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## Labor & Employment Client Advisory

### RULING MAKES IT HARDER FOR UNIONS TO COMMUNICATE USING COMPANY E-MAIL

The National Labor Relations Board has issued a ruling that allows companies to prohibit the use of its e-mail system by employees for union business solicitations, so long as it also prohibits use of e-mail for other forms of non-work solicitation. However, if a company allows employees to use e-mail for the purpose of soliciting support for other non-work entities, a company must also open its system to employee-generated union solicitations.

#### Factual Background

The ruling, [The Guard Publishing Co. and Eugene Newspaper Guild](#), involved the *Register Guard* newspaper and one of its employees, who also was the union president. The employee had sent an e-mail to fellow employees, responding to an earlier management e-mail regarding a union rally. The employee sought to “set the record straight” on alleged misstatements in the management e-mail.

In a separate incident, the employee sent two e-mails asking fellow employees marching in a local parade to wear green in support of the union’s negotiation efforts with the newspaper.

For each of the e-mail incidents, the employee received a written warning. The company claimed that the employee’s e-mails violated the company’s policy regarding the use of the company’s communications systems (including e-mail) for non-work-related solicitation.

The employer’s written policy prohibited the use of company communications systems for solicitations of support for “commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations” of any nature (not just union-related). In practice, employees routinely used e-mail for personal messages, to distribute birth and wedding announcements, party invitations, offers of sports tickets, and the like. Importantly, however, there was no evidence that employees used e-mail to solicit support for, or participation in, any outside cause or organization.

#### Union Has a Right to Communicate with Employees--But Not a Right to Dictate the Method of Communication

The NLRB first found that, while a company cannot block all communication between its employees and a union, the law does not grant unions the *de facto* right to access a company’s e-mail system. The law does not require that the company allow the union to utilize the most efficient form of communication available. For example, the NLRB has refused to mandate union access to company telephone systems, fax machines, and other forms of mass communication. In each of those decisions, the NLRB found that the company’s right to control its property outweighed any claim the union had to communicate with employees in a preferred format--so long as some reasonable method of communication existed. The NLRB found that e-mail, despite its ability to quickly disseminate a message to a large audience, was similar to these other technologies. The union, therefore, had no right to access the e-mail system in the face of a company policy to the contrary.

#### The Company Cannot Discriminate in the Enforcement of Its E-Mail Policy

Having a policy that would prohibit union communications is not enough, however. The NLRB made clear that selective enforcement of its e-mail policy, to the detriment of unions, would invalidate the policy and violate the law.

The NLRB found that the *Register Guard* had not violated the law by disciplining the employee for asking employees to wear green to a town march. This e-mail directly solicited employee support for a non-work-related activity. Since the employer had never allowed its e-mail system to be used for solicitations of support for other non-work activities, there was no selective, or discriminatory, enforcement of its policy.

Regarding the e-mail clarifying the union’s position in response to the employer’s statements about a union rally,

however, the NLRB found that the company had violated the law. While the union has no right to automatic access to company e-mail, it does have a right to be free of discriminatory treatment. The company's e-mail policy only prohibited "non-job-related solicitations," not all non-job-related communications. The company had routinely allowed its employees to send *informational* e-mails of a non-work-related nature without penalty. The warning to the employee for the union's informational e-mail, therefore, constituted selective enforcement by management. This selective enforcement violated the union's right to be free of discriminatory treatment.

### Company Action Plan

If companies wish to prevent union access to company e-mail systems, they have the right to do so--but only if they treat union and non-union messages of a similar nature equally. The company must have a policy that applies to *all* non-work-related messages. The Company must also enforce the policy equally.

Here are some practical points companies need to consider as they determine how to implement the lessons of *Register Guard*:

- The company must have a general policy regarding proper use of its e-mail system, as well as all other communications systems. The absence of a policy will likely lead to selective enforcement based on management's reaction to the content of a particular message.

- The e-mail policy should state that the e-mail system must be used exclusively for business-related purposes, except in specifically-defined circumstances.

- The line between acceptable and unacceptable e-mails can be drawn very thinly. Management needs to understand exactly what is considered inappropriate e-mail and act accordingly.

- Whenever management becomes aware of an e-mail message that violates its policy, it must handle the situation without regard to whether the message is union-related.

### Conclusion

E-mail technology has greatly enhanced corporate communications, and the Register Guard decision has given companies a powerful tool for controlling access to its systems for unwanted purposes. But companies need to carefully craft their e-mail policies to ensure that they do not selectively discriminate against unions. Also, companies cannot allow various "acceptable" violations of the policy, only to step in when the message contains pro-union sentiments. The right policy is important, but enforcement is the key to legally harnessing employee use of this most powerful of communications tools.

*If you have any questions about this ruling, or how it may impact your business, please contact Gary J. Lesneski, Esquire of Archer & Greiner's Labor and Employment Department, at 856-795-2121.*

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