Regulating Employee Email

Insights
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Considering the widespread availability of computers and email to employees, it's hardly surprising that union organizers and pro-union employees now look to an employer's email system as a prime means of organizing. Here, in the context of an important new legal decision, we discuss options for lawful and effective management and control of your e-systems, including in particular your email systems.

Many federal laws affect employer regulation of email and internet uses, such as the Federal Wiretap Act; the Electronic Communications Privacy Act; and the Stored Communications Act. In addition, state privacy laws and court decisions must be considered in preparing computer-use policies. In this article we'll focus strictly on issues arising under the National Labor Relations Act (NLRA).

The Latest
The U.S. Court of Appeals for the District of Columbia Circuit recently issued a decision that will have a major impact on employer efforts to regulate employees' non-business uses of email systems. The Court ruled on a newspaper's policy, which provided that its communication 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." *Register-Guard v. NLRB.*

The Court noted at the outset that even an employer having a valid no-solicitation rule commits an unfair labor practice if the rule is applied in a discriminatory manner. More specifically, the Court ruled that disciplining an employee was illegal since the newspaper's policy prohibited certain solicitations, but the employee's union-related emails did not include any call to action that would have made them prohibited solicitations. The discipline was also unlawful because other employees had been allowed to email about personal matters.

The Court also found that additional discipline of the same employee was unlawful, even though the employee had emailed solicitations inviting other employees to engage in union activity. The newspaper tried to distinguish discipline for union solicitation from individual solicitations that had been permitted in the past for sports tickets and the like, noting that the policy prohibited solicitations on behalf of "organizations."

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The Court disagreed, noting that the policy did not distinguish between solicitations for groups and for individuals but instead only mentioned "outside organizations" as an example of the forbidden category of "all non-job-related solicitations." In view of its findings, the Court found it unnecessary to rule on whether an employer can lawfully allow other forms of solicitation while banning solicitation on the basis of organizational status.

What Are Your Options?

The *Register-Guard* decision fails to provide clear guidelines about how an employer may lawfully regulate its email systems to maintain a primary focus on business uses. But reviewing past Board decisions shows that there are some options you may want to consider in regulating your email system.

Total ban on all non-business uses of employer's email system

While senior executives often favor this approach, it is impractical in most workplaces and can result in morale problems. For this approach to permit discipline of an individual sending union-related emails, employers would have to show that all other employees who had sent personal emails of any kind had also been disciplined. This appears unworkable except in the strictest of environments. And employers might easily generate discontent from employees unable to arrange for child care or medical appointments by email, even during their non-working times.

There is also a concern about whether such a policy would be found lawful, even if neutral on its face. Two Democratic members of the NLRB, dissenting from the NLRB's *Register Guard* decision, stated that they would have found a ban on all non-work-related solicitations to be presumptively unlawful absent special circumstances. Since the new Administration will be able to place a majority of Democratic members on the Board in the near future, that issue will no doubt be raised again.

Ban of organizational solicitations only

A second option is to impose a limit on all organizational solicitations, including union solicitations, while allowing personal solicitations. But as discussed above, the D.C. Court of Appeals has now raised at least a question about whether such a distinction would be lawful. Moreover, the Court of Appeals remanded the *Register Guard* case to the NLRB for further decision consistent with the Court's opinion.

That may give a new Democratic majority of the Board an early opportunity to move the law of solicitations in a more pro-union direction. The Board can at least be expected to agree with the Court's rulings; the Board might also go beyond that to raise further questions about whether total bans on employee solicitation or on all organizational solicitation would ever be approved.

Ban of all solicitations of any kind, except for a few annual events

A further option would be to return to an approach approved by the NLRB in past cases. Under that approach, employer no-solicitation policies would be upheld if the employer consistently enforced a

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policy against all solicitations of any kind (except possibly for one or two annual United Way-type events).

But some companies, such as health care institutions, need to solicit for their own foundations. Others may want to show support for other community organizations. So many institutions might conclude that they would be more hurt than helped by trying to ban all charitable solicitations. That, of course, would work to the benefit of unions seeking to organize. In view of the new Court of Appeals decision, this approach to a ban on solicitation involves the least risk for employers not wanting to take a more aggressive position.

"Working time is for work"

In attempting to enforce no-solicitation policies outside the area of emails and other e-communications, inconsistent past practices or the difficulty of ensuring consistency have often led employers to focus on just what work employees are doing and not doing, rather than on the content of any non-work-related activities.

Such a neutral policy is easier to enforce and need not be exclusive of other specific policies seeking to control email solicitation. If an employee is spending excessive time sending personal emails or searching the Internet, that will likely warrant discipline, regardless of the content involved.

Change You Can Believe In (And Legally Defend)

The *Register-Guard* decision is a big win for unions and warrants a careful review by employers of their e-communications policies. Considering the extent of union activity with EFCA looming, delay can be costly. Despite the numerous business reasons for policies ensuring effective management of e-systems, the NLRB generally presumes that post-union-activity policy changes are motivated by anti-union animus.

Since your institution will be held accountable for your supervisors' actions (or inactions) with regard to banned employee solicitations, all supervisors must understand the importance of their role in ensuring consistent compliance and in disciplining for any violations. If and when a union begins an organizing campaign at your institution, it will test whether you are enforcing your published limits on solicitation. If the union can find inconsistencies, it will have considerable freedom to use your internal email system for its own purposes.

Any policy restricting employee solicitations should be part of a broader computer-use policy that includes other concerns, such as privacy, confidentiality, trade secrets, and security. For example, it's important to remind employees that computers, e-mail and internet systems are the company's property and are subject to monitoring; don't give employees an exclusive password that is not also accessible to the employer. In addition, you should consider requiring employees to get special authorization to send emails to groups of employees, and prohibiting employees from downloading from the Internet or emailing non-business attachments. With the rapid increase in the use of personal cell phones, PDAs, and cameras in the workplace, you should also ensure that your policies address such subjects.

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Brace Yourself

Unregulated email abuses not only disrupt your operations during union campaigns but hurt employee productivity and generate safety risks and security concerns on an ongoing basis. Employers cannot wait until union organizing starts before implementing e-policy changes, since changes made during union activity are presumptively illegal.

While recent NLRB and court decisions leave unanswered questions, we suggest that you should act early to modify e-policies that are questionable on their face and then consider what e-policies work best to ensure that e-systems are maintained for business uses to the fullest extent reasonably possible.

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