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One Minute Memo®

National Labor Relations Board Limits Ability to Use Company Email for Union-Related Communications

On December 16, 2007, the National Labor Relations Board ("NLRB" or "Board") issued its long awaited decision in *The Guard Publishing Company d/b/a The Register-Guard, 351 NLRB No. 70,* addressing the use of an employer's email system by employees for union activity. In a 3 to 2 decision, the NLRB decided that employers have a basic property right regarding their email systems and that employees have no statutory right to use an employer's email system to conduct union business. Accordingly, employers may now establish policies prohibiting employee use of email systems for "non-job-related solicitations" without violating the National Labor Relations Act ("NLRA").

The NLRB also established an important new standard for determining whether an employer has "discriminatorily" enforced its policies against union-related solicitation. In *Register-Guard,* the employer permitted its employees to use email for various personal messages, including baby announcements, party invitations and occasional offers of sports tickets and/or requests for services. There was no evidence, however, that the employer had ever allowed employees (or any one else) to use email to solicit support for or participation in an outside cause or organization other than United Way. Looking to a series of relevant decisions from the 7th Circuit Court of Appeals, the NLRB adopted a more flexible approach to determining discrimination than the standard which had been applied in the past. In essence, the NLRB held that unlawful discrimination means "unequal treatment of equals" or, in other words, discrimination between "communications of a similar character." Under this new standard, an employer may now draw the following distinctions:

1. Charitable solicitations versus non-charitable solicitations
2. Solicitations of a personal nature (e.g., a car for sale) versus solicitations for a commercial sale of a product (e.g., Avon products)
3. Invitations from organizations versus invitations of a personal nature
4. Business-related use versus non-business-related use

Accordingly, a rule that permits charitable solicitations for groups such as the Red Cross or the Salvation Army, but prohibits non-charitable solicitations such as solicitations

for Avon or a Union would be lawful. Similarly, rules that allow personal solicitations but prohibit organizational solicitations would be acceptable. If, however, an employer discriminates in the way it applies the rule against unions involving communications of a similar nature, a violation of the NLRA would occur. For example, if an employer allows email solicitation for Avon, it could not prohibit solicitation for a union.

In the *Register-Guard* case, the NLRB found that the company violated the NLRA when it took action against a union-related communication that was not a solicitation. In so holding, the NLRB noted that the employer permitted a variety of non-work-related emails other than solicitations and that the policy itself prohibited only "non-job-related solicitations" — not all non-job-related communications. This discriminatory treatment of similar types of communication against union communications was unlawful.

The *Register-Guard* decision establishes a new set of ground rules for evaluating employer prohibitions against email communications in the workplace. Accordingly, employers are strongly encouraged to review their current email policies for legality and, in the absence of an email policy, to create a policy that takes advantage of the new flexibility permitted under the standards established by this important Board decision.

If you have any questions regarding this One Minute Memo, please contact the Seyfarth Shaw attorney with whom you work on our website, www.seyfarth.com.