Shipman & Goodwin LLP

Employer Alert

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E-MAIL POLICY PROHIBITING "NON-JOB-RELATED SOLICITATIONS" MAY BE ENFORCED AGAINST UNION E-MAILS

A long-awaited NLRB ruling has clarified the rules regarding employer e-mail policies as applied to union solicitations. The National Labor Relations Board, in a 3-2 decision issued on the last day of the Board Chair's term, upheld an employer's policy prohibiting employee use of the e-mail system for all "non-job-related solicitations," including union activities. The NLRB held that a newspaper publisher in Eugene, Oregon did not violate federal labor law by enforcing the policy against the president of a union representing 150 of its employees for sending e-mails encouraging other employees to support union activities. Based on this decision, a properly written policy, uniformly implemented, may limit the use of an employer's e-mail system or computer hardware for union activities.

In the Oregon case, the publisher disciplined a union president who sent several e-mails to fellow employees' work e-mail addresses urging support for the union during contract negotiations. The union president sent one of the emails from her work station. The NLRB stated that employees have no statutory right to use an employer's e-mail system or hardware for activity otherwise protected under Section 7 of the National Labor Relations Act, and that employers have a basic property right to regulate and restrict employee use of its e-mail system. While employers may have to yield some property interests to ensure employees will not be entirely deprived of their ability to engage in Section 7 communications, they are not required to provide employees with the most convenient means of conducting those communications, such as their e-mail system. The publisher's e-mail policy did not affect face-to-face communication among employees about union issues during non-work time.

The publisher's e-mail policy stated that its communication systems and equipment "are not to be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations." Apparently the employer allowed its employees to use the e-mail system for personal messages, including birthday announcements, offers for sports tickets, and party invitations, but the only permitted solicitation of support for an outside cause or organization via e-mail was the publisher's periodic United Way campaign. The NLRB found that the employer was entitled

to differentiate between personal communications and "calls to action" on behalf of outside organizations, including the union.

This case is significant in at least two respects. For one thing, it is the first NLRB decision to rule on the question of whether employees have an absolute right to use an employer's e-mail system for union communications. The two dissenters argued vehemently but unsuccessfully that e-mail is the equivalent of face-to-face speech in today's workplace, and that such communications should be allowed, at least during non-work time, just as personal conversations about union issues cannot be restricted except during work time and in work areas.

The other significant aspect of the case is that the Board majority departed from its former standard for evaluating workplace rules. Previously, employers could prohibit all non-work communications or other activities, but could not pick and choose which non-work communications it allowed. Under the new standard, an employer "may draw a line between charitable 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 and non-business-related use."

An employer should only attempt to apply this NLRB ruling to its own workplace if it first has an e-mail policy in place limiting non-work solicitations, and has a consistent record of enforcing the policy. Trying to adopt such a policy after a union organizing effort has begun will likely be found to be prohibited. Finally, limiting or disciplining employees for union-related e-mails while allowing solicitation for other organizations or causes, unless the line is drawn very carefully, may still be considered a violation of the National Labor Relations Act.

QUESTIONS OR ASSISTANCE?

If you have any questions about non-job-related e-mail solicitations, please contact Brian Clemow at (860) 251-5711 or Gabriel J. Jiran at (860) 251-5520.