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### NLRB Telegraphs Possible New Standard for Employee Email Use

By: Aaron D. Graves, Chair, Workplace Law Group

On Friday, September 30, 2022, the NLRB reversed its earlier stance that Chelsea Befort was lawfully terminated for violating T-Mobile's electronic communications policy. Ms. Befort sent mass emails to all 595 Customer Service Representatives at T-Mobile's Wichita Kansas call center urging them to join a union and attend a union event the following night. Ultimately, the NLRB found the termination unlawful because T-Mobile "selectively and disparately enforce[ed] its Acceptable Use Policy, Enterprise User Standard, and No Solicitation or Distribution Policy against Befort's union-related email". *T-Mobile USA, Inc.*, 371 NLRB No. 163, slip op. at 1.

The decision sidestepped the debate over changing the NLRB's existing standard for workplace electronic communications. However, Member Prouty asserted, in a series of footnotes, that the current pro-employer standard for email use is fundamentally flawed and should be replaced with a basic discriminatory enforcement standard – **prohibiting email use for union activity would be unlawful if personal, non-work related email is permitted.**

This standard would ignore employer property rights in its electronic communications equipment but, in at least Member Prouty's opinion, an employer waives its rights by allowing non-business usage of electronic communications. "Once an employer permits its equipment to be used for any nonwork-related reasons ... the employer has demonstrated its willingness to yield its property right in that equipment for nonwork purposes, which necessarily includes union ... content." *Id.*, slip op. at 5.

Such a standard is fundamentally out of touch and ignores the realities and complexities of the modern workplace. However, employers should prepare to live under this standard or something similar. With the Biden Administration's liberal majority and General Counsel Jennifer Abruzzo now in place, major changes should be expected in the near future.

Employers with questions or concerns about electronic communications policies should contact a member of **Bodman's Workplace Law Group** for more information. Bodman cannot respond to your questions or receive information from you without first clearing potential conflicts with other clients. Thank you for your patience and understanding.

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