NLRB Reversal Prompts Concerns for Employers on E-Mail Use

On December 11, 2014, the National Labor Relations Board (NLRB) issued a major decision, *Purple Communications*. The decision reversed the board's 2007 decision in *Register Guard*, where the NLRB had drawn one of the few helpful bright lines in labor. *Register Guard* said that a company's email system is just that, the company's email system, and that a company is, therefore, entitled to control usage of its email system, just as it controls usage of fleet vehicles or other equipment.

This decision created a clear line, or some would say confirmed prior law that had created a clear line. It permitted employers to say that corporate email systems can be used only for business. By reversing *Register Guard*, the NLRB has opened the door to employees who wish "to use their employer's email systems for Section 7 purposes." What are the limits of that use? Can an employee go so far as to use offensive and intimidating language, criticizing management and supervisors, for example, in a union-organizing campaign? Must employers make email addresses available to the workers? Those are just some of the questions companies will be asking.

We know at least two things from what little the NLRB did tell us in *Purple Communications*:

(1) The NLRB intends this decision to be "carefully limited" to employees' ability to exercise their Section 7 rights. It was not meant to be a broad sweeping creation of law, though as the dissent noted, it is either just that or a confusing statement of new law. In his strenuous dissent, NLRB member Philip A. Miscimarra wrote: "Nobody will benefit when employees, employers, and unions realize they cannot determine which employer-based electronic communications are protected, which are not, when employer intervention is essential, and when it is prohibited as a matter of law. Not only is such confusion almost certain to result from the majority's decision, it is unnecessary and unwarranted."

Another board member, Harry Johnson, echoed that observation: "My colleagues have created a sweeping new rule that interferes with an employer's well-established right to restrict employee use of its property based on convenience. This new framework threatens to undermine an employer's right, as recognized by Board and Court precedent, to have a productive workforce. The new framework probably exceeds the jurisdiction of the Board to impose unfunded mandates on employers and certainly violates the First Amendment."

(2) The board did not intend for this decision to give rights to any third parties, such as unions. Unfortunately, the majority carefully worded its opinion to note it also did not intend to foreclose the possibility that third parties might have such rights. Rather, it said it was saving the issue for another day: "First, (this decision) applies only to employees who have already been granted access to the employer's email system in the course of their work and does not require employers to provide such access. Second, an employer may justify a total ban on nonwork use of email, including Section 7 use on nonworking time, by demonstrating that special circumstances make the ban necessary to maintain production or discipline. Absent justification for a total ban, the employer may apply uniform and

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consistently enforced controls over its email system to the extent such controls are necessary to maintain production and discipline. Finally, we do not address email access by nonemployees, nor do we address any other type of electronic communications systems, as neither issue is raised in this case."

It is particularly frustrating that the board chose to rewrite established law when, in today's technological climate, there seems little need for the change. There was a time when an employer's email system might have been the only email system practically available to some workers. However, today, workers can get free email and social media accounts. There is no need for workers to use a company's email system. As dissenting board member Miscimarra noted, "Given the current state of electronic communications, there is no rational basis for such a presumption. National uprisings have resulted from the use of social media sites like Facebook and Twitter, for example, even when governments have used force to prevent such activities."

One more thing we know: It's time for companies to take a look at their email systems policies. When doing so, employers should also review their other policies, including policies on solicitation, bulletin boards, access, social media, confidentiality, uniforms, Section 7 disclaimers, at-will employment and arbitration, etc.

This document is intended to provide you with general information regarding the NLRB's Purple Communications decision and employer email policies. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorney listed or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.

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