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Nicole Lindquist

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You Can Send This But Not That: Creating and Enforcing Employer Email Policies Under Sections 7 and 8 of the National Labor Relations Act After Register Guard

Nicole Lindquist
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Abstract

The National Labor Relations Board’s decision in Register Guard Company (Register Guard) set new precedent regarding employee rights to use employer email systems to discuss protected activities under Section 7 of the National Labor Relations Act. The decision established two new rules of law regarding employer email policies: first, employers have a property interest in their email systems, and may, therefore, create email policies prohibiting non-work related emails including Section 7 related communications. Second, employers may enforce email limitations differently between union and non-union related emails, so long as the enforcement is not made "along Section 7 lines." This Article analyzes Register Guard and its potential impact on employers, and includes practice pointers for employers generating and enforcing email policies to avoid violating the National Labor Relations Act.

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INTRODUCTION

<1> In Register Guard,² the National Labor Relations Board (NLRB) made two controversial rulings regarding employer email policies.³ First, the NLRB established that employers⁴ have a property interest in their email systems, similar to an interest that an employer may have in a bulletin board or telephone.⁵ Second, the NLRB adopted a new test that redefines unlawful enforcement of email policies under the National Labor Relations Act (NLRA).⁶ As a result these rules, employers may prohibit employees’ “non-job-related solicitations,” so long as face-to-face communication alternatives exist.⁷ In addition, employers who broadly prohibit “non-job-related solicitations” may allow for personal “non-job-related solicitations,” but may still enforce the prohibition against employees who send union-related emails. This rule applies to protect employer enforcement strategies as long as decisions are not made “along Section 7 lines.”⁸

<2>Prior to Register Guard, the NLRB had not directly addressed whether employer email systems constituted property, oral solicitation, or written distribution² for the purposes of union organizing during non-work times.¹⁰ Although earlier decisions interpreting Section 7 had analogized employer email systems to bulletin boards or telephones, there was no ruling regarding employee use of employer email systems.¹¹ The rules announced in Register Guard, however, change how employers may craft and enforce their email policies. This Article provides factual background on the Register Guard decision and explains the two changes in NLRB policy. Furthermore, this Article concludes by providing pointers for employers creating and enforcing email policies to avoid violating the NLRA.

FACTS BEHIND REGISTER GUARD

<3>The conflict in Register Guard arose after an employee sent union-related emails on an employer owned email system. Suzi Prozanski (Prozanski), an employee and union president at The Register Guard (the “Guard”), violated the Guard’s “Communication Systems Policy” (CSP) by sending three union-related emails on the company’s email system.¹² The CSP prohibited employees from using the employer’s email system for “non-job-related solicitations.” The Guard, however, had previously failed to strictly enforce the CSP.¹³
In general, the Guard knew that employees sent personal emails such as “baby announcements, party invitations, and the occasional offer of sports tickets or request for services such as dog walking . . . .” 14 Despite these personal emails, there was no evidence that the email system was used to “solicit support for or participation in any outside cause or organization other than the United Way,” a charity supported by the company. 15 Nevertheless, Prozanski received a reprimand for violating the CSP after sending three contentious emails.

Prozanski’s first email, sent from her work computer during a break period on May 4, 2000, discussed a union rally. 16 The second and third emails were sent from Prozanski’s union office to Guard employees at their work email addresses on August 14 and August 18, 2000, and solicited support for the union. 17 At the administrative hearing considering the Guard’s reprimand, the Administrative Law Judge (ALJ) concluded that the Guard violated the NLRA. The Guard discriminatorily enforced the “non-job-related solicitation” policy against union-related email, while at the same time permitted emails that similarly violated the policy. 18 The ALJ held that the Guard violated Section 8(a)(1) of the NLRA, in addition to violating Sections 8(a)(1), 8(a)(3), and 8(a)(5) for other reasons related to the email policy. 20 The NLRB reviewed this ruling in Register Guard.

