Your e-mail, your privacy and your right to organize

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LEGAL CORNER

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FOR THOSE OF my readers in their 40s or older, try for a moment to imagine how your life was before the advent of e-mail. Hard to do, isn't it? (For my younger readers, this must seem impossible!) Before e-mail, do you remember constantly being on the phone? Did you write and receive letters? How did you communicate with colleagues and loved ones? I for one cannot possibly fathom how I conducted my life prior to using e-mail.

It's also obvious to me that not only has the method of communication changed radically but the amount of time we spend communicating has also expanded.

E-mail has not actually replaced oral or other written forms of communication. It has merely supplemented them. However, as it stands now, e-mail is the primary basis by which I communicate professionally and personally. It is inextricably intertwined with how I live. Perhaps this is true for most people. Even more remarkably, I cannot pinpoint an exact period of time when I started to rely on e-mail. It was a completely seamless transition. I would venture to guess that the use of e-mail and other modes of electronic communication have undisputedly become the predominantx means of communication in our society today.

In 2007, the National Labor Relations Board was posed an intriguing question related to e-mail. The question was this: are employees allowed to use their work e-mail during non-working time to discuss the terms and conditions of their employment with other employees? The NLRB said no. In its decision in *Register Guard, 351 NLRB No 70 (2007)*, the NLRB held that an employer may completely prohibit employees from using its e-mail system to engage in concerted activity for mutual aid and protection, even if they were otherwise allowed access to the system.

In this decision, the NLRB equated an employer's e-mail system to other communication equipment the employer owned, such as bulletin boards, copy machines, public address systems and telephones. Under prior NLRB decisions, the board has held that an employer can completely ban non-business use of such equipment, even if the use was not on working time.

The Register Guard decision was widely criticized as being totally out of touch with reality on many fronts. The dissenting opinion in fact equated the anachronistic majority opinion with a viewpoint that could only be formulated by Rip Van Winkle!

I lamented the harmful impact of the Register Guard decision in my March 2008 Allegro column, which can be read at **www.Local802afm.org/allegro**.

Well, after eight long years of slumber it finally looks like Mr. Van Winkle has awoken. On Dec. 11, 2014, the NLRB issued a decision in which it overturned Register Guard. The decision was *Purple Communications, Inc. and Communications Workers of America, 361 NLRB No. 126*. There, the NLRB held that employee use of e-mail for statutorily protected communications (those pertaining to terms and conditions of employment), on non-working time must presumptively be permitted by employers who have chosen to give employees access to their e-mail systems. The newly constituted NLRB held that the Register Guard decision improperly focused on employers' property rights, rather than on their limited ability to control and limit employees' communication at the workplace on non-working time. Viewing e-mail as being the equivalent to property such as a bulletin boards or public address systems simply did not take into account the fundamental ways e-mail systems varied from these tangible items.

First and foremost, e-mail systems are not limited resources. Multiple communications on a myriad of topics can be transmitted simultaneously, unlike a bulletin board or public address system. An e-mail can be sent to an unlimited number of recipients at the same time. Further, employees can determine whether or not to read or respond to an e-mail based upon the topic heading contained on it.

Thus, the NLRB concluded that an employer's e-mail system was less like a photocopy machine and more like a "new natural gathering place and forum in which coworkers who share common interests will seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees."

In re-focusing on e-mail as a modality of communication rather than piece of property owned by an employer, the NLRB finally recognized the ubiquity of e-mail and how prior limitations on its use hampered employees' associational rights.

While this decision should be celebrated, it must be noted that it has absolutely no impact upon any other means of employer-owned electronic communication. For instance, workers don't necessarily have the right to organize by leaving comments on an employer's Facebook page. Further, this decision does not protect workers at a workplace where an employer does not permit employee use of e-mail for *any* reason, work-related or not. Additionally, employers may continue to monitor employee e-mail communications as they had previously, which of course could constrain employee e-mail organizational campaigns, which almost always require stealth and candor.

Nonetheless, this decision is a remarkable one that reflects a new era in NLRB adjudication, and hopefully will countervail less progressive decisions rendered by the Supreme Court this term. The decision will have retroactive effect.

In a similar progressive development, the NLRB has also announced more streamlined representation election rules that should make union organization campaigns more likely to succeed. Litigation of bargaining unit issues will now be reserved until after the representational election. Also, bargaining unit employee e-mail addresses are now required to be provided to the union prior to the representation election. This too is a development that should be applauded.

All in all, this is a good way for organized labor to begin the New Year.

Also, see next page for a special column by Harvey Mars about the AFM pension fund and a new federal law.

New pension law is no cause for panic

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IN MARCH 2010, the AFM and Employers' Pension Fund revealed that it was implementing a rehabilitation plan, freezing both employer contribution levels and the multiplier it uses to calculate the amount of pension to which an eligible participant is entitled. It also announced that it was implementing employer surcharges. This was a mandated consequence of the 2008 amendments to the Pension Protection Act, known as the Worker, Retiree and Employee Recovery Act ("WRERA"). Under WRERA, if a fund is certified as being in critical (red zone) status – meaning that at that time its assets could only pay 65 percent of its vested pension liability, if everyone who had vested a pension decided to retire at the same time – it must enact steps to improve its funding percentage. Thus the rehabilitation plan was formulated and implemented on April 30, 2010.

