The Section 7 Limits On Workplace Communications Policies

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The employer may own the computers, but it doesn't own the worker's rights.

IT'S 8:45 A.M. in an office anywhere in the United States. A woman has hung up her coat, seated herself at her desk, and pushed a button on her computer monitor. She logs on, and takes a sip of coffee while waiting to get connected to the office network. Her office email account opens, and she clicks on her Internet explorer icon. A webpage opens, and she clicks back to her office email account. She answers an e-mail from her supervisor, asking about the status of a project. She responds to an inquiry from a co-worker by attaching a document she has saved

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from a shared network file and forwarding a helpful e-mail from another co-worker. She clicks back on her Internet explorer icon, and sees a Dow Jones crawl. She clicks and looks, goes to the search bar, and types in the URL of her pension administrator. She studies how things seem to be shaping up, closes the window, and goes back to her email. She reads a message from a co-worker discussing (griping about, actually) possible raises in the next year. They exchange a few more emails on the topic, and she gets to work on a document that is part of a project she's been working on.

A few days later, everyone in the organization gets a somewhat churlish reminder that the company has a "communications policy," a document circulated some years ago, the provisions of which practically nobody in the organization follows to the letter. This policy states that the company's "electronic resources" are to be used "for business purposes only." Additionally, the two employees were chided—but not disciplined—for discussing salaries over office email. They're both annoyed about the whole incident. They don't intend to do anything about it, but they're both wondering—Did the employer have any right to monitor their emails and tell them not discuss salaries? And considering that everyone in the organization is expected to take work home and email it to the office (some even have remote access to the company's network), does it make any sense to have a "no personal use" policy at all?

In many workplaces, scenarios like this have played out over and over. Electronic communications, whether over the Internet or by private network email, is the principal mode of communication among employees in the typical workplace. These systems make it possible for employees to do more work more efficiently than was even imagined a few decades ago, and in many instances, employees no longer need to be physically present in an office to carry out their work. But with the reality of instantaneous communication and access to the Internet, employers have some legitimate concerns about how employees use their electronic communications tools. Workplace communications policies are common; and typically, these rules prohibit or limit employee use of the company's electronic systems for non-business purposes. Getting back to our scenario, though, the employer might have courted some trouble. "Business-use-only" rules might run afoul of rights guaranteed to employees under Section 7 of the National Labor Relations Act (the "Act"). 29 U.S.C. §157. This article focuses on the state of labor law regarding workplace rules prohibiting or limiting employee use of the employer's electronic communication systems for non-business purposes.

"CONCERTED ACTIVITIES" PROTECTED

• Section 7 of the Act provides employees with "the right to self-organiz[e], to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing...for the purpose of collective bargaining." 29 U.S.C. §157. Section 7 also protects employees' right to engage in concerted activities, distinct from union activities, for the purpose of mutual aid or protection. *Id.*

No Single Definition

A single definition of what constitutes protected, concerted activities does not exist. Several factors, however, must be present:

• First, the activity is concerted if it is undertaken by two or more employees, or by a single employee acting on behalf of other employees or at least with the objective of inducing or preparing for group action. *Cibao Meat Products*, 338 NLRB 934 *enfd.*, 174 LRRM 2224 (2nd Cir. 2004); *Bowling Transportation, Inc. v. NLRB*, 352 F.3d 274, 280 (6th Cir. 2003);

• Second, the activity must be undertaken for the mutual aid or protection of employees, regarding terms and conditions of employment. *Holling Press, Inc.*, 343 NLRB #45 (2004);

• Third, the activity must be pursued in a manner which would not "pull it from the protective umbrella of Section 7." *Canyon Ranch, Inc.*, 321 NLRB 937 (1996). (Employees have no right to wrongfully obtain information from employers); *Uniforms Rental Service,* 161 NLRB 187 (1966).

The Act prohibits employers from interfering with, restraining, or coercing employees in the exercise of these activities. 29 U.S.C. §158(a) (1).

Review Of The Employer's Workplace Rules

The National Labor Relations Board (the NLRB), the federal agency responsible for administering and enforcing the Act, will find certain workplace rules unlawful on their face, if they interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. Review by the NLRB of an employer's workplace rules and policies could arise under several circumstances, with or without union involvement. For example, when a union seeks to organize the employer's employees, the union may file charges with the NLRB alleging that the employer is committing an unfair labor practice by maintaining rules which interfere with the employees' Section 7 rights. Without any union involvement, employees may also file similar charges with the NLRB when the employer promulgates or enforces rules that allegedly "chill" or somehow interfere with those rights.

EMAIL "BUSINESS-USE-ONLY" RULES • The NLRB has not specifically addressed whether a rule prohibiting all non-business use of company email equipment is unlawful on its face. Based on NLRB precedent, however, an argument could be made that such rules are facially invalid. Alternatively, if the rule is not facially invalid, the NLRB might find that by disparately enforcing the rules, the employer violates the Act.

No-Solicitation/No Distribution Rule

Historically, employers have promulgated rules that prohibit employee solicitation and distribution of written materials on company premises. An employee soliciting support from other employees regarding changes in terms and conditions of employment, or distributing printed information, would violate such no-solicitation and no-distribution rules. At the same time, the only practical opportunity an employee may have to solicit or to distribute written materials to fellow employees in furtherance of concerted activities may be at the workplace.

Blanket No-Solicitation Rules Unlawful

Consequently, in examining the enforceability of no solicitation, or distribution policies, the NLRB has consistently held that blanket prohibitions of solicitation and distribution violate the employees' Section 7 right to engage in union or other protected concerted activity. *Republic Aviation Corp.*, 51 NLRB 1186 (1943), *affd. Republic Aviation v. NLRB,* 324 U.S. 793 (1945).

To strike a balance between the employer's legitimate business interests and the employees' Section 7 rights, the NLRB requires employers to tailor the no-solicitation and no-distribution rules. Thus, a no-solicitation policy can only prohibit solicitation during the employees' working time. *Churchill Supermarkets, Inc.,* 285 NLRB 138, 155-56 (1987). Employees must be permitted to engage in solicitation in the work area, during breaks, before and after work time, so long as neither the employee(s) soliciting, nor the recipients of the solicitation, are on work time.

Blanket No-Distribution Rules Permissible

The NLRB has treated no-distribution rules differently, because literature distribution could