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### Employer Email No-Solicitation Policies

It is well-established that employees have the right, under the mutual aid and protection clause in Section 7 of the National Labor Relations Act (“NLRA”), to solicit coworkers on non-working time and to distribute literature to coworkers in non-work areas. With the advent of the internet and email, however, new questions have arisen concerning the appropriate balance between employees’ Section 7 rights and an employer’s conflicting rights to control its property and to operate its business productively and efficiently. Recently, the National Labor Relations Board (“NLRB”) answered some of these questions in its long-awaited decision in *The Guard Publishing Company, d/b/a The Register-Guard*.

First, the NLRB held that employees have no statutory right to use their employers’ email systems to engage in Section 7 activity. Register-Guard maintained a policy stating:

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.

After an employee-union officer solicited coworkers’ support for the union via e-mail, Register-Guard disciplined the employee for violating its policy. The employee and union challenged both the policy itself and the discipline issued under the policy. The NLRB rejected both challenges, finding that the policy was lawful on its face because it did not discriminate against Section 7 activity and that the employer did not violate the NLRA by disciplining the employee for sending two “non-job-related solicitations” to her coworkers via e-mail in violation of the facially valid policy.<sup>1</sup>

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<sup>1</sup> The NLRB, however, did find that the employer unlawfully disciplined the employee for sending a third email in which she did not make any solicitation but merely clarified some facts about a union rally.

Moreover, the NLRB majority redefined unlawful discrimination in the context of Section 7 activity to mean “disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status.” Essentially, the NLRB held that, in order for discrimination to be found, the employer must treat like communications differently. While the evidence adduced demonstrated that the employees, with the employer’s knowledge, regularly used the employer’s e-mail system to send and receive personal e-mails (such as baby announcements, party invitations, occasional offers of sports tickets, and requests for services like dog walking), there was no evidence that the employees used the e-mail system to solicit support for, or participation in, any outside cause or organization similar to a union.<sup>2</sup> Thus, applying its new standard, the NLRB determined that Register-Guard did not unlawfully discriminate against the employee’s Section 7 e-mail solicitations.

The NLRB majority, however, observed that if the employer was motivated by anti-union considerations in implementing the policy, then the policy and any discipline taken under it would be unlawful. In addition, the NLRB highlighted a key fact, namely, Register-Guard’s employees still had significant opportunities for face-to-face communications, during which they could engage in Section 7 activity. Therefore, it is conceivable that the result would be different when no other means exist for employees to communicate regarding Section 7 matters.

In summary, in most situations employers can lawfully publish policies that prohibit employees’ use of an employer’s e-mail system for non-job-related solicitations. Additionally, employers can enforce these policies through disciplinary action, if the employer does not discriminate against Section 7 communications by, for example, permitting solicitations of support for one or more outside organizations (other than employer-approved charitable organizations) while prohibiting solicitations of support for a union. To ensure consistent application and enforcement, employers should work with labor and employment counsel in the development and implementation of these policies.

<sup>2</sup> The evidence also showed that Register-Guard knowingly permitted occasional e-mail solicitations for support of the United Way as part of its periodic campaign on behalf of the organization. Although noting that e-mails soliciting support for the United Way were similar to e-mails soliciting support for a union, inasmuch as both are aimed at drumming up support for an outside organization, the NLRB adhered to its longstanding (though not well-defined) practice of permitting an employer to allow occasional solicitations for charitable organizations without running afoul of the NLRA.

If you would like to explore any of these issues further, please contact:

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