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NLRB Issues Important Ruling Affecting Employer Email Policies

On December 16th, the National Labor Relations Board (NLRB) issued its long-awaited opinion in *The Register-Guard and Eugene Newspaper Guild*. The opinion gives employers greater freedom to restrict the use of company equipment—in particular, email systems—for non-work related activities, including union solicitation.

In *Register-Guard*, the NLRB considered whether an employer could lawfully discipline an employee for using a company email system to solicit participation in a pro-union rally. The Board held that the employer's policy barring use of the email system for "non-job related solicitations" was lawful, since employers have a basic right to restrict use of company property. It recognized, however, that the employer had allowed certain non-job related messages on its email system in the past without imposing discipline, including "baby announcements, party invitations, and the occasional offer of sports tickets or requests for services such as dog walking." The question was whether, by permitting such uses while disciplining union solicitation, the employer had unlawfully discriminated against the union, in violation of the National Labor Relations Act (NLRA).

The NLRB held that selective enforcement of the email policy did not unlawfully discriminate against the union. While the Board said that, so long as an employer doesn't allow some outside groups to solicit participation, while barring others—that is, unions—it does not violate the NLRA. The Board explained its ruling this way:

> An employer clearly would violate the [NLRA] if it permitted employees to use e-mail to solicit for one union but not another, or if it permitted solicitation by antiunion employees but not by prounion employees. … However, nothing in the [NLRA] prohibits an employer from drawing lines on a [different] basis. That is, an employer may draw a line between charitable solicitations and noncharitable 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.

This ruling represents a major change in the Board's position. Under previous cases, allowing use of communications equipment for ***any*** non-work purpose meant the employer could not prohibit use of said equipment for union solicitation. This opinion grants employers greater freedom to permit some personal use of company email—and other property, like bulletin boards—without having to open the floodgates to union solicitation.

Employers should take note, however, that the decision in *Register-Guard* does not provide blanket protection for all policies that restrict union solicitation. Each case will depend on its own particular facts. For example, if a union representative can point to prior solicitations for non-union organizations on an employer's system, which were not subject to discipline, he might prevail on a discrimination claim under the NLRA.

The decision also is a politically contentious one. The *Register-Guard* opinion drew a sharp dissent from the two Democratically-appointed members of the Board. Election-year changes in the political composition of the Board could yield future decisions that limit or even reverse this one.

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