

September 2015

## NLRB Extends Its Email Rule to the Health Care Workplace

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The National Labor Relations Board (Board) continues its scrutiny of employer policies—this time striking down an email policy designed to ensure that health care employees provide patient care without distraction. *UPMC*, [362 NLRB No. 191](#) (August 27, 2015). The employers in this most recent case were two acute-care hospitals, UPMC Presbyterian Shadyside and Magee-Women’s Hospital of UPMC (Hospitals), that maintained a policy prohibiting staff from using the hospitals’ email system for any type of solicitation at any time. Building on its recent decision in *Purple Communications*, [361 NLRB No. 126](#) (December 11, 2014), a 2-1 majority of the Board applied its presumption that employees with access to their employer’s email system have a right to use that system to engage in union activity during nonworking time, absent “special circumstances.” While the Board acknowledged that “using a hospital’s email system during working time may be distracting,” it found the policy unlawful because, among other reasons, it prohibited only one type of communication (solicitation) and because the policy’s prohibition on solicitation was not limited to working time.

In a dissenting opinion, Member Johnson criticized the majority for ignoring the practical impossibility of limiting incoming email to nonworking time and for dismissing the heightened risk of patient care errors (and the consequent potential liability to the Hospitals) resulting from health care workers being distracted by incoming email. More specifically, the dissenting opinion observed that it is practically impossible for a 24/7 operation to ensure that emails unrelated to work (including union-wide emails with potentially numerous replies) would only be received by the various recipients during their specific nonworking times. Also, for health care employees required to use their email for work, the dissent notes that they must necessarily check an increased volume of incoming email (because email solicitations are included) to determine whether each such incoming email requires their attention or may be ignored.

Finally, Member Johnson cited numerous reports on the relationship between medical errors and “the distraction and constant interruptions prevalent in the health care environment,” including an article noting that “[s]uch events as the computer signaling an incoming email have been identified as very real sources of interference in the hospital environment where the intense focus necessary for effective patient care is already besieged by myriad and constant interruption diverting a practitioner, even for a few moments, from the task at hand.”

Although a health care employer may choose not to permit employees access to its email system, the Board now holds that an employer that does permit such access must give its employees the right to use the email system to engage in union activity. A health care employer seeking to limit that right must establish that special circumstances justify any limitations and must establish the connection between the restriction and the narrowly tailored limitation. In this most recent case, the Board determined that the Hospitals had not met that burden.

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For more information or if you have questions about how the issues raised in this alert affect your policies and practices, please contact one of the following members of our [Labor, Employment, Benefits + Immigration Group](#):

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