

# Client Alert

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## NLRB Sets Precedent on Employee Use of Company E-mail

A recent decision by the National Labor Relations Board (the Board) addresses employee rights to use an employer's e-mail system for pro-union solicitations. Although California case law makes clear that an employer has the right to control access and use of e-mail on company computers,<sup>1</sup> in *The Guard Publishing Company d/b/a The Register Guard and Eugene Newspaper Guild, CWA Local 37194*,<sup>2</sup> the Board addressed for the first time the question of how e-mail use by employees relates to employee rights under the National Labor Relations Act (the NLRA).<sup>3</sup>

The *Guard Publishing* case provides important guidance to employers for establishing e-mail use policies and enforcing those policies, even if they do not have a unionized work force.

### Summary of Board Conclusions

In *Guard Publishing*, the Board reviewed the employer's communications policy, which prohibited the use of e-mail for "non-job-related solicitations," to determine whether the policy violated the employees' rights under Section 7 of the NLRA and was an unfair labor practice under Section 8(a)(1) of the NLRA. In a divided decision, the majority found that the company's policy did not violate the NLRA because the employees had no statutory right to use company e-mail for Section 7 purposes.<sup>4</sup>

The Board also analyzed whether the employer violated Section 8(a)(1) and (3) of the NLRA by discriminatorily enforcing the policy against union-related, but not personal, e-mails. Ultimately the Board decided to modify its prior position regarding discriminatory enforcement of what are commonly called "no-solicitation" rules. The case establishes that in order to prove discrimination under the NLRA, there must be disparate treatment of activities or communications of a similar character because of their Section 7 protected status.<sup>5</sup>

### Factual Circumstances in *Guard Publishing*

In the *Guard Publishing* case, the employer (the Register-Guard) maintained an employment policy governing the use of its communications systems, including e-mail, which read in part:

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-*

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*related solicitations.*<sup>6</sup> (Emphasis added).

The evidence before the Board established that the employees had used company e-mail for personal announcements, offers of personal items for sale and other non-business purposes, without any disciplinary actions being taken by the Register-Guard. However, there was no evidence that employees had used company e-mail for solicitations on behalf of any outside organization.

Suzi Prozanski, a Register-Guard employee and the union president, sent three union-related e-mails to fellow employees at their company e-mail addresses. The first e-mail, dated May 4, 2000, was sent to "set the record straight" and rebut comments about a union rally previously made by management in an e-mail to all employees. Although the May 4 e-mail was composed during Prozanski's break time, it was sent from her work station. In response to this e-mail, the company gave Prozanski a written warning for violating the communications policy by using e-mail to conduct union business.

Months later, Prozanski again sent union-related e-mails to fellow employees at their company e-mail addresses, dated August 14 and 18, 2000, asking employees to wear green to support the union's position in negotiations, and to participate in the union's entry in an upcoming town parade. Prozanski sent the August e-mails from a computer in the union's office. In response, she was again issued a written warning for using the employer's communications system for "non-job-related solicitations," in violation of company policy.

### **Relevant NLRA Provisions**

The NLRA provides employees of covered employers certain rights.<sup>7</sup> At its core, Section 7 of the NLRA provides that employees

"have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."<sup>8</sup>

Section 8(a) of the NLRA establishes, in part, that it is an unfair labor practice for an employer:

- (1) "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."
- (3) "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization..."<sup>9</sup>

Past decisions of the Board and courts have made clear that certain communications at work are protected by Section 7 of the NLRA, and that disciplining employees for those communications is an unfair labor practice.<sup>10</sup> However, past Board and court decisions have also recognized that employers have a legitimate interest in restricting use of their equipment, and have held, for example, that use of telephone systems, televisions and bulletin boards are not within employees' protected Section 7 rights.<sup>11</sup>

In order to determine whether an unfair labor practice was committed in this case, the Board analyzed the Register-Guard's communications policy, the content of Prozanski's e-mails, as well as the nature of e-mail communication at work.

### **Company E-mail is Company Property**

The Board found that the Register-Guard did not violate Section 8(a)(1) by maintaining a communications policy that prohibited e-mail use for "non-job-related solicitations." While the majority acknowledged the

prevalence of e-mail communications in the workplace, it pointed out that e-mail had not changed communications at the Register-Guard such that other methods of communication, such as direct oral communication, were useless. Specifically, there was no contention that employees rarely see one another in person or that they communicate only by e-mail.<sup>12</sup>

Focusing on an employer's property right to regulate use of company property, the majority followed its well-settled principles and decided to treat e-mail communications like bulletin boards, telephones and televisions. The Board found that employees have no statutory right to use e-mail for Section 7 matters, and that the Register-Guard could bar its employees' non-work-related use of company e-mail as long as such bar did not discriminate against Section 7 activities.

