

Employees' Use of E-mail for Union Support Purposes

Employers now have more flexibility in enforcing communications policies that neither ban all communication nor permit all non-business usage

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E-mail is an essential communication tool in today's workplace. Employers and employees alike use e-mail to communicate within the company or workplace, and also externally to communicate with clients, vendors and the public. As e-mail use has become more prevalent, employers – and the law – have struggled with where to draw the line between personal and business use of this convenient communication device, especially concerning employees' use of e-mail for union organizing purposes. At least now the lines are a little easier to draw, thanks to a December 2007 National Labor Relations Board (NLRB) decision.

Overview of Employer Regulation of Employee E-mail Usage

How much control an employer can exert over its electronic equipment and communication devices is a sticky issue. Invariably, an employer rule seeking to limit an employee's e-mail use to "business purposes" could encroach on employees' rights under Section 7 of the National Labor Relations Act (NLRA). Indeed, the NLRB has historically found that employees have the right to use employer-owned e-mail and computers to communicate about workplace conditions, employer policies and other work-related issues. (See Jerry M. Hunter, *The NLRA at 70: Employer E-mail and Communication Policies and the National Labor Relations Act*, *Health & Human Resources Labor Law Journal*, 196 (Vol. 56, No. 3 2005).)

In addition, employers are often trapped between a policy purporting to limit e-mail usage to "business purposes" and the workplace reality. Despite these usage policies, many employers do not want to create an oppressive work environment where employees cannot send occasional e-mails to family, friends or co-workers regarding social gatherings, birth announcements, charitable organizations or other commonly shared life events. Yet the NLRB historically viewed enforcement of e-mail policies as an "all or nothing" proposition, in which an employer had to prohibit all non-business e-mail usage or solicitations and enforce the policy across the board, or face the potential of an unfair labor practice claim.

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Decisions from administrative law judges (ALJs) and the NLRB did little to help employers tackle this problem and created more questions than answers. However, the NLRB's December 2007 decision in *Guard Publishing Co. d/b/a The Register Guard and Eugene Newspaper Guild, CWA Local 37194 (Guard Publishing II)* provides much-needed guidance for employers in this area. In *Guard Publishing II*, the NLRB considered the five-year-old appeal of an earlier decision on the same facts, referred to herein as *Guard Publishing I*. (See 2002 NLRB Lexis 70 (Feb. 21, 2002).) *Guard Publishing II* confirms that employers can, in fact, create policies limiting e-mail use in the workplace without violating the NLRA. The decision also provides employers with some flexibility in enforcing such policies. Finally, the decision confirms employers may negotiate with unions over implementing e-mail and computer usage policies in collective bargaining. Non-unionized employers should heed the ruling (see box).

Background Regarding Unionized and Non-union Employees' Rights Under the NLRA

Some employers have the misconception that the NLRA applies only to unionized employees and, accordingly, the law's protections and rights do not apply to them. This is not the case, however. *All* employees, whether unionized or otherwise, have rights under the NLRA. Specifically as related to e-mail usage in the workplace, Section 7 of the NLRA provides certain rights to both unionized and non-unionized employees. (See 29 U.S.C. § 157.) Section 7 reads:

Employees 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 purposes of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment authorized in Section 8(a)(3).

Section 8(a)(1) makes it an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of Section 7 rights. Discriminating against union activity can violate this section. Similarly, Section 8(a)(3) makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or in any term or condition of employment to encourage or discourage membership in any labor organization." For an unfair labor practice to occur under this section, an employer's discrimination must also encourage, or as is more often the case, discourage, union activities. As stated, *all* employees have these rights under the NLRA, whether unionized or otherwise. Unionized and non-unionized employers alike should otherwise heed the rules on promulgation of communications systems in *Guard Publishing I* and *Guard Publishing II*. Otherwise, discriminatory enforcement could give rise to a charge under the NLRA.

The *Guard Publishing I* Ruling

The NLRB's *Guard Publishing* decisions arose from a Eugene, Ore., newspaper company's allegedly improper promulgation and discriminatory enforcement of its e-mail "no solicitation" policy. Eugene Newspaper Guild, CWA Local 37194 (the Union) represented approximately 150 of the company's employees. (The facts of the *Guard Publishing* cases described in this chapter are taken generally from both cases: *The Guard Publishing Co. d/b/a The Register-Guard and Eugene Newspaper Guild, CWA Local 37194*, 2002 NLRB Lexis 70 (2002) (*Guard Publishing I*) and *The Guard Publishing Co. d/b/a The Register-Guard and Eugene Newspaper Guild, CWA Local 37194*, 351 NLRB No. 70 (2007) (*Guard Publishing II*).)

