CLIENT ALERT: Court of Appeals Reverses Landmark NLRB Decision Concerning Employer's Rights to Enforce Its Electronic Communication Policy

On July 7, 2009, the United States Court of Appeals for the D.C. Circuit found that the Register Guard newspaper violated the National Labor Relations Act ("Act") by issuing written disciplinary warnings to the union president for using the Company e-mail system for union business. In so holding, the Court reversed a portion of the National Labor Relations Board's landmark decision.

The newspaper's Communication Systems Policy ("CSP") provided, *inter alia,* as follows:

"Company communications systems and the equipment used to operate the communications systems are owned and provided by the Company to assist in conducting the business of the Register Guard. Communication 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 the Appellate Court, the Union did not challenge the lawfulness of the policy but claimed that it was enforced in a discriminatory manner.

The first e-mail sent by the union president using the Company's system concerned a union rally held the previous day. The Court found the e-mail was simply a clarification of facts surrounding the rally and not a solicitation covered by the policy. Further, the Court found the newspaper's discipline of the employee discriminatory since the newspaper was aware of personal messages sent on the Company system, including baby announcements, party invitations, offers of sports tickets, and requests for services such as dog walking. Finally, the disciplinary warning stated that the employee was being disciplined for conducting union business on the Company's e-mail system. For all these reasons, the Court enforced the Board's finding that the discipline was unlawful.

The union president's next two e-mails (1) asked employees to wear green and show unity for the Union's bargaining position and (2) volunteer to help with the Union entry in a local parade. The Court found these e-mails to be solicitations covered by the policy. However, the Court disagreed with the Board's conclusion that discipline for sending the e-mails was lawful because the solicitations were on behalf of an organization and not an individual.

The Court found the Board's rationale to be a "*post hoc* invention." It was not relied upon by the newspaper when issuing the discipline. Further, the Court did not read the policy as making a distinction between solicitations for groups or individuals. According to the Court, the policy simply mentioned solicitations for outside organizations as just one example of a forbidden, non-job-related solicitation. And the disciplines issued to the union president were the only examples of enforcement of the Company policy; it had never been enforced in other non-business use circumstances. Accordingly, the Court reversed the Board and found these additional disciplines issued to the union president to be unlawful.

The *Register Guard* case demonstrates the difficulties companies encounter in developing and enforcing appropriate and lawful electronic communication policies. Companies are well-advised to work closely with employment counsel in developing and enforcing electronic communication policies.

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This alert was posted on July 13, 2009.

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