Commentary

The NLRB, E-Mail And Workplace Solicitation: What Do The Avon Representative And The Union Organizer Have In Common?

By Nelson Cary

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The world loves e-mail. Although the actual numbers are difficult to pinpoint, one estimate places the number of messages each day at approximately 170 billion. In 2000, the number was a "mere" 9.7 billion messages per day. With the explosion in e-mail use (even setting aside the percentage of "spam" messages), it is not surprising that issues involving e-mail would ultimately find their way into the workplace. After all, e-mails in the workplace about personal issues, including party invitations, jokes, and solicitations for Girl Scouts, Avon or Tupperware, surely exist somewhere in those 170 billion messages each day, and perhaps in most workplaces.

Given the volume of e-mail, and its use for workplace communications that are not solely business-related, it was only a matter of time before the National Labor Relations Board (the "Board") was confronted with the use of e-mail for union-related communications. Indeed, as e-mail grew in prevalence in modern business, many employers set out to manage their information technology resources, as they had done with other technological advances (like photocopiers, fax machines, and even telephones). Employers often responded by adopting policies limiting the use of e-mail for non-business related purposes like personal communications and solicitations. These policies may have even been drafted in the information technology department and not the human resources department.

As these policies prohibiting non-business use of e-mail became more prevalent, pro-union advocates began attacking them as unlawful. These policies, it was argued, imposed an unlawful restriction on employees who wanted to communicate with each other about workplace issues, including union organizing. Those holding this view likened e-mail to the proverbial "water cooler." Rather than standing around the water cooler to discuss working conditions or other issues of mutual concern, employees could now have "virtual" conversations in nearly real-time via e-mail. Because an employer couldn't bar the conversations around the water cooler (so long as they were on non-working time), so too they shouldn't now be able to bar these e-mail communications.

Late last year, the Board addressed this issue in The Guard Publishing Co., 351 N.L.R.B. No. 70 (2007) ("Register-Guard"). The Register-Guard, a newspaper, maintained a policy that prohibited employees from sending solicitous e-mail:

> 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.

The Board first reviewed whether the Company violated the National Labor Relations Act by merely maintaining this policy. It concluded that there was no violation.

The Board started with the fundamental principle that an employer's computer systems are the employer's property. An employer has a right to control how its property is used. There is no legal obligation for the employer to accommodate employee use of e-mail, therefore, even if the purpose for that use is union organizing or soliciting. Accordingly, a policy restricting non-work-related use of the employer's e-mail system is not an unfair labor practice so long as restrictions on use of e-mail are not discriminatory, employees are not "entirely deprived . . . of their right to communication in the workplace on their own time," and employees have access to other forms of workplace communication.

The caveat regarding "discrimination" in the Board's holding is significant, however, and the Board went on to analyze that question. A fundamental concept in labor law prohibits "discrimination" against protected, concerted activity, including union organizing. The familiar application of this rule prohibits the termination of an employee because he or she supports a union. The rule also extends, however, to the enforcement of an employer's rules against solicitation of other employees during working time.

The Board held that "discrimination" requires the unequal treatment of equals. While this concept sounds unremarkable, it is in fact a significant departure from the Board's prior approach (one that had been rejected by one of the federal appellate courts). The facts in Register-Guard help explain the distinction and its significance.

The employee in that case, who was also the union president, sent three different e-mails. The first e-mail, sent on behalf of the union by the union president, corrected inaccurate statements about a recent workplace event in a prior e-mail by a different employee. The second e-mail asked employees to wear green to support the union's position in union contract negotiations. The third e-mail asked employees to participate in the union's entry in an upcoming town parade.

The employer disciplined the employee for sending all three e-mails. The employer was aware that employees used e-mail to send and receive personal messages, such as baby announcements, party invitations and the occasional offer of sports tickets or service requests. Importantly, however, there was no evidence that those messages solicited support for participation in any outside organization, with the exception of periodic charitable campaigns for the United Way.

