

Control Of Company E-Mail Could Quickly Slip Away: NLRB Signals A Potentially Massive Shift In Employers' Rights

Labor & Employment Law Update

on May 7, 2014

On May 1, 2014, the National Labor Relations Board ("board") issued a news release regarding the board's decision in *Purple Communications, Inc.*, to invite briefs on the issue of overruling existing board precedent on employees' use of company e-mail systems.

Current precedent allows employers to restrict employee use of an employer's e-mail system to business purposes only. One consequence of a properly enforced business-purposes-only rule is that employees have no right to use their employer's e-mail system for union organizing efforts or other union-related activities.

The board's notice and invitation to file briefs issued in *Purple Communications* expressly puts employers on notice that the board is actively considering overruling existing law in order to force employers to open up their e-mail systems to union activity. If the board overrules current precedent, it will effect a massive intrusion into employers' ability to ensure that employees engage in productive activity at work. Such a change, however, would dovetail with other recent board efforts to tip the scales in favor of union organizing campaigns.

Specifically, the notice and invitation states that the board will consider the following five questions:

1. Should the board reconsider its conclusion in *Register Guard* that employees do not have a statutory right to use their employer's email system (or other electronic communications systems) for Section 7 purposes?
2. If the board overrules *Register Guard*, what standard(s) of employee access to the employer's electronic communications systems should be established? What restrictions, if any, may an employer place on such access, and what factors are relevant to such restrictions?

3. In deciding the above questions, to what extent and how should the impact on the employer of employees' use of an employer's electronic communications technology affect the issue?

4. Do employee personal electronic devices (e.g., phones, tablets), social media accounts, and/or personal email accounts affect the proper balance to be struck between employers' rights and employees' Section 7 rights to communicate about work-related matters? If so, how?

5. Identify any other technological issues concerning email or other electronic communications systems that the board should consider in answering the foregoing questions, including any relevant changes that may have occurred in electronic communications technology since *Register Guard* was decided. How should these affect the board's decision?

If the board overrules *Register Guard*, employers will be forced to revise existing policies and employee handbooks, and create new policies to rein in employee use of company e-mail for non-productive purposes.

Initial briefs on these questions are due to the board by June 16, 2014, and we will provide updates on this matter as soon as additional information is available.

Control Of
Company E-
Mail Could
Quickly Slip
Away: NLRB
Signals A
Potentially
Massive
Shift In
Employers'
Rights