December 15, 2014

NLRB Gives Employees the Right to Use Their Employer's Email to Engage in Protected Activity

On December 11, the National Labor Relations Board (NLRB) ruled employees can use their employer's email systems to communicate with each other regarding the terms and conditions of their employment and self-organization. The "use of email for statutorily protected communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email systems." This ruling overturns 2007 NLRB precedent established by *Register Guard*, 351 NLRB 110 (2007), enfd. in relevant part and remanded sub nom. *Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009). In the decision, *Purple Communications, Inc.*, the NLRB held the "workplace is 'uniquely appropriate' and 'the natural gathering place' for such communications and the use of email as a common form of workplace communication has expanded dramatically in recent years. It went on to state: In many workplaces, email has effectively become a 'natural gathering place,' pervasively used for employee-to-employee conversations. Neither the fact that email exists in a virtual (rather than physical) space, nor the fact that it allows conversations to multiply and spread more quickly than face-to-face communication, reduces its centrality to employees' discussions about terms and conditions of employment. If anything, email's effectiveness as a mechanism for quickly sharing information and views increases its importance to employee communication. **Limits on the NLRB's Decision** The NLRB limited its holding to employees whose employers have granted them access to the company's email system. Companies may continue to choose not to provide email access to some or all of their employees. Moreover, nonemployees, such as union organizers, still do not have the right to use employers' email systems. The decision places the burden on employers to justify the ban on use of email (to those employees who have company email) for nonworking purposes or during nonworking time by "demonstrating that special circumstances make the ban necessary to maintain production or discipline." Employers are not prevented from establishing uniform and consistently enforced restrictions on employees' use of their email systems. Such restrictions could include prohibiting attachments of a certain size or audio/video segments. However, the employer must be able to show it instituted these restrictions to protect against interference with the email system's efficient functioning. **The NLRB's New Analytical Framework** *Purple Communications, Inc.*, establishes a new framework for the NLRB to analyze employees' use of company email systems and disavows automatically treating email like the traditional means of in-person solicitation and distribution. The NLRB's long-standing policy regarding solicitation and distribution in the workplace is that employers can ban employees from engaging in solicitation and distribution in the workplace except in nonwork areas and during nonwork time. While email may be a form of solicitation or distribution, it may also constitute communications protected under the National Labor Relations Act (the "Act"). Therefore, "[i]n the vast majority of cases, an employer's email system will amount to a mixed-use area, in which work-area restrictions permitted on literature distribution will not apply." **Surveillance** The decision allows employers to continue to monitor their computers and email systems "for legitimate management reasons, such as ensuring productivity and preventing email use for purposes of harassment or other activities that could give rise to employer liability." However, employers cannot monitor employees' emails to see if they are engaged in union organizing, union activities or other conduct protected by the Act. **Policies and Application** Employers that maintain electronic communications policies that limit employee use of its email system and other electronic systems to "business purposes only" or to "specific purposes" violate the Act. The decision applies to all cases currently before the NLRB, as well as to all charges and complaints filed in the future. **What Should Employers Do?** Employers should take steps to make sure they are compliant with this holding. Practical tips include:

- Reviewing electronic communications policies to make sure systems use is not limited to "business purposes only." As a precaution, email policies should state that nothing contained herein is intended to limit employees' rights to engage in activities protected by Section 7 of the National Labor Relations Act.
- Confirming electronic communications policies notify employees that the employer monitors, or may monitor, the company's computer and email systems and that employees have no expectation of privacy.
- Reviewing whether access to company email needs to be granted during time spent not at work. Many employees have no need to access company emails when not at work. Such employees should not be given devices or tools to allow them to log on to the company's email system when they are not working or at work.
- Confirming that no-solicitation and no-distribution policies are in place, and if not, instituting such policies. While the vast majority of email cases will not fall under the traditional no-solicitation/no-distribution framework, based on particular facts, employers may be able to use no-solicitation/no-distribution rules as a defense for claims brought by employees or unions.

Instituting policies and procedures for when and how the company monitors employee emails.