Factual Background

The company, *The Register*, installed computer and information systems at its Eugene, Ore. facility in 1996. The system included e-mail and Internet access, and it was fully accessible in the summer of 1997. All of *The Register's* employees at the Eugene facility had access to the company-provided e-mail service. In addition, most of the employees had their own computers.

In October 1996, *The Register* enacted a written company communications policy that applied to usage of all company communication systems, including telephones, message machines (that is, voice mail), computers, fax machines and photocopiers. The policy provided: "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." The policy further provided that violation of the policy would result in discipline, including termination. Although not formally enacted until October 2006, *The Register* had distributed drafts of the policy in September 2006. Later that month, the union requested bargaining regarding use of the employer's "electronic communication system." It is unclear, however, whether the union and *The Register* ever reached an agreement on this subject.

Suzi Prozanski was a long-time employee at *The Register's* Eugene paper, and she had been the Union president since January 2000. Prozanski was a copy editor for the paper and – as such – had her own desk and computer with Internet access and e-mail. As part of her work, Prozanski used e-mail to make story lists, compile photographs, review stories and send memos to co-workers regarding work-related matters. Despite the employer's policy, Prozanski also used e-mail for non-work-related purposes, such as union business or to inform other employees that she was going on her break. (The ALJ did not explain how informing co-workers about breaks is a "non-work" function.)

Other employees also used *The Register's* e-mail for non-work-related business such as parties and lunch dates, poker games, jokes, breaks, community events, sporting events, charity solicitation and births. *The Register* seemed to accept this non-business use of e-mail because none of these employees were disciplined under the communications policy. However, Prozanski was disciplined when she sent union-related e-mails through *The Register's* e-mail system.

Discipline Follows an Employee's E-mail Soliciting Union Support

On May 4, 2000, Prozanski sent an e-mail to approximately 50 co-workers, using their work e-mail addresses. Prozanski's e-mail was regarding a union rally that took place on May 1. The e-mail was entitled "Setting It Straight," and was in response to inaccurate information in an e-mail from *The Register's* managing editor. Interestingly, the managing editor himself had used company e-mail to send this initial message to *Register* employees, using their work e-mail addresses. Nevertheless, on May 5, 2000, the managing editor issued Prozanski a written warning for violating the communication policy by using e-mail for "conducting Union business." The written warning illustrates what *The Register* did wrong. It stated, in part:

In our conversation on the afternoon of May 4, you acknowledged to me that the email system was not to be used for (Union) business and that you "should have known better." I agree. What's even more troubling to me, though, is that the message you sent – on the company's email system – is now posted on the (Union) bulletin board, compounding

the problem. Employees who see that email message are likely to assume that it's OK to use the company's e-mail for purposes other than company business. And, of course, that's not true. If you composed and sent this e-mail on work time, that would also be inappropriate.

The managing editor apparently forgot or overlooked that many other *Register* employees had used e-mail for "purposes other than company business." Moreover, these other employees had been doing so "on work time."

Later that summer, Prozanski sent two more union-related e-mails that became the subject of the *Guard Publishing* case. On Aug. 14, Prozanski sent an e-mail to *Register* employees asking them to wear green in support of the union. On Aug. 18, Prozanski sent a second e-mail asking *Register* employees to support the union in an upcoming parade. Both e-mails used the employees' company e-mail addresses. However, this time she sent the e-mails during her free time using a union computer located at the union offices. Nevertheless, on Aug. 22, *The Register* issued Prozanski another written warning stating that she had violated the company's communication policy by using the company's "communication system" for Union activities. The discipline again quoted the company's prohibition on "non-job-related solicitations."

Employer's Collective Bargaining Proposal on Using Electronic Communications

Shortly after issuing the Prozanski disciplinary warning, *The Register* and the Union entered into collective bargaining negotiations for a new union contract. On Oct. 25, 2000, *The Register* made the following counterproposal, No. 26, Section 8:

Section 8. Electronic Communications Systems – The electronic communications systems are the property of the Employer and are provided for business use only. They may not be used for union business.

