LABOR AND EMPLOYMENT

I'M ALLOWED TO CONTROL OUR BUSINESS EMAIL SYSTEM HOWEVER I WANT … RIGHT?

by David J. Houston

Everyone knows a business has a critical need, and has discretion, to control and establish its own rules for its email system, right? After all, in the amazingly short period since email came into use in ***1993***, this secure, confidential and highly efficient medium is used billions of times each business day for immediate employee-to-employee and a multitude of other business communications. (*Compare*, email's most comparable predecessor, the paper "Internal Memo" typed by the admin, and sent by "inter-office mail").

Specifically, we know that business should prohibit messages that include sexually explicit, discriminatory, or other inappropriate content. Business needs to prohibit email communications containing confidential content between employees and competitors. And in the same vein, business can prohibit communications originating from third parties or internal dissidents who seek to use the businesses' own email system against it, for the purpose of establishing an organization to advocate against the institutional interests of the business, right?

Actually, the answers to the very first and last questions soon will be a stringent, "No," according to the National Labor Relations Board.

Existing Law – *Register-Guard*

The current NLRB "*Register-Guard*" rule *allows* employers discretionary control over internal email communications. That rule comes from the very commonsense notion that as an essential commercial communication tool *paid for, provided and controlled* by the employer, labor organizations or advocates should have no business hijacking the medium for union organizing or related purposes contrary to the interest and desires of the employer. We have reported to *Client Aler*t readers comments by the General Counsel of the National Labor Relations Board suggesting his intention to challenge the *Register-Guard* decision. *See, New NLRB G.C. Plots Activist Course*, David J. Houston (12/18/2013), at http://www.dickinson-wright.com/~/media/NEW%20NLRB%20GC%20PLOTS%20ACTIVIST%20COURSE.pdf .

NLRB Considers a Change – *Purple Communications Inc.*

"Members" of the National Labor Relations Board, who actually are the *decisionmakers* in disputed cases, are presidential appointees. Therefore the political majority on the 5-member Board (and, all-too-often, the substantive rulings of that agency) change from administration to administration. *Register-Guard* was a 3-2 decision of the Bush Board. Now, the Obama-majority Board, in the case of *Purple Communications Inc.,* has asked the lawyers in that case to outline the arguments for and against "overruling" or modifying *Register-Guard*. The *Register-Guard* decision permits employers to ban email communications comprising union organizing or other employer-adverse advocacy or solicitations. A material change to that rule, it is thought, ***would likely require an employer to permit employees to use its email system to send union organizing materials, solicitations, and other communications*** that are understandably opposed and prohibited by most employers.

No union or NLRB General Counsel, to our knowledge, ever advocated requiring the employer to permit employee use of the Inter-Office Memo for union organizing, even though the paper and typewriters used to prepare those documents, and the courier system that delivered them, were business resources. The email system is far more widespread, omnipresent, and difficult to monitor than paper memoranda, arguably increasing the employer's legitimate concern about opening to an adversary such a powerful communications tool.

"It's disturbing that the Board is even considering overruling Register Guard," said attorney Robert Kane, who represents Purple Communications before the NLRB. "It is disturbing to all employers … because in general we believe that the employer has a property interest in an email put in place for business purposes, and it should be able to be limited to that."

What the Ruling May Mean

First, it is possible (though we believe, unlikely) that the Obama Board will *not* overrule *Register-Guard*. Doing so will change decades of NLRB policy that kept "hands off" of media or communications instrumentalities owned and provided by employers. Further, if the Board decides to change the existing rule, it must determine how much intrusion into employer policy regarding internal company communications is or may be "too much?"

We believe that it is a high likelihood that any new rule announced in *Purple Communications* will require an employer who uses email to campaign *against* union organizing or for a similar purpose, to allow union advocates to advance their support for unions or unionism using the employer's email system. But, will *any* non-business use of email permit use by union advocates? Will the Board follow the so-called "United Way" rule permitting *one* non-business use for *a specific community-interest purpose a year*, as it did in "no solicitation" rule decisions? Email is far more intrusive – and used – for non-business purposes. Enforcement of a work rule against employee non-business use of email would seem nearly impossible, and would have a catastrophic effect on ordinary, constructive employee communications and relationships.

We will continue to report on the Board's activity in this area.

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