NLRB WATCH: Key NLRB Precedents Likely to Fall Under Liebman Board

7/6/2009

Last week, we began our series NLRB Watch – which will analyze 10 critical decisions issued by the Bush-appointed National Labor Relations Board ("NLRB" or "Board") that likely will be overturned in the next few years if reconsidered by an Obama-appointed Board now chaired by Wilma Liebman. In most of the critical Bush-era decisions that favored employers, then Board member Liebman dissented, challenging the reasoning and conclusions reached by the Board majority. Careful analysis of Liebman's dissenting opinions in these major decisions provides a legal roadmap – charting the likely course the Liebman Board will take if it is able to reconsider these issues. Consequently, we can expect significant changes in certain labor policy areas going forward.

In Part I of this series, we analyzed IBM Corp., 341 NLRB 1288 (2004), concerning the representation rights of non-union employees. This article is available on our web site at: http://www.fordharrison.com/shownews.aspx?Show=5074. In Part II, below, we analyze *Guard Publishing Co. (Register Guard)*, 351 NLRB 1110 (2007) – concerning the employer's right to restrict employee use of company e-mail to preclude union related communications.

NLRB WATCH PART II: RESTRICTING USE OF COMPANY E-MAIL TO PRECLUDE UNION RELATED COMMUNICATIONS

Guard Publishing Co.(Register Guard), 351 NLRB 1110 (2007).

One of the more controversial decisions issued by the Bush-era Board involved the extent to which an employer can lawfully restrict the use of company e-mail to preclude union related communications. In *Guard Publishing Co. (Register Guard)*, 351 NLRB 1110 (2007), the Board ruled that the employer did not violate Section 8(a)(1) of the National Labor Relations Act ("NLRA" or "Act") when it established a policy that prohibited employees from using the employer's e-mail system for non-job-related solicitations of any kind.

Upholding the employer's right to restrict the use of company e-mail for non-business related purposes, the majority in *Register Guard* applied Board precedent concerning employee use of company equipment to find that, absent discrimination, employees have no statutory right to use an employer's equipment to solicit or otherwise engage in union related communications. Addressing the alleged discriminatory application of the policy, however, the majority in *Register Guard* departed from Board precedent to find that "discrimination under the Act means drawing a distinction along Section 7

lines."

• **Employer's Policy Did Not Violate NLRA**

The employer's e-mail policy stated, 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-related solicitations.

In finding that the employer's e-mail policy did not violate the NLRA, the Board majority held, "consistent with a long line of cases governing employee use of employer-owned equipment, we find that the employees here had no statutory right to use the Respondent's e-mail system for Section 7 matters." The Board majority noted that employers have a basic property right to regulate and restrict the use of company property and that the employer's communications system, including its e-mail system, is the employer's property.

The Board majority compared this situation to other cases in which it has held that employees have no Section 7 right to use an employer's property such as bulletin boards, telephones, and televisions, as long as the restrictions are non-discriminatory. The majority refused to adopt the more stringent analysis that is applied where an employer prohibits all solicitation at any time on its premises. The Board majority noted that the employer's e-mail policy did not regulate face-to-face solicitation and that employees could still engage in oral solicitation during non-working time and could distribute literature during non-working time in non-work areas.

Thus, the Board majority held that the employer may lawfully prohibit employees from using its e-mail system for non-work related purposes, unless the employer acts in a manner that discriminates against Section 7 activity.

• **Discriminatory Enforcement of E-Mail Policy**

In analyzing whether the employer discriminatorily enforced its e-mail policy, the Board majority held that "discrimination means the unequal treatment of equals." Thus, the Board majority clarified 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." Under this standard, "an employer would violate the Act if it permitted employees to use e-mail to solicit for one union but not another, or if it permitted solicitation by anti-union employees but not by pro-union employees." In either situation, the employer has distinguished between permissible and impermissible activities on Section 7 grounds.