NLRB RULES THAT EMPLOYEES HAVE NO RIGHT TO DISCUSS SECTION 7 MATTERS OVER EMPLOYER EMAIL SYSTEMS

The NLRB in Register Guard held that employers have property interests in their email systems, thereby defining how Section 7 of the NLRA fits in the modern workplace. Generally, employees have rights to communicate with one another under the NLRA. Section 7 of the NLRA protects employee rights to engage in certain concerted activities, 21 and states the following: “[e]mployees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .” 22

Section 7 protected activities include the equal right of association at the workplace to discuss labor-related issues. 23 For example, employees have the right to communicate about certain matters at the worksite during non-work times, such as lunch or breaks. 24 An employer may violate the NLRA by “interfer[ing] with, restrain[ing] or coerc[ing] employees in
exercising the rights guaranteed in section 157 [Section 7] of this title."\(^{25}\) Differential treatment of union-related activities, or discriminatory treatment, violates this section and is discussed later in this Article.

\(<8>\) Although employees have a right to communicate, employers may limit employee modes and methods of communication.\(^{26}\) For example, the NLRB has held that employers may lawfully limit employee use of employer-owned bulletin boards and telephones.\(^{27}\) Likewise, in *Register Guard*, the NLRB classified employer email systems as property similar to a telephone, which may be restricted.\(^{28}\) Because employers have the right to regulate their property, employees are not, therefore, entitled to communicate on employer email systems under Section 7 where face-to-face communication alternatives exist.\(^{29}\) The NLRB disregarded any differences between telephones and email systems, because sending email does not "tie up the line" like a telephone call.\(^{30}\) As such, the bar on "non-job-related solicitations" in place at the Guard was upheld as a valid exercise of the employer's property right.\(^{31}\)

\(<9>\) The ruling in *Register Guard* continues to maintain precedential value. In *Henkel Corp.*, for example, the NLRB upheld the validity of "[e]mployer's Internet rule [that] prohibits 'non-job-related [e-]solicitation' in its entirety" during all hours.\(^{32}\) The petitioning employees in the case sent union-related emails on the employer email system, as well as telephone, text messages and fax messages.\(^{33}\) The employees claimed that the employer’s communications policy was discriminatorily written and enforced.\(^{34}\) Relying on *Register Guard*, the NLRB found for the employer.\(^{35}\)

Register Guard May Have Limited Impact in Tech Savvy Workplaces

\(<10>\) Despite *Register Guard*'s precedential impact, the decision offers little guidance regarding how this property rule will be applied in tech savvy workplaces. First, the decision appears to require a case-by-case analysis of alternative forms of communication available to employees. The rule that allows employers to control their property is limited where employee face-to-face communication is non-existent or highly limited. Indeed, in *Register Guard*, the NLRB implied that where employees "rarely or never see each other in person or that they communicate with each other solely by electronic means," employees may have a Section 7 right to communicate on employer email systems.\(^{36}\) Scenarios in which face-to-face
communication may be limited include workplaces where telecommuting is commonly practiced, or even where employees communicate mostly via email in the same building, complex or corporate campus. Thus, as technology continues to impact the ways in which employees communicate, employees may, in fact, have a Section 7 right to use employer email systems in spite of

Register Guard.

Where email has changed the way in which employees communicate, a different analysis for Section 7 rights could apply. In a strongly worded dissent, two members of the NLRB argued that email has become a regular form of workplace communication such that Section 7 protects these forms of communication, even on an employer’s “property.” Following Republic Aviation Corp. v. NLRB, the minority argued to employ a balancing test that weighs employee Section 7 rights and employer rights to maintain business and discipline. Although this is not currently the practice, such an analysis could apply in email-reliant workplaces or tech-savvy businesses. Employers should be aware not to infringe upon Section 7 rights in such scenarios.

Furthermore, employers should be wary of a second area of ambiguity in the aftermath of Register Guard surrounding the property rule. It remains unclear whether an employer could sue an employee that violates an email policy for property infringement. In Intel Corp. v. Hamidi, for example, the Supreme Court of California held that “under California law [an action for trespass to chattels] does not encompass . . . an electronic communication that neither damages the recipient computer system nor impairs its functioning.” The court rejected the property infringement cause of action absent an actual hardware injury. However, the court hypothesized that email may, in certain cases, cause a cognizable injury despite the absence of an actual injury that particular case. While both the NLRB and California rules do not discuss employer property claims against employees, employers should be aware of state law and remaining ambiguities when considering potential causes of action relating their email system interests.

