



LABOR & EMPLOYMENT DEPARTMENT

ALERT

EMPLOYERS MUST USE CAUTION WHEN ENFORCING NO-SOLICITATION POLICIES

By Marvin L. Weinberg and Brian A. Caufield

In December 2007, we issued an [alert](#) reporting on the NLRB's decision in *Guard Publishing Company*.

Guard Publishing Company's (Guard) Communications Systems Policy (CSP) prohibited employees from using its communication systems and equipment to, among other things, solicit for outside organizations or other non-job-related solicitations. An employee, who happened to be the union president, sent three e-mails to co-workers using Guard's e-mail system: one correcting facts about a union rally, one soliciting support for the union's position in negotiations and one asking employees to participate in the union's entry in the upcoming town parade. Guard disciplined the employee for sending the e-mails.

The NLRB determined that the discipline for the union rally e-mail was unlawful because the e-mail was a "communication," not a prohibited "solicitation." The NLRB found that the discipline for the negotiations and town parade e-mails was lawful, reasoning that they were solicitations on behalf of an outside organization prohibited by the CSP, and there was no evidence that Guard had permitted similar solicitations on behalf of other outside organizations, just personal solicitations such as for sports tickets or other personal items.

On appeal, the D.C. Circuit Court of Appeals (No. 07-1528, D.C. Cir., 2009) found that the CSP was lawful (the union did not contest the CSP's lawfulness) but disagreed with the NLRB's reasoning on how the

policy could be enforced. First, the court upheld the NLRB's determination that the discipline for the rally e-mail was unlawful because the CSP prohibited certain solicitations and the rally e-mail was not a solicitation. With respect to the other two e-mails, the court reversed the NLRB's finding that the discipline was warranted, instead finding that Guard's attempt to draw a line against solicitations based on organizational as contrasted to personal status was a "post hoc invention" never invoked by it until before the NLRB filed its complaint. In short, there was no enforcement of the CSP on non-business use other than union use. Thus, when Guard disciplined the employee for soliciting for the union, as compared to allowing employees to solicit to sell personal items, it committed a violation of the National Labor Relations Act.

The court's decision allows an employer to distinguish between organizational and personal solicitations. However, employers are cautioned that they should have a written policy providing for that distinction and the policy must be enforced on that basis. Any attempt to draw the organization-personal distinctions for solicitations will be viewed in light of how an employer enforced the policy in the past.

For more information about this topic, contact the authors or any member of the firm's [Labor & Employment Law Department](#).

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