

CLIENT ALERT: NLRB Expands Rights of Employees to Use Employer Email

In a 3-2 decision, the National Labor Relations Board reversed its own decision from 2007, and significantly expanded the rights of employees to use employer email systems to communicate about unions or terms and conditions of employment. *Purple Communications, Inc.*, 361 NLRB No. 126 (December 11, 2014).

In *Purple Communications*, the employer's policy provided that its email system and other technology was the sole and exclusive property of the company. The policy stated that the equipment should be used for business purposes only. The policy prohibited employees from using the email system and other technologies on behalf of organizations or persons with no professional or business affiliation with the company and/or to send uninvited email of a personal nature.

The Board majority recognized that the employer's policy and practices were lawful under the Board's 2007 decision in *Register Guard*. In *Register Guard*, a decision which was enforced in relevant part by the Court of Appeals of the District of Columbia, the Board by a 3-2 vote had ruled that employees did not have a statutory right under the National Labor Relations Act to utilize an employer's email system. Nevertheless, and with what the majority described as sparse evidence of use of the email system for non-business purposes, the majority held that Purple Communications' policy was unlawful.

In *Purple Communications*, the Board majority held that the *Register Guard* decision focused too much on employer property rights and too little on the importance of email as a means of workplace communications. It reasoned that the *Register Guard* decision failed to adequately protect employee rights and abdicated the Board's responsibility to adapt to "changing patterns of industrial life." There was a vigorous dissent from the Board two Republican members.

Based on the majority ruling in *Purple Communications*, employees with access to the employer's email system, are presumptively permitted to use email for statutorily protected communications (communications relating to unions and terms and conditions of employment) on non-working time. The employer can rebut this presumption and justify a total ban on non-work use of email if it can demonstrate special circumstances which make the ban necessary to maintain production or discipline. The majority noted that such special circumstances would be rare. Even absent special circumstances, the employer can apply uniform and consistently enforced controls over their email systems such as prohibiting large attachments or audio/video segments if it can demonstrate that they would interfere with the email system's efficient functioning. An employer need not provide an employee with access to email, but if it does, these rules apply.

This new Board law does not provide non-employees with rights to access an employer's email system. Further, the Board decision does not grant employees the right to write or read emails on work time. However, an employer must be careful about the monitoring of employee emails to ensure that it does not engage in unlawful surveillance of union or concerted activity. Further, an employer must be careful to avoid claims of discriminatory enforcement of its rules relating to electronic communications during work time. Any such rules should be applied consistently, and not single out employees who engage in statutorily protected communications.

The employer in *Purple Communications* has a right to appeal the NLRB's decision to a United States Court of Appeals. As of this writing, it is uncertain whether such an appeal will be filed.

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