NLRB Reverses Course and Creates Presumptive Right for Employees to Use Employers' Email Systems for Union Organizing

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Earlier this month, the National Labor Relations Board (NLRB) held that employees who are given access to employer email systems for work purposes are now presumptively permitted to use those systems for certain union organizing and other concerted activities during non-working time. This decision reverses the Board's 2007 decision in Register Guard, 351 NLRB 1110 (2007), calling its earlier decision "clearly incorrect."

Section 7 of the National Labor Relations Act protects the right of employees to engage in union and other "concerted" activities for "mutual aid or protection." In Register Guard, the NLRB balanced employers' property rights with employees' section 7 rights and held that an employer may ban non-work uses of company email, provided the prohibition is not applied to discriminate against union activity (e.g., permitting employees to use email to solicit on behalf of other causes, but not unions). The Register Guard decision treated employer email systems in a manner akin to other employer property, including telephones and bulletin boards, where non-work related uses have historically been lawfully prohibited.

In Purple Communications, Inc., 361 NLRB No. 126 (2014), the Communications Workers of America (CWA) contended that Purple's restrictive email policy interfered with employees' free choice in union elections held at two of Purple's facilities. Purple's employees were given access to Purple's email system at their work stations, in the employee lounge area, and on personal devices, although Purple's employee handbook prohibited all non-work uses. Although there was no evidence that Purple applied its email policy in a discriminatory manner, the CWA argued that the policy was facially unlawful, violating the employees' Section 7 right to engage in union and other concerted activities.

In its decision, the NLRB stated that Register Guard overvalued employer property rights when weighing them against the communication rights of employees. According to the Board, unlike telephone systems and bulletin boards, non-work use of an email system does not add costs to the employer, nor prevent concurrent work use. The Board instead followed another line of cases, beginning with the U.S. Supreme Court's Republic Aviation decision, where the Supreme Court held it to be presumptively unlawful for an employer to prohibit union solicitation by employees, on the employer's premises, during non-work time, in the absence of evidence that 'special circumstances" made the rule necessary to maintain production or discipline. (For example, both the Supreme Court and the Board have accepted restrictions on union solicitation during non-working time in "immediate patient care areas" of hospitals, as a special circumstance, because such solicitations may adversely affect patient care.)

Applying the Republic Aviation principles to email, the NLRB noted that while face-to-face communication was the standard for employee communication in the 1970s, email is now the primary form of work communication. This central role makes employer email systems

"uniquely appropriate" for self-organization and employee discussion of the terms and conditions of employment. Thus, the Board held that it is presumptively invalid for an employer to prevent an employee, who is already given access to an employer email system, to be prevented from sending "protected" union and other concerted activity communications during non-working time, unless special circumstances are present. Thus, the Board held that it is presumptively invalid for an employer to prevent an employee, who is already given access to an employer email system, to be prevented from sending "protected" union and other concerted activity communications during non-working time, unless special circumstances are present. The Board remanded the case for the Administrative Law Judge to reconsider the legality of Purple's policy under this new standard.

As is often the case, the Board's decision was split on partisan lines. In their separate dissents, the two Republican members of the Board noted:

• In order to enforce an email policy, the new rule will require employers to determine which emails qualify as "protected" activity, in essence encouraging employers to engage in the surveillance of employees' union activities.
• The new rule foreshadows future expensive litigation on the meaning of "special circumstances" in the digital realm.
• Contrary to the majority's claim that employer email is essential to employee communication, the dissent cited the availability of social networking platforms and smartphones as popular alternative means of communication.
• Forcing employers to subsidize speech that they do not necessarily support violates employers' property and First Amendment rights.
• Most significantly, the disruption caused by the new rules will be far greater than that caused by face-to-face communications between employees on non-work time. While compliant employees may send protected emails only during times when they are not working, those messages may well be received
and read by employees who are on the clock. Thus, the employer will often be forced to subsidize the time spent reading these messages, which will negatively affect productivity and efficiency. Moreover, it remains to be seen whether employees found to be reading protected emails during working time may be lawfully disciplined.

ASK MSK

Q: What steps should employers take in response to the new Purple Communications decision?

A: Employers should carefully review existing email access policies to make sure that they conform to the NLRB's new rule. Any email use policy that completely prohibits the sending of non-work emails will be presumptively unlawful.
Moreover, this rule only applies to those employees who are given access to email systems for business use; therefore, employers should confirm that only those employees with a true business need are given access to the company email system. While it is doubtful that employers may restrict employee email access during their non-working times while at work, employers should consider restricting remote email access only to essential employees.

Q: May an employer prohibit abusive use of their email systems?

A: Yes. Employers may still monitor and punish unlawful activity on their email systems, including harassment or bullying behavior and the downloading or sending of files in violation of Copyright law. Employers also may want to implement or increase email monitoring policies, in response to an expected increase in employees' personal email traffic, in order to prevent unlawful use of company email systems. Beyond these examples, this new rule creates uncertainly on permissible use restrictions. Employers should consider preventing downloads containing damaging viruses or the sending of personal email attachments that are large enough to disrupt the employer's system. However, these and other similar limitations must be narrowly drawn to meet the "special circumstances necessary to maintain production or discipline" standard.