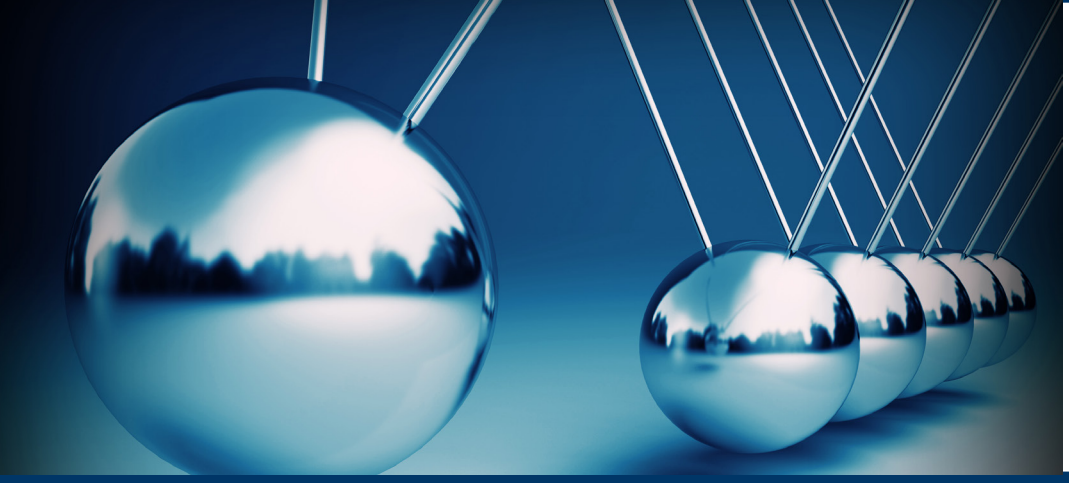

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The National Labor Relations Board Just Confiscated Your E-Mail System (And It Wants to Take the Rest of Your Stuff Too)

The headline of this article is an inaccurate exaggeration. But the NLRB did issue a decision on December 11, 2014 that dramatically changed the way employers can limit employee use of the employer's e-mail system. The written decision also calls into question decades of precedent holding that employers may limit the use by employees of any of the employer's equipment if the employees want to use it for union organizing or other protected activity.

At issue was an employer's "Electronic Communications Policy" that, like many such policies, "strictly prohibited" employees from using the employer's electronic communications systems, including e-mail for, among other things:

- Engaging in activities on behalf of organizations or persons with no professional or business affiliation with the Company; or
- Sending uninvited e-mails of a personal nature.

The employees in question had individual e-mail accounts on the system and used those e-mails for work purposes. No evidence showed that the employer made exceptions to this rule or that it had disciplined anyone for violating the rule.

A union sought to represent the workers and lost in secret ballot elections. The union then objected to the election results arguing that the Electronic Communications Policy violated the National Labor Relations Act because it was overbroad and employees should have been able to use the employer's e-mail system to help the union in its organizing efforts. At the trial level, the judge dismissed the allegations that the Electronic Communications Policy was unlawful. It applied a 2007 NLRB decision that allowed employers to restrict the use of its e-mail system.

However, in this case the Board voted 3-2 to overturn that earlier case and establish a new standard for employee use of an employer's e-mail system for union activity or any other National Labor Relations Act protected activity. The Board decided that employee use of e-mail for protected communications on non-working time "must presumptively be permitted by employers who have

If you have any questions about the issues addressed here, or any other matters involving Labor and Employment issues, please feel free to contact:

Susan J. Baronoff

Michael Colgan Harrington

Lauren M. Hopwood

William J. Keenan, Jr.

Hugh F. Murray, III

Lissa J. Paris

Rachel Faye Smith

Barry J. Waters

Jennifer A. Corvo

Stella Szantova Giordano

Colleen O'Neill

Monica P. Snyder

Kristen L. Zaehringer

chosen to give employees access to their email systems." The Board emphasized that it did not require that the employer allow employees to use e-mail, but if they did allow such use for business purposes they must allow it for union organizing and other protected purposes unless the employer could demonstrate "special circumstances" that would make a ban on non-work use necessary.

This ruling will almost certainly be appealed, and a court may or may not allow it to stand. Moreover, the NLRB has been a favorite agency of both parties for political show-downs in recent years, and with control of both Houses of Congress in the Republicans' hands next year this may become a high profile issue.

In the meantime, employers should take this opportunity to review their own electronic communications policies to ensure that they reflect reality. Most employers tolerate some degree of personal use of their e-mail system, and those employers should make sure that their policies conform with their practices. If an employer has a prohibition against any personal use of e-mail, it should examine whether such a policy is really necessary and examine whether it might have "special circumstances" that could justify such a blanket prohibition. If not, the employer may wish to amend its policy rather than be at risk of the NLRB bringing a claim alleging that it maintained an unlawful policy.

What about the parenthetical in our headline: "(And It Wants to Take the Rest of Your Stuff Too)"? One of the analytical hurdles that the Board needed to address was the decades of precedent holding that an employer does not have to allow employees to use its equipment for union organizing purposes. Rather than attempt to leap or circumvent this hurdle, the Board ran right through it, stating:

> *The supposed principle that employees have no right to use, for Section 7 purposes, employer equipment that they regularly use in their work is hardly self-evident. We reject its application here and we question its validity elsewhere.*

The Board followed this statement with a footnote announcing that it was explicitly overruling a 2005 case "to the extent that it held that the employer acted lawfully by prohibiting the employee from using a sheet of its used copier paper to notify coworkers about a union meeting." These statements and the larger context of this case certainly imply that unless the employer can demonstrate "special circumstances," employees are presumptively allowed to use any of the employer's property that they use in their work for purposes of union organizing or other protected activity.

All employers, union and non-union, need to be aware of this significant development regarding electronic communications policies (and perhaps more general policies on equipment use generally).

Please contact Hugh F. Murray, III at 860.240.6077 or hmurray@murthalaw.com or Michael Colgan Harrington at 860.240.6049 or mharrington@murthalaw.com if you have any questions concerning the issues discussed in this article.