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NLRB May Clear A Path For Union Activity On Employer Email

By **Ben James**

Law360, New York (August 20, 2012, 7:36 PM ET) -- The National Labor Relations Board may use its ruling in a closely watched case concerning grocery company Roundy's Inc.'s ban on handbill distribution by union agents at two of its stores to give workers a green light to use employer email systems to solicit union support, lawyers say.

The long-running Roundy's case, which is ripe for a decision and stands among the NLRB's top priorities, could end up expanding not just handbilling access, but also employees' ability to use work email for union solicitation, according to attorneys.

"The Roundy's decision will likely tackle the email issue and expand workers' rights to use their employers' systems for union activity," said Charles Caulkins of Fisher & Phillips LLP, adding that he expected a decision before the November presidential election. "Employers will then be faced with the dilemma of absolutely banning all personal use of their email system or otherwise permit mass emails containing commercial solicitations, including pro-union mailings."

The case stems from Roundy's move to block agents of the Milwaukee Building & Construction Trades Council — who were not Roundy's employees — from distributing unflattering handbills at two of Roundy's Pick N Save stores. Roundy's prohibition of the handbilling allegedly violated the National Labor Relations Act because it allowed similar activity by nonunion entities, like the Red Cross and the Girl Scouts.

One of the prior rulings the NLRB will be weighing when it decides Roundy's is its 1999 decision in Sandusky Mall Co., which found that an employer violated labor law by barring union access to its property while allowing other individuals and groups to use its premises.

The NLRB may use the Roundy's case as a vehicle to extend that logic from physical property to virtual property, and state that employers who allow any nonbusiness use of their email systems must allow use for union purposes, according to Ronald Meisburg, former NLRB general counsel and board member, and a partner with Proskauer Rose LLP.

"What I suspect the board wants to do is say, 'We're going to apply a Sandusky Mall-type standard for any nonbusiness use of any property, even if it's virtual property,'" Meisburg said. "They'll wrap it up in what will sound like one test for everything. The problem is it may be very difficult, if not nearly impossible, for some employers to avoid nonbusiness use of things like email, so they may feel caught in a trap."

The NLRB invited amicus briefs in the Roundy's case in 2010, and asked what bearing, if any, the board's 2007 Register-Guard decision had on the standard for finding unlawful

discrimination in cases like Roundy's.

The reference to Register-Guard, which held that employees did not have a statutory right to use employer email systems for union activities, stoked concerns that the NLRB would use the Roundy's ruling to reverse the Bush-era holding.

The 3-2 Register Guard ruling, which came with a strong dissent from Democrats Wilma Liebman and Dennis Walsh, said that a policy forbidding use of the employer's email system for all nonwork-related solicitations didn't run afoul of the NLRA, and that employees had no statutory right to use the system for the purpose of Section 7 of the NLRA, which allows workers to engage in protected, concerted activity.

However, drawing on Seventh Circuit precedent, the majority also said that unlawful discrimination meant "unequal treatment of equals" or the disparate handling of similar communications because of union or Section 7-protected status.

So while an employer would be violating the NLRA if it let workers use email to solicit for one union but not another, or allowed solicitations from anti-union workers but not pro-union workers, employers are free to make distinctions on a "non-Section 7-basis."

Thus, companies can draw a line between, for example, charitable and noncharitable solicitations, personal and commercial solicitations, or invitations for an organization versus personal invitations.

Liebman and Walsh called the NLRB "the Rip Van Winkle of administrative agencies" and said they would find banning all nonwork-related solicitations unlawful, absent special circumstances.

Liebman and Walsh also took exception, "in the strongest possible terms," to the majority's take on the meaning of discrimination and the "new test" under which employers will be within the bounds of the NLRA when they let employees use company equipment or media "for a broad range of nonwork-related communications but not for Section 7 communications."

The Roundy's case and the Register-Guard case are like "apples and oranges," and if the Roundy's ruling gives short shrift to the distinctions between the cases, the NLRB's decision will likely run into a successful court challenge, said John Raudabaugh, a professor at the Ave Maria School of Law and a former NLRB member.

Still, some attorneys say the countdown to the November elections could factor into the NLRB's thought process.

"This current makeup of the board may not have another crack at this issue before the November elections, and therefore, even though Roundy's really doesn't deal with an email communications policy — it deals with the broader scope of access — this may be an opportunity for them to take this one step further and wipe out Register-Guard," Donald Schroeder of Mintz Levin Cohn Ferris Glovsky & Popeo PC said.

Regardless of exactly when and how the Roundy's case concludes, management-side lawyers are bracing for change when it comes to Register-Guard, which has been widely viewed as a prime candidate for reversal by the Obama-era NLRB.

"Clearly, this labor board is going to look for an opportunity to reverse Register-Guard and adopt the position in the dissent," Michael Lotito of Littler Mendelson PC said. "Whether that vehicle is Roundy's or some other vehicle, I think it's only a matter of time before the Register-Guard dissent becomes the law."

--Editing by John Quinn and Andrew Park.