

## **NLRB Rules that Employees Have a Right to Use Employers' Email Systems for Non-Business Purposes**

December 12, 2014

In a 3-2 decision issued on December 11, 2014, the National Labor Relations Board (NLRB) held in *Purple Communications Inc.* that, in most circumstances, employees have a right to use employer email systems for non-business purposes during non-working time. This decision reversed the NLRB's 2007 decision in *Register Guard*, in which it found that employers could limit employee use of email systems to "business purposes only" and that employers could "specifically prohibit" certain email system uses by employees.

In *Purple Communications*, the employer gave its employees access to a company email system, which employees were permitted to use every day at work. It also maintained an electronic communication policy which, in relevant part, prohibited employees from using computer, internet, voicemail and email systems for (1) engaging in activities on behalf of organizations or persons with no professional or business affiliation with the Company, and (2) sending uninvited email of a personal nature. The Board found this policy to be unlawful and to violate employees' statutory right to engage in "protected, concerted activity," such as discussing terms and conditions of employment. In reaching this conclusion, the Board adopted a presumption that employees who have been given access to an employer's email system are entitled to use that system to engage in discussions about their terms and conditions of employment while on non-working time.

In adopting this presumption, the Board addressed two issues: (1) can an employer maintain a total ban on non-work email use by employees, and (2) can an employer apply uniform and consistently enforced controls on their email systems? In both cases, the Board concluded that an employer would have to demonstrate "special circumstances" to justify a ban. The Board noted that such "special circumstances" would be rare and might include a ban on non-work email that was necessary to protect an email system from damage or overloads due to excessive use. Likewise, the Board stated that an employer may be able to maintain a uniformly enforced policy banning large attachments and video/audio segments if an employer could show that such files interfered with the email system's proper functioning.

The Board noted that its decision is limited to both non-work time and the employees who are already granted access to the employer's email system. The Board's decision does not grant email access to employees who do not already have it, nor does it allow non-employees to use an employer's email system to communicate with employees.

This decision is important to all employers, both union and non-union. The Board determined that it will apply its new standard retroactively to all pending cases. As a result, employers should immediately review their email use policies in order to ensure compliance.

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