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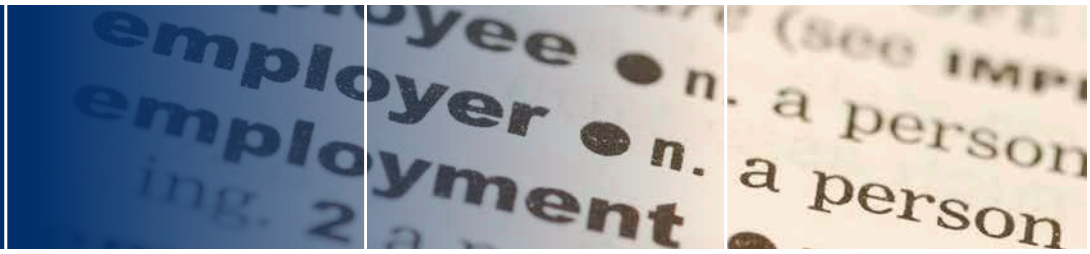

NEWSLETTER
April 2015

"Hijacking" Employer Email Systems for Union Organizing and Other Non-work Purposes

A recent decision by the National Labor Relations Board (NLRB or Board) has imposed requirements on employers to generally allow their employees to use the employer's email systems in support of union organizing efforts and other non-business activity protected by the National Labor Relations Act (NLRA), even if the employer's policy is that its email system is provided strictly for business use. That is the result of the holding in *Purple Communications, Inc. and Communications Workers of America, AFL-CIO*, 361 NLRB No.126 (NLRB Dec.11, 2014). This watershed decision overrules existing law and presents a number of challenges to employers, including how to maintain employee productivity and monitor abuse of their property going forward.

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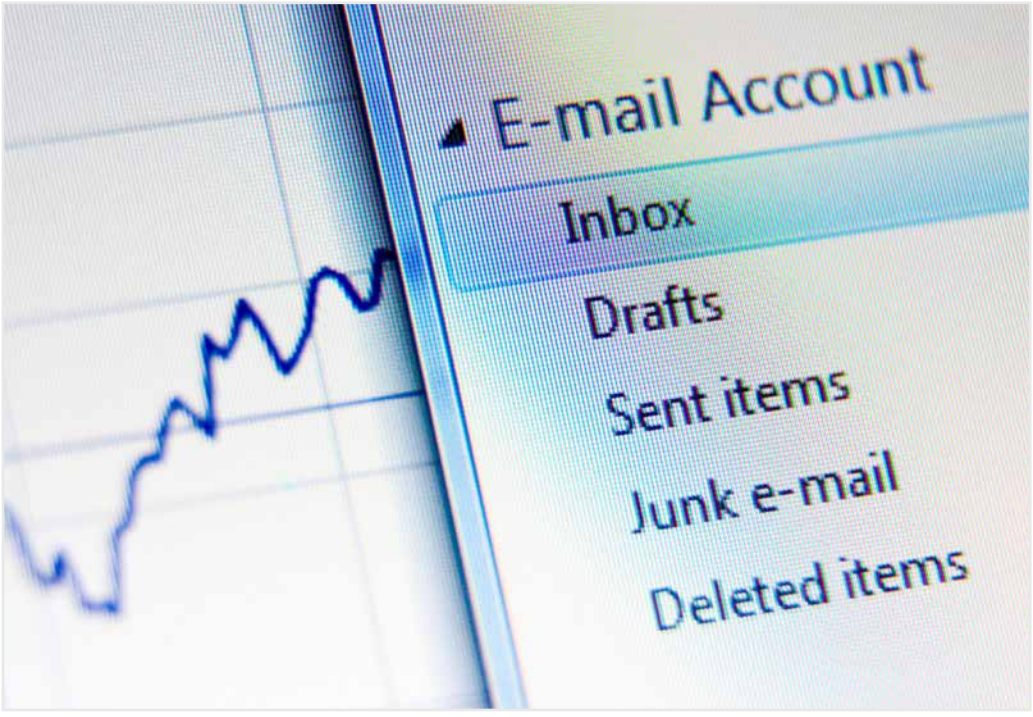


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THE DECISION

Prior to *Purple Communications*, it was settled that so long as the employer did not discriminatorily single out union organizing email for different or harsher treatment than other types of communications, it could enforce a rule that its email systems were not to be used for non-business communications. Such a restriction would prohibit the use of emails protected by Section 7 of the National Labor Relations Act (NLRA), including but not limited to use for soliciting employees to join a union, other related union organizing efforts (e.g., publicizing union events), or other activity – known as "concerted activity."* Indeed, in the 2007 ruling *Register Guard*, 351 NLRB 1110 (2007), *enforced in relevant part and remanded* sub nom *Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009), the Board rejected union efforts to force use of employer email for union-related communications when the employer uniformly enforced a work rule that barred use of its email system for all types of solicitation. *Purple Communications* specifically overrules *Register Guard*.