### **Board Modification of its Prior Position on Establishing Discrimination**

While Prozanski was disciplined for sending union related e-mails, other employees who sent personal e-mails were not similarly disciplined. Consequently, the Board looked at the e-mail content to determine whether there was a violation of 8(a)(1) and (3) for discriminatory enforcement.

Before the case came before the Board, following standards from two previous NLRB decisions,<sup>13</sup> the Administrative Law Judge had ruled that "if an employer allows employees to use its communications equipment for non-work related purposes, it may not validly prohibit employee use of communications equipment for Section 7 purposes."<sup>14</sup> The judge therefore found Register-Guard in violation of the NLRA for disciplining Prozanski for each of the union-related e-mails.

On review, the Board acknowledged that its prior precedent would support

this proposition, but opted to modify its position to follow Seventh Circuit precedent, which previously denied enforcement of the NLRB decisions on which the Administrative Law Judge relied. In *Guard Publishing*, the Board adopts the Seventh Circuit's reasoning and principle that "unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7 protected status."<sup>15</sup>

### **Activities or Communications of a Similar Character**

As a result of its adoption of the Seventh Circuit analysis, the Board considered whether the other employees' e-mail communications regarding personal issues and Prozanski's union-related e-mails were similar in character.

The Board focused on the language in the communications policy that prohibited "non-job-related solicitations." The Register-Guard was aware that employees used e-mail to send and receive personal messages concerning "social gatherings, jokes, baby announcements, and the occasional offer of sports tickets or other similar personal items."<sup>16</sup> Yet there was no evidence that other employees used e-mail to solicit support for, or participation in, any outside cause or organization.<sup>17</sup>

Similarly, Prozanski's May 4 e-mail did not call for action and was not a solicitation.<sup>18</sup> Since the employer permitted a variety of non-work-related e-mails other than solicitations, and the only difference between the May 4 e-mail and other e-mails permitted is that the May 4 e-mail was union-related, the Board found that the employer violated Section 8(a)(1) with respect to the May 4 e-mail, and Section 8(a)(3) for disciplining Prozanski as a result thereof.

## E-mails Soliciting Employee Action

In contrast to the May 4 e-mail, the Board concluded that the e-mails dated August 14 and 18 were non-job-related solicitations which called for action, asking employees to wear green and attend a parade in support of the union. The Board said that an employer may distinguish between the types of solicitations it opts to allow, as long as the distinction is not along Section 7 lines.

“An employer may draw a line between charitable solicitations and noncharitable solicitations, between solicitations of a personal nature (e.g., a car for sale) and solicitations for commercial sale of a product (e.g., Avon products), between invitations for an organization and invitations of a personal nature, between solicitations and mere talk, and between business-related use and non-business related use. In each of these examples, the fact that union solicitation would fall on the prohibited side of the line does not establish that the rule discriminates along Section 7 lines.”<sup>19</sup>

Thus, the employer's enforcement of its communications policy as to the August e-mails did not violate Section 8(a)(1). Similarly, there was no violation of Section 8(a)(3) for disciplining the employee for sending those e-mails.

Interestingly, the distinction drawn by the Board between the May and August e-mails<sup>20</sup> leaves open the possibility of employee use of company e-mail for some union-related communications, such as e-mails for informational purposes, or explaining and/or discussing issues without soliciting or urging employees to take action or strike.

It should also be noted that the location from which the e-mails were sent was not determinative. The May 4 e-mail was sent from Prozanski's work station,

but found to be protected by Section 7, whereas the August e-mails were sent from the union office, but validly banned because they were solicitations sent to company e-mail addresses.

