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Labor and Employment Law

Employees Can Use Company Email for Union Organizing and Other Concerted Activities

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In its relentless pursuit of expanding non-union employee rights, the National Labor Relations Board ("NLRB" or "Board") overturned past precedent by ruling that employees can now use their company email accounts to communicate about union organizing activities, and their terms and conditions of employment. Purple Communications, Inc., and Communications Workers of America, 361 NLRB no. 126 (Dec. 11, 2014). Just seven years earlier, the NLRB had ruled that employers could prohibit employees from using company email systems for non-work related purposes, including collective workplace concerns, as long as any prohibitions were not limited to banning protected activities under the National Labor Relations Act ("NLRA" or "Act"). Register Guard, 351 NLRB 1110 (2007).

For instance, employers were permitted to have policies that allowed the use of its email systems for charitable solicitations while banning its use for non-charitable purposes, including union organizing. Also, systems could be used for personal solicitations while prohibiting ones of a commercial nature. These rules effectively prevented company systems from being used against the employer during union organizing campaigns, or for employees to air their collective concerns.

In reversing itself, the Board stated that its past precedent focused "too much on employer's property rights and too little on the importance of email as a means of workplace communication, [therefore] it failed to adequately protect employees' rights under the Act and abdicated its responsibility to adapt the Act to the changing patterns of industrial life." It went

on to say that email has "effectively become a natural gathering place pervasively used for employee to employee conversations" and the fact that this gathering place is virtual does not undermine the role that email plays in Section 7 protected workplace discussions. Further, given the rise in telecommuting, email has become an even more important tool for co-worker communications.

Under its new interpretation, employees who are granted the right to use an employer's email system for business purposes, now also have a presumptive right to use their account to communicate about issues protected by Section 7 of the NLRA, including union organizing. Such emails, however, must be drafted and sent during non-work hours. Also, there is no requirement that all employees now be given access to an employer's email system, if they would not otherwise be given an account for work related purposes.

Employers wishing to overcome the presumptive right of employees to use their systems for collective action must show that "special circumstances" necessitate a ban in order to maintain production or discipline. More specifically, employers must "articulate the interest at issue and demonstrate how the interest supports the email restrictions it has implemented." Employers may also place certain restrictions on the use of its systems, shy of a total ban, if it can show such controls are necessary to maintain production and discipline. For instance, employers can limit the size of attachments or audio/video files if such data would lead to network damage or system overloads, provided the same restrictions apply to non-section 7 related communications. The Board, however, strongly suggested that a total ban, or set of controls, will be found lawful only in rare situations, with the burden placed on the employer to justify its rules.

The decision also leaves open the possibility that the concepts applied to email systems could be expanded to the use of other company equipment and systems. The Board noted that past decisions prohibiting non-work related access to bulletin boards, telephones, faxes, copy machines, public address systems, and teleconferencing systems may eventually be reversed. It expressly stated that "broad pronouncements in the [past] equipment cases, to the effect that employers may prohibit all non-work use of such equipment…are best understood as dicta…. [and] nor is it clear that the Board endorsed those broader statements." It went on to say 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, and we question its validity elsewhere."

The decision also leaves unclear how past decisions regarding the right of employers to ban distribution of literature in work areas will now be affected. The traditional rule permitted employees to engage in oral solicitation during non-work time, in work and non-work areas. Distribution of literature was permitted during non-work time, but only in non-work areas. To overcome the apparent problem of permitting employees to write, read and print emails in work areas, the Board conveniently stated that emails are neither solicitations or distributions, but merely "communications," and that the space where they would be written, read or printed are neither work or non-work areas, but "mixed-use" areas where the work area restrictions prohibiting literature distribution generally will not apply. This newly created fantasy zone within the workplace indicates the lengths the Board is willing to go to expand non-union worker rights at the expense of the employer's.

An additional complication is that under the NLRA surveillance of organizing efforts by employers is generally unlawful. However, employers currently have the right to monitor their systems and eliminate any privacy rights for employees using their systems. While the ruling stated that such monitoring could lawfully continue, and employees would not enjoy greater privacy rights when communicating about collective concerns, given the Board's aggressiveness, this fine line may become blurred over time. Already, the Board has stated that employers may not change their monitoring policy in response to union organizing activity, or target protected conduct or union activists. Therefore, having a policy in place in advance of any such activity is critical.

Employers should review their handbook, and email and equipment use policies, as the Board has long held that just having an express rule that violates the NLRA is unlawful, even if the rule is never used to actually discipline an employee. Also, employers should carefully analyze any disciplinary or termination decision that involves use of its systems, as at-will employees will now have greater latitude to claim the adverse decision violated their section 7 right to engage in protected concerted activity. Such a finding can result in reinstatement and back pay.

Finally, this latest ruling coupled with another recent Board decision to speed up the election process once a union files a petition for recognition will make it much easier for employees to unionize. By aiding their communications effort, and significantly reducing a company's reaction time from about 38 days to between 10-20 days, the NLRB has tipped the balance significantly in favor of employees seeking union representation. As such, employers may want to consider implementing a more robust preventive employee relations strategy, and

developing a rapid response plan in the event of union organizing activity, often referred to as a "campaign in a box."

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