Now, if an employer allows an employee to use email in the normal course of the employee's work, it generally must allow that employee to use email for union solicitation and other communications protected by Section 7.

Two conditions are placed on this new right: First, the employee's email use must be on nonworking time; the employee is not supposed to use email for unionizing or other NLRA-protected purposes when the employee is supposed to be working. Second, the Board held open the right of an employer to enforce a total ban on non-work use of email, including on nonworking time, but only if the employer could demonstrate "special circumstances" that make the ban necessary to maintain production or discipline. The Board's decision makes it clear that it will be the "rare" case in which an employer will be able to fulfill this standard of "special circumstances."

In reaching its decision, the Board emphasized that email has become an important method of workplace communication, rising to the level of an electronic forum – a "natural gathering place" replacing physical gathering sites such as an employee cafeteria – for the exchange of ideas and discussion of issues important to employees. Relying on prior cases that stressed the importance of allowing employees to discuss their concerns while at the workplace, the Board focused on email as an excellent means by which employees can

communicate quickly and efficiently among themselves using the employer's own email address list, even reaching co-workers they do not know personally.

The Board rejected a variety of arguments raised against adoption of its new rule, such as the unfairness of (1) allowing employees to use an employer's property intended for work purposes only, (2) forcing an employer to bear the cost of allowing its email system to be used for non-business purposes, (3) the difficulty of monitoring abuse of the new right, (4) the presence of alternative means by which employees can communicate among themselves (e.g., their own

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*Section 7 of the NLRA gives employees rights, *inter alia*, "to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Section 7 permits employees to act in "concert" to discuss, complain about, or seek to improve their terms and conditions of employment. Significantly, the protection applies even if the employees are not represented by a union.

electronic devices), and (5) the possible negative effect on worker productivity. In each case, the Board found a justification for imposing the new rule, stressing the right of employees to engage in Section 7–protected activity at the workplace so long as it was done on nonworking time. The Board acknowledged the difficulty of actually identifying whether email use occurred on working time or nonworking time, but brushed aside the concern as simply the consequence of the technology at issue.

The Board saw its role as encouraging employees to communicate while at the workplace on topics such as unionization and other protected activity, found that modern email systems are a highly useful tool to accomplish that goal, and concluded that the employers' rights were little impacted by the rule announced. Many view this as part of the ongoing efforts by the Obama Administration Board to aid and facilitate unions in organizing, as their memberships and organizing efforts have steadily declined since the 1950s.

WHAT *PURPLE COMMUNICATIONS* LEAVES UNANSWERED

The Board expressly stated that it was not addressing (1) the issue of email system access by nonemployees or (2) any other types of electronic communications systems, as neither issue was raised in the case before it. The Board's analysis, however, suggests that

at least other types of employer-provided electronic communications (e.g., texting, instant messaging) will in the future be subject to the same standard, allowing similar nonworking time use by employees.

Indeed, the Board specifically criticized what it referred to as the "Board's Equipment Precedents," a line of cases that had been seen as generally allowing an employer to restrict the use of its equipment, such as telephones and copiers, to business use only. Hinting that further forced diversion of employer property to Section 7 activities may be permitted in the future, the Board somewhat ominously stated that:

> The supposed principle that employees have no right to use, for Section 7 purposes, employer equipment that they regularly use in their work is hardly self-evident. We reject its application here [in the case of email systems], and we question its validity elsewhere. *Purple Communications* slip op. at 10 (footnote omitted).

The Board also failed to explain in any detail how an employer could show "special circumstances" justifying a total ban on non-work email use by employees to maintain production and discipline. The fact that the Board's rule adopted in *Purple Communications* applies only to email system use by employees while on nonworking time may make it difficult for an employer to justify being within the exception. Resolution of this question as to "special circumstances" factors likely awaits further guidance from the Board.

