

National Labor Relations Board Holds That Employees Have No Statutory Right To Use Employer's E-Mail System

The United States Chamber of Commerce, as *amicus*, selected Marshall Babson to argue orally before the National Labor Relations Board in what resulted in an important success for employers nationwide in the Board's seminal decision in *Register-Guard*, 351 NLRB No. 70 (December 16, 2007). The Board held that employees have no statutory right to use their employer's e-mail system for non-business purposes. The NLRB also modified its approach in discrimination cases to make clear that unlawful discrimination requires disparate treatment of activities or communications of a similar or like character on account of their union status.

Consistent with a long line of cases governing employee use of employer-owned equipment, the Board found that employees have no statutory right to use their employer's e-mail system for union matters. The Board rejected the argument that this issue should be analyzed under *Republic Aviation v. NLRB*, 324 U.S. 793 (1945), which requires the balancing of employees' organizational rights with the employer's interest in maintaining discipline. The Board noted, "*Republic Aviation* requires the employer to yield its property interests to the extent necessary to ensure that employees will not be 'entirely deprived,' of their ability to engage in [certain organizational activities] in the workplace on their own time. It does not require the most convenient or most effective means of conducting those [activities], nor does it hold that employees have a statutory right to use an employer's equipment or devices for [organizational] communications." Importantly, this ruling permits an employer to bar employees' non-business use of its e-mail system, as long as the employer does so in a non-discriminatory manner.

In addition, the Board clarified the appropriate analysis for alleged discriminatory conduct in such matters by holding that discrimination means the "unequal treatment of equals." Unlawful discrimination must consist of disparate treatment of activities or communications of a similar or like character on the basis of their union content or status. The Board emphasized:

[N]othing in the Act prohibits an employer from drawing lines on a non-Section 7 basis. That is, 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 the 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.

This decision is a significant victory for all U.S. employers. The NLRB's ruling allows employers a measure of freedom to control the use of their e-mail systems. Like all such issues, however, prudence requires that policies regarding e-mail use and the enforcement of such policies be reviewed with counsel.

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