## Alleged Illegal Bargaining Proposal

Finally, a question was raised as to whether there was a violation of Section 8(a)(5) because of the company's bargaining proposal restricting use of e-mail.<sup>21</sup> The union claimed that the company insisted on a bargaining proposal that would have wholly prohibited use of e-mail for union business,<sup>22</sup> and that such proposal was an unfair labor practice under Section 8(a)(5). The Board found no violation in this instance. However, rather than addressing the substantive question of whether the proposal itself was illegal, the Board simply concluded that there was insufficient evidence to show the employer insisted on this proposal during negotiations.<sup>23</sup>

## Practical Guidance

1. Section 7 rights applies to all “employees” under the NLRA, which means every employee of a covered employer who is not a supervisor.<sup>24</sup> (The Board has what it calls “jurisdictional yardsticks” by which it determines whether an employer is engaged “in commerce” and hence covered by the NLRA. In general, any employer with more than a small number of employees is more than likely engaged “in commerce” and therefore covered.) While unionized employers are more likely to pay attention to this issue, Section 7 rights extend to *all* non-supervisory employees, in addition to union employees, so long as the activity in which they are engaging is protected concerted activity.
2. All employers should review their employment policies governing electronic communications and

e-mails. Such policies should make clear what types of personal use, if any, may be permitted on company e-mail. As the *Guard Publishing* decision makes clear, it is possible to prohibit categories of communications, such as solicitations. Policies should clearly indicate which categories of uses are prohibited, if not all. As is also clear from the *Guard Publishing* decisions treatment of the May 4 e-mail, an employer that wants to prohibit all union-related communications on its e-mail system may have to prohibit all non-business communications.

3. Employers should also make sure their disciplinary actions are consistent with the prohibitions they want to impose. In the *Guard Publishing* case, the evidence did not establish that the e-mail system had been used for other non-business solicitations; however, had such use occurred and the company failed to impose discipline, the company may not have been able to discipline the employee for the August 14 and 18 e-mails.
4. *Guard Publishing* suggests that employers may also prohibit employees from sending correspondence otherwise prohibited under company policy to work designated e-mails from outside e-mail addresses. Employers should therefore consider updating their communications policies to clarify that such conduct is prohibited, and be aware that such conduct is subject to discipline.

#### Endnotes

- <sup>1</sup> See *TBG Insurance Services Corp. v. Superior Court of Los Angeles*, 96 Cal. App. 4th 443 (2002).
- <sup>2</sup> *Guard Publishing Company et al.*, 351 N.L.R.B. No. 70 (December 16, 2007).
- <sup>3</sup> 29 U.S.C. §§151-169 (2006).
- <sup>4</sup> *Guard Publishing, supra*, at p.1.
- <sup>5</sup> *Id.* at p.9.
- <sup>6</sup> *Id.* at p.2.

<sup>7</sup> Most private sector employers fall within NLRB jurisdiction. Note, however, that the NLRB does not have jurisdiction over certain individuals, including, but not limited to, independent contractors, supervisors, and government employees. See [http://www.nlr.gov/Workplace\\_Rights](http://www.nlr.gov/Workplace_Rights); see also 29 U.S.C. §152.

<sup>8</sup> 29 U.S.C. §157.

<sup>9</sup> *Id.* at §158.

<sup>10</sup> See *Republic Aviation v. N.L.R.B.*, 324 U.S. 793 (1945); *Beth Israel Hospital v. National Labor Relations Board*, 437 U.S. 483 (1978); *Automotive Plastic Technologies, Inc.*, 313 N.L.R.B. 462 (1993); *Aladdin Gaming, LLC*, 345 N.L.R.B. 585 (2005).

<sup>11</sup> As a fundamental difference, the dissent contends that this well-settled principle should not apply to e-mail, and instead that a ban on non-work-related e-mail should be presumptively unlawful. The majority clearly rejected this view. *Guard Publishing, supra*, at p.5.

<sup>12</sup> *Id.* at p.6.

<sup>13</sup> *Fleming Co.*, 336 N.L.R.B. 192 (2001); *Guardian Industries*, 313 N.L.R.B. 1275 (1994).

<sup>14</sup> *Guard Publishing, supra*, at p.8.

<sup>15</sup> *Id.* at p.9.

<sup>16</sup> *Id.* at p.10.

<sup>17</sup> *Id.* at pgs. 2, 10.

<sup>18</sup> *Id.* at p.10.

<sup>19</sup> *Id.* at p.9.

<sup>20</sup> Based on the language of the *Register-Guards'* communications systems policy at issue in this decision.

<sup>21</sup> Section 8(a)(5) reads, in part, that it is an unfair labor practice "to refuse to bargain collectively with the representative of his employees..." 29 U.S.C. § 158.

<sup>22</sup> The proposed contract language reads as follows: "The electronic communications systems are the property of the Employer and are provided for business use only. They may not be used for union business." *Guardian Publishing, supra*, at p.3.

<sup>23</sup> *Id.* at p.12.

<sup>24</sup> 29 U.S.C. §152(3)(11).

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