In November, *The Register* reaffirmed to the union that Counterproposal 26 prohibited use of the communication systems only for *union* purposes. The company indicated that the communications policy would be used in circumstances in which e-mail was used for purposes "other than union business."

The NLRB's Holding

In response to the discipline against Prozanski, the NLRB General Counsel filed an unfair labor charge against *The Register*, alleging that it had violated the NLRA by "maintaining, promulgating and enforcing an overly broad *solicitation* policy." Needless to say, the union also filed a charge under the NLRA, alleging that *The Register's* e-mail counterproposal violated Section 8(a)(5). Specifics of the NLRB's ruling follow.

1. *The Employer's E-mail Policy Itself Was Valid Because an Employer Can Validly Limit Use of Communications Equipment so Long as it Does so in a Non-Discriminatory Manner.*

Generally, employees have no statutory right to use an employer's equipment or media. (See *Mid-Mountain Foods, Inc.*, 332 NLRB No. 19 (2000).) Accordingly, under the NLRA, an employer may validly limit employee use of its communications equipment, such as bulletin boards, telephones, public address systems, video equipment and even e-mail, so long as the limitations do not discriminate against Section 7 activity. (See *Honeywell Inc.*, 262 NLRB 1402 (1982) (bulletin boards); *Union Carbide Corp.*, 259 NLRB 974, 980 (1981)

(telephones); *The Heath Co.*, 196 NLRB 134 (1972) (public address systems); *Mid Mountain Foods, Inc.*, 332 NLRB No. 19 (2000) (video equipment); *Adrantz AAB Daimler-Benz Transportation NA, Inc.*, 331 NLRB No. 40 (2000) (e-mail).)

The problem with *The Register's* policy in this case, according to the Union and the NLRB's general counsel, was that *The Register's* policy prohibited use of the e-mail for "solicitations," which they argued violated Section 7. The union and the general counsel argued that the e-mail system was a "workplace," and, accordingly, *The Register* could not ban employee use of e-mail for solicitation without some justification. The ALJ disagreed with this "workplace" argument, however. The ALJ noted that the NLRB had never held that an e-mail system is a "workplace," and reminded the complainants that nondiscriminatory limitations on employee communications are allowed.

2. *The Employer Violated the NLRA When It Disciplined the Employee in a Discriminatory Manner for Sending Union-Related E-mails.*

Though an employer may limit employees' use of its communication systems, it cannot do so in a way that discriminates against employees' rights under Section 7. (See *E.I. du Pont de Nemours & Co.*, 311 NLRB 893, 919 (1993).) Accordingly, if an employer allows its employees to use communications equipment for non-work-related purposes, it cannot validly prohibit employees from using the communications equipment for Section 7 – that is, union solicitation – purposes. (See *Fleming Companies Inc.*, 336 NLRB No. 15 (2001).) In the case of *The Register's* disciplinary action against Prozanski, it appeared that the only reason she was disciplined was because she sent union-related e-mails using the company's e-mail system. *The Register* argued, however, that its discipline of Prozanski was not discriminatory because: (1) it prohibited e-mail solicitation from other 3rd-party organizations; and (2) Prozanski's violation was more egregious because she had sent the e-mails to multiple recipients (that is, "spammed" them).

The ALJ disagreed with both of *The Register's* justifications for disciplining Prozanski. In determining whether *The Register* applied its policy in a discriminatory manner, the ALJ applied the test established in *Wright Line*, 251 NLRB 1083, 1088 (1980).

The *Wright Line* Test for Discriminatory Discipline

The *Wright Line* test attempts to discern the motivation behind an employer's adverse conduct against an employee, such as *The Register's* discipline of Prozanski. Under *Wright Line*, the general counsel must establish that the employee's protected activity, such as Prozanski's union solicitations and communications, motivated the disciplinary action. If the general counsel makes such a showing, the employer can present evidence that it would have disciplined the employee despite the protected activity. This evidence must be sufficient to persuade the ALJ or the NLRB that the same discipline would have occurred even without the protected conduct. For example, in this case, *The Register* would have to prove that it would have disciplined Prozanski even if her e-mails were not union-related.