PRACTICAL POINTS

Employers should review their employee handbooks and other policies to ensure that they are in compliance with the new rule. As discussed above, a total ban on the use of the employer's email system for non-work purposes, even if done on nonworking time, almost certainly will be found to violate the NLRA if that rule is applied to Section 7– protected activity or even could be construed by employees to reach that activity.

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The Board over the past few years, along with *Purple Communications* and other cases, has been highly proactive in finding employers' handbooks in violation of the NLRA Section 7 rights.

However, this does not mean an employer cannot promulgate a rule against other types of non-work-related use of its email systems, even if that use is on an employee's nonworking time. An employer may continue to enforce a rule against any use of its email system in a manner that could constitute sexual or other unlawful types of harassment, or to operate a business competing against the employer. Also, an employer could enforce a rule that prohibits use of its email system for any function that is not work-related, so long as it is made clear that the rule does not apply to Section 7 activities. To ensure compliance, legal counsel should be consulted for advice on how to draft appropriate language, especially since promulgating a rule that the Board finds reasonably could "chill" permitted Section 7 use will expose the employer to the risk of a finding that it has violated the NLRA.

The Board's decision also does not mean that an employer that does not currently allow employee use of its email system must now allow access. However, if access is permitted, it cannot be limited in a manner inconsistent with the new rule.

In addition, an employer still is permitted to advise its employees that the employer retains the right to monitor all email system usage. If an employer wishes to do so, it should ensure that employees are properly warned of that fact and the fact that employees should not think they have any expectation of privacy in their use of the employer's email system.

Exactly how an employer can lawfully monitor employees' use of the email system to ensure that they are not exercising their newly granted right when they are supposed to be working presents a number of difficult issues. As noted above, even the Board acknowledged that it may be difficult to identify when an employee actually sent or read a Section 7–protected email. Moreover, whatever procedure the employer

adopts, it must be cautious to ensure that it does not run afoul of other aspects of the NLRA.

In that regard, the Board expressly cautioned that any email-monitoring as part of legitimate business practice should be nondiscriminatory and, what it referred to as, "not out of the ordinary." Monitoring should not be especially directed toward seeking to uncover Section 7 activity. The Board stated:

> An employer's monitoring of electronic communications on its email system will … be lawful so long as the employer does nothing out of the ordinary, such as increasing its monitoring during an organizational campaign or focusing its monitoring efforts on protected conduct or union activists. *Purple Communications*, slip op. at 16.

In addition, even wholly legitimate monitoring may result in learning – perhaps for the first time – that some employees are considering unionization or are union activists.

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Once it has this knowledge, the employer must ensure that it cannot be accused of using that information to discipline employees for their union sympathies or activities. Such conduct would be found to be in violation of the NLRA and subject the employer to adverse findings by the Board or its agents.

The same caution applies if the employer learns that employees are engaging in other conduct protected by Section 7, such as complaining about their working conditions or perhaps criticizing the employer or particular members of management in a manner that may seem inappropriate. As noted, employees' Section 7 rights include discussing and complaining about their working conditions, even absent a union. The question of whether an employee complaint or other discussion falls within the realm of Section 7–protected concerted activity has been the subject of a number of recent Board decisions, many of which have found that comments made by employees on social media outside the workplace are protected conduct. Legal counsel should be consulted before disciplining an employee for what may be Section 7–protected activity.

Finally, *Purple Communications* does not change prior Board law holding that an employer may not single out Section 7–protected communications for special, harsher treatment than other types of communications, regardless of the workplace rule at issue. In summary, employers should always take care not to give even the appearance that they are attempting to quash Section 7– protected communications.

CONCLUSION

The *Purple Communications* ruling is yet another in a series of Board decisions in the past several years extending employee Section 7 rights and generally favoring unions. As shown, the ruling presents unanswered questions and challenges. Yet, armed with a proper understanding of the contours of the ruling and the NLRA generally and backed by appropriate legal guidance, which the employment practices lawyers at Wilson Elser are prepared to provide, employers will be able to navigate this latest challenge to running their businesses in an efficient and productive fashion.

Members of Wilson Elser's Employment & Labor practice, located throughout the country, provide one convenient point of contact for our clients. Please contact any of the following partners to access the experience and capabilities of this formidable team.

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