

Employees Do Not Have A Right To Use Their Employer's Email System For Union Organizing

On December 16, 2007, the National Labor Relations Board ("NLRB" or "Board") held in *Guard Publishing Company*, 351 NLRB 70 (2007), that employees do not have the right to use their employer's email system for union organizing. You may be thinking that this case does not affect your workforce because you are not unionized. Not so. The National Labor Relations Act ("NLRA") applies to nearly all employers, with few exceptions.

In *Guard Publishing*, the employer maintained a policy, much like those of many employers, prohibiting use of the employer's email system for "non-job-related solicitations." However, the employer permitted non-work related emails between employees, although it had never permitted employees to send emails requesting support for groups or organizations. When one employee began using the company email system for the purpose of union organizing, the employer disciplined her. In response, the employee filed an unfair labor practice charge with the NLRB alleging that both the policy and discipline were unlawful.

The NLRB has long held that employers may prohibit solicitation during working time and that employee's may not use an employer's equipment for protected, concerted activity. However, if an employer permits solicitation during working time for certain things, e.g. Girl Scout cookie sales, then it must allow union organization during working time. In *Guard Publishing*, the NLRB found that employees may not use the employer's email system for union organizing, absent discriminatory enforcement of the policy.

To determine whether the employee was lawfully disciplined, the NLRB looked to the cases involving employer bulletin boards. NLRB precedent has long been that employer may not prohibit employees from posting organizational material, if it permitted employees to post other non-work related material. However, the Seventh Circuit Court of Appeals has distinguished between items posted on the bulletin board that are personal, such as wedding announcements and "for-sale" notices and those seeking support for a group or organization. In a surprising move, the Board adopted the reasoning of the Seventh Circuit Court of Appeals and refused to apply past Board precedent. Because the employer had never permitted employees to solicit support of organizations on its email system, the Board determined that the discipline of the employee was lawful.

This decision is good news for employers who wish to limit the use of their email systems by employees. The reality of today's workplace is that a complete prohibition of personal email is impossible. Pursuant to the ruling in *Guard Publishing*, some personal use of the company's email system does not afford employees with the unfettered right to use the company's email system for support of a union.

In the wake of this rare pro-employer decision by the NLRB, it is a good time to review your company's policies relating to the use of employer equipment and solicitation. Let us know if we can help.