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NLRB Gives Employees the Right to Use Company Email for Protected, Non-Work Purposes

On December 11, 2014, the National Labor Relations Board (the "NLRB" or "Board") issued a much-anticipated decision in *Purple Communications, Inc.*, holding that employees have a right to use employer-provided email systems for union organizing and other activity protected under the National Labor Relations Act (the "Act" or "NLRA"). In light of the decision, employers are encouraged to review their email use and monitoring policies to ensure compliance with the Board's new interpretation of the Act.

Section 7 of the NLRA grants employees of both unionized and non-unionized employers the right to communicate with one another and to engage in collective activity to support their interests regarding the terms and conditions of their employment. Traditionally, and notwithstanding employees' rights under Section 7, employers have maintained a right to restrict the use of their property to business purposes as long as such restrictions are applied consistently and do not discriminate against activity that is protected under the Act. Under the Board's 2007 decision in *Register Guard*, employers' right to restrict non-work use of their property was deemed to include the ability to restrict the use of employer-provided email systems to business activities only, without any accompanying justification, as long as the policy was not applied in a discriminatory manner.

In *Purple Communications*, the employer maintained an email policy consistent with the Board's ruling in *Register Guard*, namely that email "should" be used for business purposes only; that employees were

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not permitted to use the email system on behalf of organizations or individuals with no business affiliation to the company; and that employees were prohibited from sending uninvited emails of a personal nature. The employer cited the Board's 2007 decision in its own defense, but the Board expressly overruled *Register Guard*, finding such policies unlawful under the NLRA even without evidence of targeted or discriminatory application.

Although holding that employees have a right to use employer-provided email systems for activity protected under Section 7 of the Act, the Board clarified that employers are not required to give employees access to email, but rather that – where employers do provide access to email – they cannot prohibit the use of these email systems for protected activity absent "special circumstances" that demonstrate a need for the restrictive policy. In addition, the ruling does not require employers to allow outside individuals or organizations, such as union organizers or independent solicitors, access to their email networks.

Email as the "Water Cooler" of a New Generation

It is well established that a ban on oral communications that are protected under Section 7 during non-working time is presumptively unlawful under the NLRA. In *Purple Communications*, the Board extended this principle to email communications on non-working time, likening the "virtual space" of employer-provided email to a "mixed-use" physical space where employees engage in both business and non-business activities. In so holding, the Board highlighted the rise of telecommuting and telecommuters' lack of other means to communicate with coworkers, stressed the frequency of non-business inter-office dialogue through email, and further lauded email as an efficient, less-disruptive means for conducting minor personal tasks during the workday.

The Board further rejected the respondent employer's argument that the widespread availability of personal email and other social networking media (often as readily available to employees as employer-provided email) provided adequate alternatives for electronic communication between employees. The Board considered the availability of other channels of communication irrelevant to its analysis of

restrictions on employee-to-employee communications, but nonetheless noted that not all employees choose to maintain personal email or social media accounts, and in any event may not have ready access to each other's personal contact information to facilitate dialogue about the terms and conditions of their employment.

Sparse Guidance on "Special Circumstances" Meriting Restrictions

In its decision, the Board held that where an employer can show that a complete prohibition on non-work communications through employer email is necessary to maintain production or discipline, a policy for such "special circumstances" may be lawful under the NLRA. However, given the often-minimal burden on data networks associated with text-based email, the Board predicted "that it will be the rare case where special circumstances justify a total ban on nonwork email use by employees." The Board further indicated that employers may be permitted to maintain less severe limitations on non-work email use where such restrictions can be suitably justified. As an example, the Board suggested that a prohibition on sending large audio or video files through company email for non-work purposes might pass scrutiny under the *Purple Communications* standard. However, the Board also indicated that the employer seeking to maintain such a prohibition would be required to prove that the restricted conduct would interfere with the efficient functioning of the email system or other legitimate employer prerogatives.

Based on the Board's decision, an employer who intends to restrict use of its email system to business purposes or categorically restrict the non-business use of email should be prepared to justify any limits on non-work email use that impede communications between employees protected under Section 7; any decision to implement such blanket restrictions should be reviewed with counsel to ensure compliance with the Board's decision.

