publishing* decision provides much-needed guidance to employers wishing to impose reasonable limitations on employee e-mail use. In light of this decision, employers should review their e-mail or electronic communications policies to determine the appropriate standards for use. Policies should be clear and non-discriminatory, and should accurately reflect the employer's practice. Employers should be able to articulate a legitimate justification for any distinctions on permitted non-business use under its policies. To reduce the likelihood of legal liability, employers should enforce restrictions consistently and uniformly. The new Board standard on discrimination also provides employers with the opportunity to re-assess policies on the use of other communications equipment as well.

For employers whose employees are unionized, the ability to unilaterally modify such policies will depend on the terms of the collective bargaining agreement and may require notice and an opportunity to negotiate with the union. Employers whose employees are in the midst of a union organizing campaign must exercise particular caution in revising their policies to avoid the inference of a discriminatory intent.

If you have any questions or need any advice regarding this issue or other labor relations issues, please contact:

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