The ALJ found that *The Register* did not show that Prozanski would have been disciplined even if her e-mails were not union-related. The ALJ viewed *The Register's* arguments with skepticism. For one thing, the ALJ pointed out, *The Register* permitted other organizations, such as Weight Watchers and United Way, to communicate through its e-mail system. In addition, it permitted employees to use its e-mail system for a plethora of non-business uses, including solicitations for dog walking and sports tickets, and announcements regarding parties and births.

Regarding *The Register's* spamming argument, *The Register* had permitted other employees to send non-business-related e-mails to groups of recipients without facing any discipline. *The Register* also presented no evidence that the group e-mail affected productivity. Because *The Register* had permitted its employees to use e-mail for other non-business-related e-mails, it could not prohibit Prozanski from using its e-mail system to send union-related e-mails, or subsequently discipline her for having done so.

3. *The Employer's Insistence on Counterproposal 26 During Collective Bargaining Violated the NLRA.*

Under the NLRA, neither party may require the other to agree to contract provisions that would violate the NLRA. (See *National Maritime Union (Texas Co.)*, 78 NLRB 971, 981-982, enforced by 175 F.2d 686 (2nd Cir. 1949).) Simply proposing or bargaining about an illegal subject does not necessarily violate the NLRA, however. A violation occurs when a party has rejected the illegal proposal, yet the proponent of the proposal insists on the illegal subject regardless. (See *California Pie Co.*, 329 NLRB 968, 974 (1999).) In *The Register's* case, the Union had filed repeated objections to the counterproposal and had filed an unfair labor practice charge with the NLRB in response. Nevertheless, *The Register* continued to insist on inclusion of Counterproposal 26 in the union contract, arguing that it had to be read in conjunction with the companywide communications policy banning all non-business use of communications equipment.

Rejecting *The Register's* argument, the ALJ stated that the argument "might hold water" except for the fact that *The Register* did not actually enforce the companywide communications policy. The ALJ found that Counterproposal 26 was a codification of a discriminatory policy and thus an illegal subject for collective bargaining, in large part because *The Register* banned union-related e-mails and but not other non-business-related e-mails.

So what does *Guard Publishing I* mean for employers and employees? (See box.)

The Rationale and Impact of *Guard Publishing I*

The decision in *Guard Publishing I* specifically rejected the NLRB General Counsel's argument that e-mail constituted a "computerized workspace." (See *Pratt & Whitney*, 12-CA-18446 et al. (Advice Memoranda dated Feb. 23, 1998); *Computer Associates Int'l.*, 1-CA-388933 (Advice Memoranda dated Oct. 26, 2001)). The general counsel had argued that in cases in which employees used e-mail as the primary method to communicate with each other and management – and where a significant amount of work was performed using the employer's communication system – the system itself was a "work area" like any other work space within the employer's physical building. Accordingly, an outright ban on personal e-mail, the "only method of communication" in the "computerized work area," also impermissibly banned protected communications.

Consequently, *Guard Publishing I*:

- 1) Reaffirmed an employer's power to control use of its own electronic communications systems, as decided in previous NLRB decisions.
- 2) Provided clear guideline for employers that wanted to implement a policy limiting use of their communication systems to business-related purposes only. Under *Guard Publishing I*, an employer could promulgate a policy banning all non-business-related use of its communications systems, including e-mail.
- 3) Confirmed that employers could implement a policy that banned use of their communications system, including e-mail, for all non-business-related solicitations.

The Rationale and Impact of *Guard Publishing I* (continued)

However, *Guard Publishing I* required that the employer be incredibly diligent about policy enforcement. For example, if the policy banned all non-business use of e-mail, employers would have to discipline employees for even innocuous violations of the policy, such as informing a co-worker of a party, or face an unfair employment practice charge for discriminatory enforcement. This also potentially put a burden on employers to discover whether employees were violating the policy, lest the NLRB find that the employer permitted non-business use of its e-mail systems.

The *Guard Publishing II* Ruling

Neither the NLRB General Counsel nor the employer was happy with the ALJ's decision in *Guard Publishing I*. Both parties appealed the ruling to the NLRB, which issued its *Guard Publishing II* decision on Dec. 16, 2007.

