NEW ORLEANS CITY BUSINESS

Inbox outcry: Ruling allows employers to bar union e-mail solicitations

By: Christian Moises, News Editor February 22, 2008 0

NEW ORLEANS – The National Labor Relations Board ruled in a split 2007 decision that employers can ban union solicitations on their e-mail systems.

An employer "may lawfully bar employees' non-work-related use of its e-mail system, unless the (company) acts in a manner that discriminates" against union organizing and collective bargaining rights under the National Labor Relations Act, the NLRB ruled in a 3-2 decision.

Fred Preis, an attorney in the labor and employment law section at Lemle and Kelleher, said the concern in New Orleans is about union organizing.

"Where this is really used is in non-union facilities to try to get them unionized," Preis said. "It's to use that system to solicit those who are not organized to become organized. That's what the whole thing is about. Those who already have unions don't care. It would be easier for them to communicate with each other, but the impact is really on those who are non-union to solicit each other to sign (a) union card, go to union meetings, support a union."

Preis pointed to hospitals and hotels as two employers facing the most union problems.

"A lot of e-mailing goes on at hospitals, the ability to e-mail each other at work and solicit each other on the hospital's e-mail system," he said. "If they can't do that, if it's a violation, that will limit them in some fashion and they'll have to do it by telephone away from work or personally during non-work time."

Before the ruling, employers saying the e-mail system was their property and not to be used for personal use were pitted against employees who claimed the right to communicate with each other.

Union advocates say the NLRB decision makes employer property rights paramount to employee rights to communicate.

"The labor board gave employers a road map to write an e-mail policy that bans union solicitations and allows almost everything else," said Nancy Schiffer, associate general counsel of the AFL-CIO.

Preis agrees.

"There's virtually no employer e-mail system that's not subject to some personal non-business use," he said. "You pretty much can't ban all that. There's going to be some personal use but it's how much (use) and how can you limit it."

Root of the ruling

In the case underlying the ruling, the president of the Newspaper Guild union at The Register-Guard in Eugene, Ore., e-mailed other employees inviting them to attend a union rally and asking them to wear green in support of union negotiations. The union represents about 150 newspaper employees.

The newspaper's "communication systems policy" stated the company e-mail system was "not to be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations."

The company knew employees used e-mail for personal matters such as party invitations and offers of sports tickets, and the e-mail system was also used to campaign for the United Way, which the company supports.

In its union negotiations, the newspaper suggested a contract term specifically banning union business from the electronic communication system. The union claimed the proposal violated the employee right to organize under Section 7 of the National Labor Relations Act.

But the NLRB ruled there is no statutory right to use an employer's equipment or media as long as the restrictions are nondiscriminatory.

"We recognize that e-mail has, of course, had a substantial impact on how people communicate, both at and away from the workplace. It is clear that use of the (employer's) e-mail system has not eliminated face-to-face communication among the employees or reduced such communication to an insignificant level. Indeed, there is no contention in this case that the employees rarely or never see each other in person or that they communicate with each other solely by electronic means.

"Thus we find that use of e-mail has not changed the pattern of industrial life at the facility to the extent that (other) forms of workplace communication have been rendered useless and that employee use of the e-mail system for Section 7 purposes must therefore be mandated. Consequently, we find no basis in this case to refrain from applying the settled principle that, absent discrimination, employees have no statutory right to use an employer's equipment or media for Sect. 7 communications," the NLRB ruled.

Member dissent

Two members of the board issued dissenting opinions, complaining "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 communications equipment to be treated just as the law treats bulletin boards, telephones and pieces of scrap paper."

United Teachers of New Orleans wasn't happy with the ruling.

"That's not something we're terribly concerned about as we have a pretty good relationship with (Recovery School District Superintendent) Paul Vallas," said Christian Roselund, communications director for UTNO. "We certainly don't like to hear that there's any encroachment of people's rights to come together and bargain collectively, but it doesn't sound like it would be a tremendous setback to us."

Roselund said most UTNO members have their own separate e-mail accounts.

And the ruling may mean good news for employers, Preis said.

"Some employees were waiting and some unions were waiting to see what the labor board would do."•

Lawyers Weekly contributed to this report.