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NLRB "Deletes" Employer Email Rule

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Until December 11, employers thought that they owned their email systems and could limit their use to company business. On that day, a divided National Labor Relations Board ("NLRB") ruled "not so." In *Purple Communications*, 361 NLRB No. 126 (Dec. 11, 2014), the NLRB ruled that employees who have access to an employer's email system as part of their job generally may, during non-working time, use the email system to communicate about wages, hours, working conditions and union issues. The NLRB reached this conclusion notwithstanding the fact that Purple Communications has a rule providing that its email system was to be used for "business purposes only." It is expected that the NLRB's ruling will be challenged in the federal courts.

Specifically, the NLRB ruled that employees with access to company email can use company email systems for union organization and Section 7 protected activities. The ruling overturned the NLRB's 2007 decision in *Guard Publishing v. NLRB*, (571 F.3d 53 (D.C. Cir. 2009)) ("*Register Guard*") which held, in relevant part, that employees have no statutory rights to use their employer's email systems for labor organization purposes or discussions about wages or other workplace issues. The *Purple Communications* ruling is the result of a case brought by the Communications Workers of America union ("the Union") after it failed in its attempt to organize employees of a company that provides interpreting services for the deaf and hard of hearing. The Company, for its part, had an "Internet, Intranet, Voicemail, and Electronic Communication Policy" that allowed the use of company owned electronic equipment and systems, including its email system, for "business purposes only." The Company claimed that its "business purposes only" restrictions for company email use were aimed at reducing workplace distraction. The Union argued, on the contrary, that the Company's prohibition of its employees' use of company email for non-business purposes and on behalf of organizations not associated with the company interfered with the Company's employees' Section 7 rights.

As anticipated, the NLRB sided 3-2 with the Union; the three Democratic appointees voting in favor of what many will view as an unprecedented taking of private, employer property. The two Republican appointees filed vigorous dissents. The NLRB held that Section 7 statutorily protected communications (*e.g.*, communications about labor organizations, wages or other workplace issues) between employees on nonworking time must be permitted by employers that have chosen to provide employees email accounts hosted on the employer's email servers. In the ruling, the NLRB stated that *Register Guard* initially got the issue wrong because it undervalued employees' Section 7 rights and placed too much emphasis on employers' property rights. Additionally, the majority opined, *Register Guard* incorrectly analogized company email to company-related equipment (*e.g.*, bulletin boards, copy machines, public address systems, etc.). The NLRB previously determined in an unrelated case that employers could place restrictions on company-related equipment, given its physical size and content limitations. But, for purposes of the current case, the NLRB concluded that this analogy "inexplicably failed to perceive the importance of email as a means by which employees engage in protected communications." Moreover, the majority noted that since *Register Guard* was decided seven years ago, the importance of email as a means for communication has only increased, further intensifying the error of the *Register Guard* decision.

The *Purple Communications* ruling, of course, turns *Register Guard*, on its head. However, the NLRB attempted to make its ruling seem more palatable by proffering several caveats in its general repudiation of *Register Guard*. First, the *Purple Communication* ruling applies only to employees who already have been granted access to an employer's email system in the course of their work. Accordingly, the ruling does not require employers to provide employees access to the employer's email system in the first place. Second, employers can still ban all non-work-related use of email—including Section 7 email use on nonworking time—if the employers can demonstrate that special circumstances make the ban necessary to maintain "production or discipline." Additionally, absent justification for a total ban of non-work related email on non-working time, employers may still limit employees' use of the employer's email system as long as the limitations are applied uniformly and are necessary to maintain "production and discipline." Unfortunately, the NLRB stated that the circumstances in which a ban would be justifiable would be "rare."

In a further effort to attempt to placate the anticipated employer reaction to the decision, the majority also stated that its ruling did not apply to non-employees, and that employers could lawfully monitor employee email use as long as doing so fell within the ordinary scope of its email system monitoring polices. This effectively means that employers may not increase its monitoring during a labor "organizational campaign" or "focus its monitoring efforts on protected conduct or union activists" or otherwise enhance their monitoring efforts to stymie protected activity. But, employers may continue to tell their employees that it monitors, or at least reserves the right to monitor, computer and email use for legitimate business reasons. Further, the ruling does not change the general rule that employees have no expectation of privacy when they utilize their employer's email systems. Thus, even though employees' use of their employer's email systems for Section 7 purposes is now protected, employers can still monitor their employees' use of the email system and also advise employees' that they are doing just that.

Finally, regardless of the far reaching impact of its decision, the NLRB did note that its *Purple Communications* decision would not prevent an employer from establishing uniform and consistently enforced restrictions. These restrictions could include, for example, prohibitions on large attachments or audio/ video segments, if the employer could demonstrate that, left unregulated, the employee actions would interfere with the email system's efficient functioning.

The upshot of the *Purple Communications* ruling is that employers should review their email system policies. In some cases, employers may want to eliminate email system usage by employees whose jobs do not require the use of email. Otherwise, employers need to ensure they apply their email system policies, including monitoring, uniformly and consistently. Finally, it never hurts to very clearly remind employees that they have no expectation of privacy when they use company email systems—even if they are engaging in Section 7 protected activities.

While some employers may modify their rules that the email system is to be used for business purposes only to read that "With the exception of communications regarding wages, hours, working conditions and unions, our email system may be used only for business purposes," other employers may wait to see if the federal appellate courts embrace this departure from decades of NLRB and judicial precedent.

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