

Employment Law Developments to Ring in 2008

1. Keep Your Eyes on the Road – And Your Hands on the Wheel

On January 1, 2008, a new Washington law goes into effect that prohibits text messaging while driving. Under the new law, drivers who read and compose text messages could face a \$101 ticket. A related ban on talking on cell phones while driving without a hands-free device will be enforced in July 2008.

If you don't already have one, all employers are strongly advised to implement policies that govern the use of cell phones, PDAs and other electronic devices by employees while driving. We can assist you in preparing a policy that is right for your business. The consequences of not having such a policy can be severe. A recent case in Virginia involving a law firm associate is instructive. The associate was driving while talking on a cell phone and struck and killed a pedestrian walking on the side of a roadway. Family members of the deceased victim sued the law firm, arguing that the firm was vicariously liable for the death because the associate was acting in the course and scope of her employment. The family members further argued that the law firm was negligent by failing to enact a policy regulating cell phone use by its employees while conducting business. The parties settled out of court for an undisclosed sum, but the plaintiffs were seeking \$30 million in damages.

2. Minimum Wage Rising

Washington's minimum wage will increase 14 cents to \$8.07 an hour beginning Jan. 1, 2008. The Department of Labor and Industries recalculates the state's minimum wage each year in September as required by Initiative 688, which was approved by Washington voters in 1998. The law requires an annual adjustment to the state minimum wage corresponding to the change in the federal Consumer Price Index for Urban Wage Earners and Clerical Workers during the 12 months ending each Aug. 31. Washington's minimum wage applies to workers in both agricultural and non-agricultural jobs, although 14 and 15-year-olds may be paid 85 percent of the adult minimum wage.

3. NLRB Gives Employers Broad Latitude to Maintain Control Over Company E-Mail

For many months, employers and unions alike have been anxiously awaiting word from the National Labor Relations Board (Board) on whether employers can bar employees from using corporate e-mail for union activities or organizing. The Board has now issued its decision and it ruled decisively in

favor of employers.

The Board's closely split 3-2 decision came in a case involving an Oregon newspaper (The Register Guard). The Board held that "employees have no statutory right to use an employer's equipment or media for Section 7 communications." Section 7 of the National Labor Relations Act permits employees to engage in certain protected activity, including union activity such as solicitation, organizing, grievances, picketing, strikes, and discussions about the terms and conditions of employment. In the wake of this decision, an employer may "lawfully bar employees' non-work-related use of its e-mail systems," including use for union activities.

The Board cautioned that employers must not discriminate against employees in the exercise of their Section 7 rights, although the Board defined "discriminating" in a narrower fashion than it had previously. In some of its prior decisions, the Board had found discrimination where an employer disciplined an employee for using company e-mail or bulletin boards for union activity but permitted other employees to use e-mail or bulletin boards for non-work material, such as baby shower invitations, Final Four office pools or charitable solicitations. The Board overruled its past decisions, explaining that "unlawful discrimination consists of disparate treatment of activities or communication of a similar character because of their union or other Section 7-protected status."

What does that mean? The Board explained that an employer could not permit employees to solicit for one union but not another, or permit the use of e-mail for anti-union communications but not pro-union communications. By contrast, the Board explained, an employer could properly permit only business-related communications on e-mail, ban all solicitations via e-mail, permit only charitable solicitations or, most surprisingly, permit all solicitations of a personal nature, but not "group" solicitations.

Employers should review their existing policies to ensure that they comply with the Board's decision. If your policy bans the use of e-mail for non-work related purposes, the policy most likely does not need to be revised. If your policy allows employees limited use of e-mail for charitable purposes or for solicitations of a personal nature (parties, office pools etc.), it is still likely to survive scrutiny under this new Board standard. Of course, a company policy cannot be motivated by anti-union animus or be a subterfuge for stopping union-related communication. In addition, a company cannot prohibit union related communication while permitting similar communications relating to other membership organizations. Now is a prudent time for employers to review their existing policies to ensure that they comply with the Board's decision in Guard Publishing.

We'll continue to monitor developments, as this decision may be appealed to the United States Court of Appeals. In addition, control of the National Labor Relations Board will be at issue in the 2008 Presidential election (as 3 of the 5 members of the Board typically are from the President's party). Given the Board's willingness to reverse itself when the composition of the Board changes, the Register Guard case could be up for grabs in 2009.

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