The NLRB's Decision and Rationale

Although the NLRB affirmed *Guard Publishing I* in large part, it significantly deviated from the ALJ's analysis of whether *The Register* discriminatorily enforced its communications policy. Rather than examining whether the employer had objected to all types of non-business communications were objected to by the employer, like the ALJ did in *Guard Publishing I*, the NLRB "modified Board law regarding discriminatory enforcement" and adopted a more refined test. Under the NLRB's new analysis, the question is whether the employer consistently banned the same type of non-business-related use of its communication systems. The NLRB also affirmed that communication/no-solicitation policies are valid and do not violate Section 7 of the NLRA.

1. *E-mail Is Employer-owned Equipment and its Use Can Be Limited Without Violating the NLRA.*

Generally, employers have a basic property right to regulate and restrict employee use of company property. (See *Union Carbide Corp. v. NLRB*, 714 F.2d 657, 663-664 (6th Cir. 1993).) Accordingly, the NLRB has previously and consistently held that employees have no statutory right to use an employer's equipment or media, as long as the employer implemented non-discriminatory restrictions. For example, the NLRB has previously held that employees have no statutory right to use an employer-owned television to show pro-union videos. (See *Mid-Mountain Foods*, 332 NLRB 229, 230 (2000).) The NLRB also has found that employers may properly restrict use of their telephones. (See *Churchill's Supermarkets*, 285 NLRB 138, 155 (1987); *Union Carbide Corp.*, 259 NLRB 974, 980 (1981)). Similarly, employers can restrict use of copying machines (*Champion International Corp.*, 303 NLRB 102, 109 (1991)), public address systems (*Heath Co.*, 196 NLRB 134 (1972)) and bulletin boards (*Eaton Technologies*, 322 NLRB 848, 853 (1997)).

2. *E-mail Is "Employer Property" That it Could Restrict in a Manner Similar to Other Communication Devices.*

The general counsel once again asserted that e-mail was unlike other communication devices like telephones, copiers and bulletin boards. The general counsel and other organizations arguing on the union's behalf asserted that e-mail is a "common gathering place" for employees, like a lunch room or break room, and, accordingly, an employer could not ban personal use of e-mail during an employee's personal time. These groups presented essentially the same argument as the general counsel in *Guard Publishing I*:

e-mail is a “gathering place,” and, accordingly, personal or “non-business” use cannot be totally banned.

The NLRB rejected this argument. Instead, it found that e-mail is “employer property” similar to a telephone, bulletin board, copy machine or public address system. Accordingly, it held that an employer may lawfully ban employees’ non-work-related use of its e-mail system, so long as the ban did not discriminate against Section 7 activity. In *The Register’s* case, the NLRB found that its communication’s policy, which purported to ban all “non-business-related” e-mail use, was valid and did not discriminate against Section 7 activity on its face.

3. *Adopting the 7th Circuit Rationale, the NLRB Overturns Prior Board Decisions and Holds that Employers May Ban Some Personal E-mail Use While Permitting Other Use.*

As noted earlier, the NLRB had determined that if an employer permitted employees to use its communications equipment for non-work-related purposes, it could not validly ban employee use of communication systems for Section 7 purposes. (See *Fleming Co.*, 336 NLRB 192 (2001).) In an earlier case, *Guardian Industries*, 313 NLRB 1275 (1994), the court similarly held that an employer violated Section 8(a)(1) when it permitted employee “swap and shop” postings on its bulletin boards but banned union-related postings.

Both cases were appealed to the 7th U.S. Circuit Court of Appeals, which denied enforcement of the NLRB’s decision in both cases. (See *Fleming*, 349 F.3d 968 (7th Cir. 2003); *Guardian Industries*, 49 F.3d 317 (7th Cir. 1995)). In declining enforcement in *Guardian Industries*, the appeals court agreed that an employer could not discriminate against Section 7 activity. (*Guardian Industries, supra* at 319). The court reasoned that discrimination involves “the unequal treatment of equals.”

Accordingly, it analyzed whether *Guardian Industries* had treated similar types of non-work-related communications differently. The court noted that *Guardian Industries* had never allowed its employees to post notices regarding any organizational meetings, union-related or otherwise. Indeed, the only personal notices permitted were for employee announcements regarding personal “for-sale” items. The court found no similarity between announcements regarding union meetings and personal “for-sale” announcements. It therefore concluded that *Guard Industries* had not discriminated against the union.