NLRB ADOPTS A NEW TEST FOR UNLAWFUL DISCRIMINATION UNDER NLRA SECTION 8(A)(1)

Aside from the property rule, the NLRB made another shift in Register Guard that redefines unfair labor practices in the email policy context. Under the NLRA, employers may not “interfere with, restrain, or coerce employees in exercising the rights guaranteed . . . by Section 7.” Employer interference
with Section 7 rights is an unlawful unfair labor practice under Section 8(a)(1) of the NLRA, and includes disparate or discriminatory treatment of Section 7 activities. In Register Guard, the NLRB changed the meaning of discriminatory treatment in the email context, granting employers more freedom in enforcing email policies.

Prior to Register Guard, the NLRB broadly construed discriminatory enforcement to allow greater protections for unions and other labor related communications. The Fourth Circuit Court of Appeals summarized the NLRB rule prior to Register Guard as follows: “[w]hen company-sponsored channels of communication [were] opened to non-company purposes, the NLRA prohibit[ed] an employer from preventing use for union purposes.” For example, if an employer permitted some emails that violated an employer’s policy, the employer had to allow all emails, even an employee’s union-related communications.

As recently as 2005, the NLRB acknowledged this “old test” in an employer-email policy enforcement case similar to Register Guard. In Media General Operations, the NLRB affirmed the ALJ’s decision that an employer violated Section 8(a)(1). There, the employer unlawfully enforced an email policy against employees who sent union-related emails while allowing individuals who sent other types of personal emails on the employer’s email system.

In Register Guard, the NLRB announced its new test for establishing what constitutes unlawful discrimination against Section 7 protected activities set forth in Section 8(a)(1). The new test states that “in order to be unlawful, discrimination must be along Section 7 lines.” Furthermore, the NLRB stated 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.” In offering some guidance as to what “along Section 7 lines” means, the NLRB state the following:

[A] n 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 nonbusiness-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.51

<17> The new test allows employers greater discretion when faced with email communications written with different purposes. Employers may allow personal email communications, but may also enforce email policies against union-related communications so long as the employers prohibit other union-like groups’ communications, assuming such communications are similar in content or purpose.

<18> In arriving at this new test, the NLRB highlighted the Seventh Circuit’s discrimination analysis first announced in Guardian Industries v. NLRB.52 In Guardian Industries, the Seventh Circuit overruled an NLRB decision in which the Board found that an employer had unlawfully discriminated under Section 8(a)(1) under the “old test” for discrimination noted above. Judge Easterbrook explained that “discrimination is a form of inequality, which poses the question: ‘equal with respect to what?’”53 Judge Easterbrook distinguished between personal for-sale notices and union announcement postings on a bulletin board based on their differing characters.54 The Seventh Circuit overruled the NLRB’s finding of unlawful discriminatory enforcement because of the dissimilar nature of the emails.55 The Seventh Circuit again applied this likeness comparison in Fleming Co. v. NLRB.56

<19> In August of 2008, the NLRB applied the new Register Guard discrimination rule in another case—Henkel.57 The NLRB found that an employer did not discriminatorily enforce a policy “along Section 7 lines” when the employer carried out the “non-job-related” solicitation policy against union-related messages, but simultaneously avoided enforcing the policy against employees who sent personal messages.58

REPERCUSSIONS OF REGISTER GUARD: EMPLOYERS BEWARE OF THE EFFECTS OF UNEQUAL EMAIL POLICY ENFORCEMENT

<20> Like the property rule, the new discrimination test appears to require a case-by-case analysis of email usage in the workplace. Employers may now prohibit “non-job-related solicitations” via email, in certain circumstances, and are no longer required to enforce such a policy equally. The rule prohibits, however, enforcement decisions made “along Section 7 lines.” Thus, employers wishing to prohibit organizational “non-job-related solicitations” must be vigilant and attentive to all similarly situated groups in order to avoid making a
discriminatory decision under Section 8(a)(1).
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The new rule appears as a sensible approach to the realities of email usage where monitoring employee email is costly, especially given the widespread use of technology in the workplace. Whereas the “old test” required that employers closely monitor employee emails, the breadth of the new test allows employers to more selective in their monitoring and enforcement decisions without fearing a NLRA violation.

However, employers should be aware of the potential consequences of relaxed enforcement of email policies. Email could serve, if it does not already, as the virtual meeting space where employees communicate regularly via email, online chatting, and blogs. As previously discussed, where email replaces face-to-face communication, employees may in fact have a right to communicate Section 7 related matters using an employer email. Employers must, therefore, be careful how they craft and enforce their policies in light of the potential effects on employee email usage.

