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Client Alert News Flash

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Employees May Use Company Email to Support Unions

Employers who provide email access to employees may have provided employees with a powerful union-organizing tool.

On December 10, 2014, the National Labor Relations Board (NLRB) issued a decision reversing a 2007 NLRB decision which held that an employer could prohibit use of its company email system for union organizing purposes.[1] Recently, the General Counsel's office of the NLRB had advocated for a change in that decision. The NLRB's decision in *Purple Communications, Inc.*, 361 NLRB No. 126 (2014) reflects that shift.

In *Purple Communications*the NLRB ruled that employees who have been granted access to an employer's email system can use that system to attempt to unionize the workforce, provided they do not do so during work time.

Section 7 of the National Labor Relations Act (NLRA) guarantees, among other things, employees' rights to self-organize, to form, join or assist labor organizations, and to engage in concerted activities for the purpose of collective bargaining. Section 8(a)(1) of the NLRA makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by section 7."

In its 2007 decision, the NLRB rejected employees' claims that their employer violated section 8(a)(1) by prohibiting use of its email system for "nonjob-related solicitations," which included union-related activity. The NLRB held that employees have no statutory right to use an employer's email system for Section 7 purposes, and that a policy prohibiting use for "nonjob-related solicitations" therefore did not violate Section 8(a)(1).

The NLRB has now decided that its prior ruling was "clearly incorrect."

Background

Purple Communications assigned its employees individual email accounts, which they used on a daily basis at work. The company's policy provided that all electronic equipment and systems access "should be used for business purposes only." The policy further prohibited "[e]ngaging in activities on behalf of organizations or persons with no provisional or business affiliation with the Company," and "sending uninvited email of a personal nature."

The union, the Communications Workers of America, AFL-CIO, successfully petitioned for elections at seven of the company's locations, but filed objections to results at two locations, asserting that the policy interfered with the employees' freedom of choice. The union also filed an unfair labor practice charge

concerning the policy. The union argued that if the employer generally allows employees access to the system and uses the system to communicate with them concerning hours, wages or working conditions, the employees should be allowed to use the system for Section 7 purposes — unless the employer can demonstrate that use of the system is expressly limited to specific and defined business purposes. The employer argued that it had a strong property interest in the systems, and that the employees had adequate alternative means to communicate, such as smart phones and personal email accounts.

The NLRB concluded that its prior decision had overemphasized the employer's property right in the system, underemphasized the employees' Section 7 rights, failed to appreciate the importance of email as a communication method, and failed to recognize that the risk that an employee's use of the email system to communicate on Section 7 issues was unlikely to interfere with others use of the system or add any significant incremental cost. For those reasons, the NLRB overruled its earlier decision and adopted a new analytical framework.

The NLRB analogized email communications to face-to-face oral communication, and adopted a presumption that restrictions on email communications outside of working time, such as during meal and rest breaks, are "an unreasonable impediment to self-organization" if imposed on employees who regularly have access to email on the job.

The NLRB expressly limited the application of its decision in some respects:

- Employers are not required to grant access to their email system to employees who do not otherwise have it.
- An employer may justify a total ban on nonwork use of email, including union-related matters, by demonstrating that special circumstances make the ban necessary to maintain production or discipline.
- Absent a total ban, an employer may apply uniform and consistently enforced controls over its email system to the extent such controls are necessary to maintain production and discipline.

The NLRB specifically stated it was not addressing email access by nonemployees or use of other types of electronic communication systems.

Implications

The practical impact of this decision could be substantial. An employee with access to the email system has nearly instant access to a list of co-workers and an easy method of contacting them en masse.

Notably, the 2007 decision was issued by an NLRB dominated by appointees of President George W. Bush, while the *Purple Communications* decision comes from an NLRB consisting of President Barack Obama's appointees, split along party lines. Hence, quite possibly a change in control of the White House could bring about another reversal of this rule.

Recommendations

Employers should always exercise caution when implementing policies or practices that may impact Section 7 rights. Given this most recent decision, employers should:

- Review existing email or systems use policies and revise to the extent it does not comply with Purple Communications

- Evaluate whether email access has been granted to employees who do not have a need to use email for regular business purposes, and consider removing their access

- Continue regular email monitoring practices, but exercise caution in adopting or changing such practices (including the focus, frequency or subject matter monitored) at the time you learn of new or increased union activity to avoid allegations of unlawful surveillance on union activity

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If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

Joseph B. Farrell
joe.farrell@lw.com
+1.213.891.7944
Los Angeles

Linda M. Inscoe
linda.inscoe@lw.com
+1.415.395.8028
San Francisco

John D. Shyer
john.shyer@lw.com
+1.212.906.1270
New York

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Endnotes

[1] *Register Guard*, 351 NLRB 1110 (2007), enfd. in relevant part and remanded *sub nom*, *Guard Publishing v. NLRB*, 571 F.3d 53 (D.C.Cir. 2009)