In reviewing the NLRB’s decision in *Fleming*, the 7th Circuit affirmed its *Guardian Industries* decision. Like the “for-sale” notices in *Guardian Industries*, the court found that other personal postings (birthday cards, party announcements) were distinguishable from “organizational material” like meeting notices. (*Fleming, supra*, at 349). Accordingly, the employer had not discriminated against the union when it permitted postings of a personal nature but banned organizational notices.

Rejecting its own precedent in *Fleming* and *Guardian Industries*, the NLRB agreed with the 7th Circuit’s reasoning in both cases. The NLRB held:

“Thus, in order to be unlawful, discrimination must be along Section 7 lines. In other words, unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section-7 protected status.”

4. *Impact of Guard Publishing II.*

Under *Guard Publishing II*, an employer can permit employees to use company-owned e-mail for some purposes and ban other purposes, as long as the type of communication permitted or banned was consistent and consistently enforced.

The NLRB provided some helpful examples (see box).

Examples of Legal and Illegal E-mail Bans
<p>An employer would violate the NLRA if it permitted:</p> <ul style="list-style-type: none"> • employees to solicit for one union and not another, and • anti-union but not pro-union employees to solicit. <p>An employer would violate the NLRA if it:</p> <ul style="list-style-type: none"> • permitted solicitations of a personal nature (such as a car for sale or sports tickets for swap) but banned commercial sale of products (such as Avon); • distinguished between charitable solicitations (such as for the Red Cross or United Way) and non-charitable solicitations (such as for Amway); and • permitted personal invitations (such as to birthday parties and weddings) but not invitations for organizations (such as the Rotary club).

The NLRB recognized that in each of its examples of permitted distinctions, union-related solicitation could fall within the material the employer had banned. It emphasized that this is not the proper inquiry to determine whether a communication rule is discriminatory. Rather, the rule would only be discriminatory if it treated similar communications differently.

Application of Guard Publishing II

The *Guard Publishing II* decision affected not only the complaint against *The Register*, but also how the parties conduct collective bargaining.

Impact on Discipline of Employee

As discussed, *The Register* had permitted its employees to use company e-mail to send personal messages such as jokes, party announcements, birth and wedding announcements, and offers to sell or trade personal items such as sports tickets. However, there was no evidence that *The Register* permitted employees to use e-mail to solicit other employees to join or support any groups or organizations. Prozanski's August 14 and August 18 e-mails urged *Register* employees to wear green to support the Union and to participate in the Union's entry in a parade. The NLRB found that these e-mails were akin to soliciting for any other group or organization, which the employer apparently had banned previously. Accordingly, *The Register* had *not* violated the NLRA by disciplining Prozanski for sending them.

However, *The Register* had discriminated against Prozanski as to her May 4 e-mail. That e-mail was not a solicitation but an attempt to clarify facts surrounding a union rally. The NLRB found this communication was similar to the personal, non-work-related e-mails (party announcements, etc.) that *The Register* allowed. Accordingly, *The Register* violated Section 8(a)(1) by enforcing the communications policy against Prozanski in a discriminatory way.

Impact on Conduct of Collective Bargaining

The NLRB reversed the holding in *Guard Publishing I* that *The Register* had violated the NLRA during collective bargaining on the communications policy issue. However, the NLRB's decision was not based on a change in the law, but a different view of the facts. Unlike the ALJ in *Guard Publishing I*, the NLRB determined that the evidence on the record was insufficient to show that *The Register* had *insisted* on Counterproposal 26 before entering into a collective bargaining agreement. The NLRB noted that the union had withdrawn its unfair practice charge and shortly thereafter represented to *the Register* that it was ready to bargain over the proposal and that it neither "accepted nor rejected" the counterproposal. Also, the union never asked that the counterproposal be withdrawn from bargaining. Accordingly, *The Register* did not violate Section 8(a)(5) of the NLRA when it proposed and not voluntarily withdraw Counterproposal 26. The court did not, therefore, consider whether Counterproposal 26 was illegal on its face.

Guard Publishing II's Meaning for Employers

Employers now have much more flexibility to create and enforce e-mail usage policies. Employers have the ability to craft policies that permit employees to engage in social conversation and exchanges via e-mail, while still lawfully banning other non-business use or solicitations.

Employers may offer communications policies as a proposal in collective bargaining, even if the proposal is unlawful. However, employers still cannot insist on such a proposal as a condition of entering into a collective bargaining agreement. Employers should therefore proceed with caution when proposing a restrictive communications policy during collective bargaining.