

Employees May Use Employers' Email System to Engage in Protected, Concerted Activity, NLRB Rules

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Companies that provide employees access to email systems "must presumptively" allow those employees to use them for statutorily protected communications on non-working time, the National Labor Relations Board (NLRB) ruled in *Purple Communications* on December 11, 2014, reversing the Board's seven-year old precedent.

In 2007, the NLRB held in *Register-Guard* that employers may completely prohibit employees from using employers' email systems to engage in activity protected by the National Labor Relations Act (NLRA). Many employers relied on *Register-Guard* in adopting and implementing "business use" only technology policies in response, which generally prohibit employees from using employer technology for non-business purposes.

In *Purple Communications*, the NLRB examined an employer's "business purposes only" electronic communications policy that expressly prohibited employees from "engaging in activities on behalf of organizations or persons with no professional or business affiliation with the company" and from "sending uninvited email of a personal nature." There was no question that this policy complied with the NLRA under *Register-Guard*.

In overruling this precedent -- and with two vigorous dissents -- the NLRB (3-2) emphasized the centrality of email in today's modern workplace. It has, according to the majority, "become a critical means of communication, about both work-related and other issues, in a wide range of employment settings" and its "effectiveness as a mechanism for quickly sharing information and views increases its importance to employee communications."

Because *Register-Guard* failed to "fully acknowledge the major role" email plays in employees' workplace communications and because it gave too much weight to employers' property rights (i.e., control over its technology systems), the NLRB in *Purple Communications* overruled that precedent and adopted a new paradigm to evaluate similar employer policies. That is, the NLRB "will presume that employees who have rightful access to their employer's email system in the course of their work have a right to use the email system to engage in Section 7-protected activity on nonworking time." An employer may then rebut this presumption "by demonstrating that special circumstances necessary to maintaining production or discipline justify restricting its employees' rights." Finally, it is worth noting that the NLRB retroactively applied this new approach and remanded the case to allow the employer to present rebuttal evidence against this new presumption.

What Does this Mean for Employers?

The *Purple Communications* majority stressed that its decision is "carefully limited." Accordingly, it only applies to employees who have already been granted access to their employers' email system in the course of their work and only during nonworking time. *Purple Communications* does not grant non-employees the right to access an employer's email system and it does not require an employer to grant employees access to its email system, where it has not chosen to do so. Moreover, *Purple Communications* does not prevent an employer from establishing uniform and consistently enforced restrictions, such as prohibiting large attachments or audio/video segments, if the employer can demonstrate that they would interfere with the email system's efficient functioning. Finally, nothing in *Purple Communications* prevents an employer from monitoring their computers and email systems for legitimate management reasons, such as

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ensuring productivity and preventing email use for purposes of harassment or other activities that could rise to employer liability, provided that the employer does nothing out of the ordinary, such as increasing its monitoring during an organizational campaign and/or focusing its monitoring efforts on protected conduct or union activists.

Whether the majority's decision will ultimately prevail remains to be seen as an appeal is possible, if not likely. Unless and until that happens, as indicated in one of the dissents, it is not unreasonable to conclude that the Board's rationale in *Purple Communications* could "extend beyond email to any kind of employer communication network (be it instant messaging, internal bulletin boards, broadcast devices, video communication or otherwise) that employees have access to as part of their jobs." Therefore, employers are advised to review their current policies governing employee use of technological resources to ensure compliance with this decision.