The fund's red zone certification engendered a huge degree of concern among members, and there was an outgrowth of fear that the fund was headed towards insolvency.

To quell this concern, on Feb. 17, 2010, Local 802's officers along with former Local 802 President Bill Moriarity (who is also a fund trustee) met with members to discuss the status of the fund and the ramifications of its red zone certification Further, I published an article in Allegro that demonstrated that given its current funding levels, anticipated retirement patterns and a modest 7.5 percent growth of fund assets, the fund would remain solvent for approximately the next 40 years. (The article can be found at **www.Local802afm.org/allegro** and also **www.polyphonic.org**.)

Presently the fund is in much better standing than it was in 2010. It is 88 percent funded. Nonetheless, it remains in the red zone since it is projected to have an accumulated funding deficiency through March 31, 2019. This is as expected, given its prior funding levels. However, the fact the fund is in the red zone and will most likely remain in critical status for the foreseeable future has no impact on its solvency. The fund is solvent and projected to remain solvent.

Pension law has remained static for several years. However, on Dec. 16, 2014, Congress enacted the Continuing Resolution/Omnibus spending bill (which was nicknamed the Cromnibus Bill). This law radically changed the complexion of pension law for multi-employer funds, including our own.

Under this statute, which seemed to whiz by Congress with little debate, certain pension plans are now permitted to modify vested benefits even while they are paying out benefits. This is an extraordinary remedy, since one of the primary tenets of ERISA (the federal law guiding operation of multi-employer pension plans) is that once a pension is vested it cannot be altered, decreased, modified or otherwise alienated. The new law changes this fundamental principal.

However, what must be stressed is that modification of paid pension benefits is only permissible in extremely limited and dire circumstances.

The effort this new legislation has undertaken is to stave off bankruptcy for the most deeply underfunded plans, those that are teetering on the brink of insolvency. Roughly 200 multi-employer pension funds are in this direly critical status. The thinking is that some pension benefit for retirees is better than none.

Further, permitting the adjustment of benefit payments will give greatly needed relief to the Pension Benefit Guarantee Corporation, the federal agency that would be picking up the tab for any multi-employer defined benefit plan that became insolvent. The new law protects the PBGC just as much as it protects soon-to-be insolvent pension plans.

Under the Cromnibus law, paid benefits may only be adjusted if a given pension fund will not have enough money to pay vested benefits in 10 to 20 years. Benefit adjustments could go down as much as 60 percent, but vary depending upon the age of the retiree. (In rare circumstances, cuts could exceed 60 percent of the current benefit. There is a limit established by the law and cuts cannot exceed 110 percent of the PBGC guaranteed benefit level.)

The older the retiree, the less the permissible adjustment. Furthermore, any decision to decrease benefit payments must be approved by the majority of the pension fund's board of trustees. The law does not apply to single employer pension plans. Finally, the law also extends application of the Pension Protection Act, which expired last year.

As it presently stands, this law does not (and in all likelihood will not) apply to the AFM pension fund since our fund is projected to remain solvent through at least 2047, the longest period for which actuaries have made projections.

Musicians who are currently receiving pension benefits from the fund should rest secure. They can rely upon a stable income from the pension that they earned through their many years of labor. Like the announcement of the rehabilitation plan, the enactment of this new legislation is not cause for alarm.

The union trustees of the fund have issued a statement in this regard, which is set forth below.

*Harvey Mars, Esq. is counsel to Local 802. See also Harvey's regular legal column in this issue on the facing page. Legal questions from members are welcome. E-mail them to **HsmLaborLaw@HarveyMarsAttorney.com**.*

STATEMENT ON PENSION

The following was previously published in the January 2015 issue of Allegro on page 5.

AS A MEMBER of the board of trustees of the AFM and Employers' Pension Fund, I received the following communication authored by members of the union-side trustees. I am aware that there are some concerns and questions regarding the recently passed legislation regarding multi-employer pension funds. As a trustee to the fund, I agree with the following statement.

"As you may be aware, last week Congress passed a spending bill to prevent a federal government shutdown. Attached to the legislation were 162 pages of changes to the government's multi-employer pension rules. Many of these were technical modifications to the existing law. However, a significant new provision would allow certain financially troubled funds to lower benefits already earned by participants, including those receiving pensions. The provisions would apply only to those funds facing imminent insolvency (within 10 to 20 years). Each eligible fund's trustees could decide whether or not to use the provisions and, should they decide to apply them, there is a provision for a participant vote to reject the reductions, although it is at present unclear how that would work. No benefit could be lowered to less than 110 percent of the Pension Benefit Guarantee Corporation's guarantees, right now just under $13,000 a year. Those provisions would not apply to the AFM-EPF at present since it is currently projected to be solvent through at least 2047, which is the longest period for which the actuaries have made projections." – AFM-EPF Trustees Bill Moriarity, Laura Ross, Brian Rood and Phil Yao

This expresses our individual views. If the board of trustees subsequently issues an official statement, we will provide it to you right away.

– **Local 802 President Tino Gagliardi**