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RE: National Labor Relations Board Rules On Right Of Employers  
To Restrict E-Mail Use At Work

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On December 16, 2007, the National Labor Relations Board issued a long awaited decision regarding whether employees have the right to use an employer's e-mail system for non-job related matters. Included in the Board's review was whether an employee may use an employer's e-mail system for union and/or organizing related matters. The Board issued a split decision on a 3-2 vote but in doing so provided much needed clarification to management regarding the level of restrictions that an employer may place on an employee's use of work e-mail.

In *The Register-Guard*, 351 NLRB No. 70 (2007), the employer had a written policy that prohibited employees from using the employer's e-mail system to "solicit or proselytize" for commercial ventures, religious or political causes, outside organizations or other non-job-related solicitations. However, the employer did permit employees to use the e-mail system to communicate about non-work related personal matters (such as jokes, baby announcements, party invitations, offers of sports tickets, and requests for personal service such as a dog walker, etc.) provided such e-mails were not a solicitation of some kind. The employer consistently prohibited employees from using the work e-mail to solicit support for or participation in any outside cause or organization with one exception: the United Way campaign in which the employer participated.

The facts of this case were not in dispute. In May and August 2000, the employer issued two written warnings to an employee who also was the union president. The employer issued these warnings because the employee had sent three e-mails to unit employees using the employer's e-mail system. The first e-mail involved a union rally. The second e-mail involved an employee alleging that a manager had given inaccurate information to employees regarding the rally. The employer issued a written warning for the second e-mail stating that the employee should not have used the e-mail system to conduct union business.

Apparently not dissuaded by the May written warning, in August, the same employee sent two additional e-mails to unit employees. The first e-mail asked employees to wear green to support the Union's position in negotiations. The second August e-mail asked employees to participate in the union's entry in the upcoming town parade. As with the May e-mail, the employee sent the e-mails to multiple unit employees at their work e-mail addresses. This time however, the employee sent the e-mails from the union's business office instead of from her work computer. Not

appreciating the employee's argument that she did not violate the company's e-mail policy because her e-mail did not originate from a work computer, the employer issued the employee a second warning. The union then filed an unfair labor practice charge against the employer claiming that the employer had inappropriately restricted its right to communicate with employees.

Although a National Labor Relations Board Administrative Law Judge ruled against the employer, on appeal, the National Labor Relations Board reversed the judge's decision, in part, by upholding the employer's right to discipline the employee for issuing the August e-mails about wearing green and attending a parade in support of the union. The Board found that although the employer tolerated personal employee e-mail, there was no evidence that the employer had ever permitted employees to use e-mail to solicit other employees to support any group or organization, union or otherwise. Unfortunately though, the Board found the employer had violated the employee's rights in issuing a warning for the May e-mail in which the employee sought "to clarify" what she thought was misleading information issued by management. Because the employer's policy only prohibited solicitations, the employer could not treat differently non-solicitation union e-mails from non-solicitation personal e-mails (jokes, baby announcements, etc.). The Board held that singling out e-mails solely based on its union content violates the National Labor Relations Act.

This Board decision allows employers to tailor their e-mail policies to meet the employer's needs and expectations. While employers cannot specifically prohibit e-mails based on union content, employers can target categories of communications that include e-mails with union content. Therefore, in response to this Board decision, employers can and should develop proactive e-mail communication policies. These policies can play an important role in limiting an employee's ability to use the work e-mail system to conduct a unionization campaign. Please contact us for assistance in updating your solicitation and e-mail policies.

Sincerely,

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