"Work" vs. "Non-Work" Distinction Increasingly Vague

The Board describes its own holding granting employees the right to use employer-provided email systems for Section 7 activity as "expressly

limited to nonworking time." This would suggest that employers who prohibit non-work use of email during "work time" need not now alter those policies to allow email for Section 7 purposes during such times. Realistically, however, the lines between "work" and "non-work" time are increasingly blurred, and employees who spend much of their workdays on the computer (or with their cell phone) sometimes take short breaks for personal emails or other messaging. Many employers accept or even encourage these short breaks to avoid greater interruptions to the workday (such as emailing a personal vendor to schedule a service appointment, rather than spending a substantial amount of time "on hold"). In its decision, the Board majority conceded that email use can be difficult to allocate to working or non-working time, but insisted – over the objections of the dissenters and the responding employer – that its decision did not further erode this distinction.

As before the Board's decision in *Purple Communications*, employers must not discriminate against employees based on their protected activity under Section 7, and those employers who tolerate minor, employee-driven interruptions to the workday for non-protected personal activities must permit similar interruptions involving protected concerted activity. As with other personal activities, this broader principle does not require employers to abandon legitimate productivity expectations or otherwise tolerate abuse of the email system for non-work purposes.

Employers' Right to Monitor Email Largely Unaffected

The Board's decision also discusses the implications of its holding for employer investigations involving the review of company email accounts. It opined that nothing in its holding would prevent employers from monitoring employee email traffic for legitimate business purposes, and compared employee use of the employer's email accounts to public remarks lacking enforceable expectations of privacy. Of greater concern, from the Board's perspective, would be a practice of overt monitoring that intimidated or discouraged employees from engaging in protected concerted activity.

Employers who provide their employees with company email accounts should review their company email policies to ensure that employees understand that their email communications are not necessarily private and may be reviewed by their employer. Even employers who do not regularly monitor employees' emails may have an obligation to review past or current messages in the context of an investigation or lawsuit, or may develop a reason to do so, such as searching for data that was inadvertently deleted elsewhere. Such reviews sometimes yield surprises, including grounds for discipline, and even when the employer acts with the most lawful of business reasons, coincidences of timing or misperceptions may invite charges that a particular employee was targeted for engaging in concerted activity. In the event of such a charge, the Board may call upon the employer to explain and justify its monitoring practices, both in general and as applied in the particular case. Although informing employees in advance that their email communications may be monitored will not wholly insulate an employer from allegations of intimidation or selective scrutiny, a previously-announced policy may prove to be a useful part of the employer's defense.

Other Restrictions on Use of Employer Property Called into Doubt

Although the Board's rationale in *Purple Communications* emphasizes the typically minimal burden to employers of permitting employees to engage in concerted activity by email during non-work hours, aspects of its reasoning may also be cited in the future to scale back an employer's right to prohibit employee use of its *physical* resources for non-work purposes. In overruling its prior holding in *Register Guard*, the Board considered and distinguished earlier holdings supporting an employer's right to restrict the use of its physical communication media, such as telephones, copiers, and break-room televisions.

Following this discussion, the Board expressly rejected the general proposition that "employees have no right to use employer equipment … that they regularly use in their work" for Section 7 purposes. Further, in footnote 47, the Board took pains to overrule its 2005 decision in *Johnson*

Technology, which held that an employer could lawfully maintain a neutral policy restricting the use of company property to business purposes that, in practice, prohibited an employee from printing a union flyer on the back of a sheet of previously-used, employer-provided copy paper. (While the policy at issue in *Johnson Technology* was arguably applied in a discriminatory manner, the Board's decision in that case found in favor of the employer on this issue.) The *Purple Communications* decision rejects *Johnson Technology* to the extent it expressed an "absolutist" view of employer property rights, and overruled that decision's holding that the employer lawfully barred the employee's nonbusiness use of used copy paper. Although it is not yet clear how far the Board will extend the implications of this shift in policy, this footnote could be cited in support of an argument entitling employees to use other employer equipment and supplies while engaging in protected activity. Employers should review their personnel policies and consider whether any other current policies regarding the use of their property may be affected by this footnote in the *Purple Communications* decision.

Other Prohibitions on the Personal Use of Email Not Implicated

Although the Board's decision in *Purple Communications* grants union and non-union employees the right to use their employer-provided email addresses to engage in activity protected by Section 7 of the NLRA, this decision does not require employers to permit other, unprotected, non-business uses of their email systems (e.g., charity solicitations, recipe exchanges, etc.). Similarly, employer prohibitions on harassing, discriminatory, or other unlawful uses of their email systems remain fully enforceable.

In light of the Board's decision, employers are encouraged to review their company email policies with counsel to ensure compliance with current law. If you have any questions or would like detailed information about the Board's decision, please contact Nick Bauer at (212) 758-7793, or any other attorney at the firm.