In addition, as a note of caution, employers enforcing policies should be aware that Register Guard could be overturned for departing from the long-standing concept of discrimination under Section 8(a)(1) of the NLRA. Prior to Register Guard, discrimination under Section 8(a)(1) did not require a discriminatory motive. Nevertheless, the NLRB’s new test appears to require some sort of anti-union intent, given the Seventh Circuit’s reasoning, which may be subject to rejection or approval by other courts. Moreover, as another legal scholar argues, the Seventh Circuit misapplied Title VII Civil Rights Act analysis of disparate treatment discrimination to Section 8(a)(1) claims. As such, the new test arguably permits discrimination that “[S]ection 8(a)(1) is designed to guard against.”

CONCLUSION

Employers should be aware of the two new rules established by Register Guard regarding the creation and enforcement of email policies to avoid violating the NLRA. First, employers may lawfully create email policies that prohibit “non-job-related solicitations,” including Section 7 communications, because of their property right in the email system. Where face-to-face communication is limited, however, employees may retain a right to communicate Section 7 matters using employer email systems. Regardless of the face-to-face alternatives in the workplace, employers should craft their email policies carefully to explain to employees the non-work-related purposes for
which they may use the email system. Moreover, state law 
regarding email system property rights may also be relevant in 
understanding the consequences of employer and employee 
email conduct.

In addition, employers now may create or enforce policies 
that limit employee use of employer email systems, so long as 
enforcement avoids "Section 7 lines." This means that 
employers must treat similarly situated groups equally. 
Employers should also generally be aware about the function 
that email serves in an ever-evolving digital age, especially in 
light of the fact that NLRB rules and technology may be subject 
to change.

PRACTICE POINTERS

- Decide how email should be used in the workplace 
  and inform employees of the policy.

- Remember that employees are guaranteed rights to 
discuss certain work-related matters on employer’s 
property under the NLRA.

- When creating a policy for email communications in 
situations where face-to-face contact might be 
limited, be aware that employees may have a right 
to discuss Section 7 matters over email, or other 
high-tech means, and tailor the policy and 
enforcement accordingly.

- Enforce employer email policies equally amongst all 
similarly natured organizations and communications 
to avoid enforcing “along Section 7 lines.”

- Continue to carefully monitor updates from the NLRB 
and courts to ensure that the new test maintains 
validity.

Footnotes

1. Nicole Lindquist, University of Washington School of 
Law, J.D. program Class of 2009. Thank you to 
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4. This Article’s target audience is employers that have employees that are protected by the National Labor Relations Act, 29 U.S.C. §§ 151-169 (2006). However, not all employees are so protected. See Elena N. Broder, Note, (Net)workers’ Rights: The NLRA and Employee Electronic Communications, 105 Yale L.J. 1639, 1646 n.34 (1996).

5. See Guard Publ’g, 351 N.L.R.B. at 1116.


7. See Guard Publ’g, 351 N.L.R.B. at 1115-16.

8. See id. at 1116.


13. The CSP stated the following: “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 to proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations.” Guard Publ’g, 351 N.L.R.B. at 1111 (emphasis added).

14. Id.

15. Id.

16. Prozanski’s response followed two emails regarding the union rally planned for May 1, 2008. The first email was sent by Managing Editor, Dave Baker (“Baker”), encouraging employees to leave work early because anarchists might be at the union rally that day. The second email was sent by another employee, Bill Bishop, replying to Baker and the other employees with an attached Union notice that Register Guard had alerted the police. After discussion between Baker and Prozanski regarding some false information contained in the emails, Prozanski sent an email on May 4 which relevantly read as follows: “In the spirit of fairness, I’d like to pass on some information to you . . . . We have discovered that some of the information given to you was incomplete . . . . The Guild would like to set the record straight . . . . Yours in solidarity, Suzi Prozanski.” Guard Publ’g, 351 N.L.R.B. at 1111.

17. “The August 14 e-mail asked employees to wear green to support the Union’s position in negotiations. The August 18 e-mail asked employees to participate in the Union’s entry in an upcoming town parade.” Guard Publ’g Co., 351 N.L.R.B. 1110, 1112 (2007).

18. Id. at 1112.

19. Id.

20. See id.

21. 29 U.S.C. §§ 151-169; see also Charles J. Morris, NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct,


24. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803 n.10 (1945) (establishing that break time, during lunch or rest periods, "[is] an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property.").