In this case, the employer prohibited employees from using its e-mail system for all non-job-related solicitations. Accordingly, it did not violate the Act by disciplining an employee for using its e-mail system to solicit employees to take action to support the union, according to the Board majority. Significantly, however, because the employer allowed employees to use its e-mail system to send non-job related e-mails other than solicitations, it

violated the Act by disciplining the employee for sending a union related e-mail that did not solicit employees to take action since the only difference between this e-mail and those for which employees were not disciplined was that this e-mail was union related.

Current status of Board Law: Under *Register Guard*, the Board treats electronic communication systems, including e-mail systems, the same as other types of employer property – e.g., employer telephone systems, copy equipment, fax machines, etc. Thus, employees have no "right" to use the employer's e-mail system for Section 7 purposes. Additionally, employers do not violate the NLRA merely by prohibiting the use of e-mail systems for non-work related purposes or by permitting some non-work related uses while prohibiting others, as long as Section 7 is not the basis for distinguishing between permissible and impermissible uses.

Liebman Dissent in *Register Guard*: Members Liebman and Walsh wrote a highly critical dissenting opinion in Register Guard effectively accusing the majority of issuing an anachronistic decision that fails to recognize the realities of the modern workplace. According to the dissent:

Today's decision confirms that the NLRB has become the 'Rip Van Winkle' of administrative agencies. . . . Only a Board that has been asleep for the past 20 years could fail to recognize that e-mail has revolutionized communication both within and outside the workplace. In 2007, one cannot reasonably contend, as the majority does, that an e-mail system is a piece of communication equipment to be treated just as the law treats bulletin boards, telephones, and scrap paper.

Id. at 1121.

Rejecting the majority holding that the employer's ban on using e-mail for non-job-related solicitations was lawful, Liebman's dissent argued that any employer restriction on "all non-work related e-mail" would be *presumptively invalid* unless the employer can show that "special circumstances" justify the restriction. According to Liebman's dissent, "[w]here, as here, an employer has given employees access to e-mail for regular routine use in their work, we would find that banning all nonwork-related [sic] 'solicitations' is presumptively invalid absent special circumstances."

Likewise, Liebman also rejected the majority's approach to the alleged discriminatory enforcement of the employer's policy. According to Liebman, "We also dissent, in the strongest possible terms, from the majority's overruling of bedrock precedent about the meaning of discrimination as applied to Section 8(a)(1)" – i.e., alleged interference with employees' rights to engage in protected concerted activity. *Id*. 1121. Noting that the majority test overrules precedent in favor of a more narrow definition of discrimination as "disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status" (*emphasis added*), the dissent criticized that an employer would not violate Section 8(a)(1) under the majority's test by maintaining a policy that permitted employees to use the employer's equipment or media for a broad range of non-work related communications, but not for Section 7 communications. *Id*. at 1128.

Potential Shift in Board Approach: Liebman's dissent in *Register Guard* makes it clear that given the opportunity the Board likely will overrule *Register Guard* and impose a much stricter standard with regard to employer

restrictions on employee use of company e-mail for union related solicitation. In fact, the dissent forewarns that the Liebman Board would consider any such restriction to be *presumptively* unlawful absent "special circumstances" – although the dissent fails to indicate what such "special circumstances" would entail. Moreover, the Liebman Board would also return to a broader definition of discriminatory enforcement of employer policies, finding a violation any time the employer permits any non-work solicitations but then restricts union related communications.

Employers' Bottom Line: Employers should review their current solicitation policies as well as the enforcement of those policies. If an employer maintains a policy that restricts the use of company e-mail for non-work related communications, such policies could be invalidated if the Liebman Board reconsiders the issues addressed in *Register Guard*. Moreover, under the Liebman approach, an employer may be in violation of Section 8(a)(1) simply by maintaining such a policy – regardless of whether the employer actually enforces the policy against any employee.

For more information concerning the Ford & Harrison *NLRB Watch* and the Board precedents likely to be overturned under the Liebman Board, contact the Ford & Harrison attorney with whom you usually work, or the author of this Alert, John Bowen, a partner in our Minneapolis office at jbowen@fordharrison.com or 612-486-1703.

Look for Part III of NLRB Watch next Monday