The Board held that the employer properly prohibited the second and third e-mails, as both contained solicitations to participate in outside organizational activities. However, the Board found that the employer unlawfully disciplined the employee for the first e-mail because it was not a solicitation, but was more analogous to the type of personal e-mail message the employer had historically allowed. Accordingly, the employer discriminated against the union president because her first message was no different than other messages the employer had historically allowed. In essence, the Board said that if an employer is going to prohibit only "solicitation," then it may discipline employees only for "solicitation" and not for mere personal use of the e-mail system.

Since the Board's ruling, the General Counsel to the Board, who essentially acts as the "prosecutor" in proceedings before the Board, has reviewed five different cases under the Register-Guard decision. In a report issued last month, the General Counsel announced that in four of those cases, a violation of the law was found, even applying the Register-Guard decision. In most of these cases, however, the employer conduct at issue appeared to violate long-standing restrictions that Register-Guard didn't disturb. For example, in one case, the employer disciplined an employee for union solicitation, but didn't discipline other employees for — among other things — institutional commercial solicitations (*e.g.*, Avon, Mary Kay and Tupperware). This is a classic case of discrimination that always has been against the law.

In the one case where the General Counsel found no violation, the employer's rule barred union officials from sending e-mails to company managers outside of the facility. This particular employer had multiple facilities. The union representing employees at one facility would sometimes send e-mail to managers at other facilities. The General Counsel found, in light of Register-Guard, that the employer's policy was lawful.

The implications of Register-Guard are potentially far reaching. First, virtually every employer in today's economy uses e-mail. The Board has given a "green light" to policies that limit the amount of non-business related use employees may make of that equipment. Thus, employers will want to review their e-mail and Internet usage policies to identify whether they should be revised in light of the Board's ruling.

E-mail is, of course, only one form of "virtual" communication that the Board's decision could implicate. Many organizations have employees using instant messaging and text messaging. Adding an additional layer of complexity to the analysis is the issue of handheld e-mail devices, such as a Blackberry. Sometimes, employees own these devices themselves. Because ownership is a significant issue in the Board's analysis, and depending on the nature of the employer's workforce, different policy language may be necessary with respect to these types of messages and/or devices to avoid an adverse finding by the Board.

Second, and more significantly, Register-Guard should lead employers to re-think their solicitation and distribution policies. The Board's ruling opens the door to changing how solicitation policies are phrased and the types of solicitation that are prohibited. For example, the Board suggested that a rule prohibiting non-charitable solicitations, but permitting charitable solicitations, would be permissible, even though union solicitations would be prohibited under that policy. This rule equates the conduct of the union organizer to that of the Avon representative, but potentially carves out an exception for the Girl Scouts. Clearly, employers are well advised to review their policies and seek the advice of their labor counsel on an appropriate strategy post-Register-Guard.

Third, it is important that information technology managers be trained and fully understand the employer's policy on e-mail. In one of the cases discussed in the General Counsel's recent report, the employer's information technology (IT) director made statements about the employer's policy that were held against the employer. Specifically, employees asked the IT director what was considered abuse of the computer system. The IT director did not mention e-mail. Moreover, the IT director allowed for the possibility that some use of the employer's computer system during working time and in a working area would be permitted. Had the IT director in this case more fully understood the issues implicated by the employee's question, the employer may have obtained a better result.

A note of caution. In deciding Register-Guard, the Board voted 3-2. The two dissenting members were the Democratic appointees to the Board. In a strongly worded dissent (that described various portions of the majority opinion as, among other things, "absurd," "untenable," and "flawed"), these two members reached exactly the opposite conclusion. The dissent held that the employer's policy was facially unlawful and that, even if it wasn't, all three disciplinary actions were unlawfully discriminatory because of the evidence of extensive personal use of the e-mail system. Given the strenuous dissent, employers may face a different outcome in future cases depending on the results of the November 2008 election.

In sum, Register-Guard presents an opportunity for employers to reevaluate not only their e-mail policies, but also their solicitation and distribution policies. E-mail volumes likely will continue to rise and will affect different workplaces in different ways. For some employers, the Board's decision could present a watershed opportunity to improve productivity and efficiency. Other employers may ultimately decide to take no action in light of the holding. Every employer, however, should stop to consider the impact of the decision on its unique circumstances. ■