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Labor Board Approves Restrictive E-mail Policies

EMPLOYMENT LAW

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The National Labor Relations Board just announced new guidelines for private sector employers detailing just how far an employer may go in restricting employee use of its e-mail system. This was a case of first impression for the Labor Board.

The issue arose in a case involving a unionized newspaper publisher in Eugene, Oregon. The immediate question in the case was whether the employer violated federal labor law by disciplining the employee under its e-mail policy for using the employer's e-mail in support of a union. The employer policy at issue prohibited employees from using e-mail for "non-job related solicitations."

In ruling on the issue, the Labor Board took the opportunity to announce a new set of guidelines on employer e-mail policies. These guidelines must be followed by union and non-union employers alike that are covered by the federal law. Here is what happened and what you need to know.

Background

The written policy at issue prohibited the use of e-mail for "non-job-related solicitations." In practice, however, the newspaper had allowed a number of non work-related employee e-mails such as jokes, baby announcements, party invitations, and the occasional offer of sports tickets or a request for services such as dog walking, though there was no evidence that the employer had ever permitted e-mails urging support for groups or organizations of any kind. The employer issued three written warnings to an employee (who also happened to be the union's president) for sending three different union-related e-mails. The union challenged the warnings by filing unfair labor practice charges with the Labor Board.

The Labor Board issued a complaint against the company alleging that the mere maintenance of the policy by the employer chilled employees' federally protected rights to support a union or otherwise express their displeasure about working conditions. The Labor Board also alleged that the employer "discriminatorily enforced" its rule by disciplining the employee for her union support, while allowing other personal e-mail. The Labor Board addressed each issue and laid out a new set of rules for when such policies violate federal labor law.

Policy Maintenance

Addressing the mere maintenance of the policy issue, the Board piggybacked on a series of older precedents to conclude that the rule itself was lawful. The Labor Board previously had ruled that employees have no statutory right to use an employer's equipment for union organizing or other purposes. Likening the e-mail system to any other piece of employee equipment like a telephone or bulletin board, the Labor Board found no reason to change that view in the context of e-mail.

Differential Treatment

In enacting the federal law in 1935, Congress gave employees the federally protected right to form, join or assist a labor union to organize at the workplace and to band together to convey displeasure or disagreement over working conditions. Consistent with that mandate, longstanding Labor Board policy has prohibited employers from "discriminating" against employees by imposing harsher discipline or more onerous working conditions on employees that express favor for a union or granting more favorable working conditions to those who don't.

Thus, the Labor Board will scrub the facts looking for evidence that the policy is not being evenhandedly enforced on account of the content (i.e., union related matters are treated more harshly than others). Applying this standard, there have been literally hundreds of Labor Board rulings against employers where it was established that the employer had allowed some innocuous solicitation while prohibiting those relating to a union.

The current case is good news for employers because the Labor Board took this opportunity to take fresh look at how it analyzes such matters. In doing so, the Labor Board decided to discard many of its prior rulings in favor of a new and more employer friendly approach to the whole issue. Notably, the new approach will allow an employer to permit some forms of personal solicitation while still prohibiting all "non business related" solicitation.

In clarifying how much differential treatment by the employer will now be permitted, the Labor Board cautioned that that not all differences in treatment will violate the law. Rather, it's only those distinctions aimed at protected union organizing activity. The Labor Board then gave the following examples of when the employer violates the law and when it doesn't.

The Labor Board stated that an employer would clearly violate the law if it permitted employees to use the e-mail system to solicit for one union, but not another, or if it permitted solicitation by anti-union employees, but not by pro-union employees.

By the same token, the Labor Board said that the following are permitted distinctions in the application of an employer email policy: (1) allowing e-mail to be used for charitable solicitations while prohibiting all other solicitations; (2) allowing e-mail to be used for solicitations of a personal nature (e.g., sale of a car) while prohibiting solicitations of a commercial product (e.g., Avon products); (3) allowing e-mail to be used for invitations of a personal nature (e.g., a party) while prohibiting invitations for an organization; and (4) allowing e-mail to be used for business related purposes, while prohibiting use of the e-mail system for non business related purposes.

In what is good news for employers, the Labor Board announced that the mere fact that union solicitation might fall on the prohibited side of the line does not establish that the line being drawn by the employer is illegal. The key distinction in each case is that employer policy was not specifically aimed at activity protected by the labor law.

In the future, the Labor Board will carefully examine whether the permitted uses of the employer's e-mail system were of the same character or nature. This is favorable news for employers that may wish to allow employees to use the company e-mail system for limited personal or charitable reasons without having to open up the entire e-mail system for use by union organizers.

In applying this new analysis to the newspaper, the Board ruled that the employer lawfully implemented a policy that its "[c]om-munications 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 then found one of three disciplinary actions was unlawful, but upheld the other two. The warning found to be unlawful was issued for sending an e-mail clarifying the facts about a previous union rally. The Board observed that this e-mail was not a violation of the employer's policy prohibiting "non business related solicitation" because it did not actually contain any kind of "solicitation" at all. Thus, the Labor Board concluded that the employer must have issued the warning because of its content (i.e., the e-mail was union-related).

The Future

The case has far-reaching implications. The law has long been interpreted to allow employees to voice grievances and organize for a union. Until now, the Labor Board rulings allowed employees to use company e-mail for these purposes whenever the employer allowed employees to use the e-mail system for any other non-business purposes such as e-mailing jokes, invitations to a party, or other personal messages. The new ruling changes all that. Employers may now safely permit certain non-work related e-mail, such as to support charitable causes, without concern that in doing so, the company is opening the e-mail system for employees who wish to use it to solicit for a union or otherwise express anti-employer sentiment.

What Should I Do?

If you wish to take advantage of the ruling, we recommend conducting a legal review of existing policies concerning the use of e-mail and other employer property, solicitation of employees, and workplace communications. Since the ruling allows for new flexibility, you may expand existing restrictive policies to allow for such things as charitable or entirely personal solicitations. In conjunction with that effort, it is recommended that you also inventory current practices with management to ensure that managers are properly enforcing existing policy. Where that hasn't been the case, a strategy should be developed to distance the old way of doing things from the new.

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