27. See, e.g., Churchill's Supermkts., 285 N.L.R.B. at 155.

28. Guard Publ’g, 351 N.L.R.B. at 1114.

29. Id. at 1116 (observing that “absent discrimination, employees have no statutory right to use an employer’s equipment or media for Section 7 communications.”).

30. Id.


33. Id. at *3.

34. In this case, the employer’s communications policy stated the following: “The Internet, E-mail and voice mail are intended for the transmission of business-related transactions and should not be used for personal gain or advancement of individual views. Utilization of the Internet, E-mail or voicemail to
solicit for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations is prohibited.” *Id.* at *30.

35. *Id.* at *29-33.


38. See *id.* at 1124-27 (Liebman, dissenting) (“We reject the majority’s conclusion that email is just another piece of employer ‘equipment.’ Where, as here, the employer has given employees access to email in the workplace for their regular use, we would find the banning all nonwork-related ‘solicitations’ is presumptively unlawful absent special circumstances. This presumption recognizes employees’ rights to discuss Section 7 matters using a resource that has been made available to them for routine workplace communication.”). There has been scholarly debate concerning the proper place of employer email in the union organizing context, which relates to email as a form of oral or written communication. See, e.g., Nancy J. King, *Labor Law for Managers of Non-Union Employees in Traditional and Cyber Workplaces*, 40 *Am. Bus. L. J.* 827, 870 (2003) (“The NLRB should extend the rules on solicitation and distribution that protect employees' Section 7 rights in the brick and mortar world and the balance of employee and employer rights that has been fashioned for that world to the cyber workplace.”); Christine Neylon O’Brien, *The Impact of Employer E-mail Policies on Employee Rights to Engage in Concerted Activities Protected by the National Labor Relations Act*, 106 *Dick. L. Rev.* 573 (2002); Weiner, supra note 9; Martin H. Malin & Henry H. Perritt, Jr., *The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces*, 49 *U. Kan. L. Rev.* 1 (2000).

39. The Court noted that although employers have a recognized property right, that right may be limited to “safeguard the right to collective bargaining.” Republic Aviation Corp. v. NLRB, 324 U.S. 793, 802 n.8 (1945). The Court held that “a rule that prohibits union solicitation by an employee outside of working hours, although on company property. . . must be presumed to be an unreasonable impediment to self-
organization and therefore discriminatory in the absence of evidence that special circumstance make the rule necessary in order to maintain discipline.” Id. at 803 n.10.


41. Id. at 300-301.


44. Media Gen. Operations, Inc. v. NLRB, 225 F. Appx. 144, 148 (4th Cir. 2007) (“The NLRB’s conclusion on the merits was also reasonable. The Media General e-mail policy restricted use of the e-mail system to company purposes. The company made no attempt, however, to enforce the policy against any violations other than union messages. The record contains numerous examples of messages unrelated to the work of the newspaper. . . .Restriction of the union’s access to this communication channel, while others were allowed unfettered access, is an unfair labor practice that is prohibited by the NLRA.”) (internal citations omitted), aff’d, 346 N.L.R.B. 74 (2005).

45. See id.


47. See id. at 76.


49. Guard Publ’g Co., 351 N.L.R.B at 1117.

50. Id.

51. Id. at 1118.

53. *Id.* at 319 (internal citations omitted).

54. *See id.* at 320.

55. *See id.*

56. Fleming Companies, Inc. v. NLRB., 349 F.3d 968, 975-76 (7th Cir. 2003) (reversing the NLRB findings of discrimination under Section 8(a)(1) on grounds that personal postings on a bulletin board were unlike union postings.)


58. *See id.* at *29-36.

59. Guard Publ’g Co., 351 N.L.R.B. 1110, 1125 (2007) (Liebman, dissenting) (“Even employees who report to fixed locations every day have seen their work environments evolve to a point where they interact to an ever-increasing degree electronically, rather than face-to-face. The discussion by the water cooler is in the process of being replaced by the discussion via e-mail.”) (internal citations omitted).

60. Due to controversy surrounding the NLRB’s composition and the opinion, there is reason to believe this opinion may not stand through the Obama administration. *Cf.* Greenhouse, *supra* note 3.


62. *Id.* at 118.