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NLRB Rules that Employees Have a Legal Right to Use an Employer's Email System for Union Communications

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A majority of the National Labor Relations Board ("Board") recently overruled its own precedent and held that employees who are allowed to use an employer's email system for work purposes must also be allowed to use that email system during their non-working time for communications that are protected by Section 7 of the National Labor Relations Act ("Act"). *Purple Communications, Inc.*, 361 N.L.R.B. No. 126 (12/11/14). Only if an employer can show that there are "special circumstances" necessary to maintain production or discipline can an employer bar such access to its email system. Otherwise, if an employer cannot show such "special circumstances," it can apply "uniform and consistently enforced" controls over an email system, but only to the extent that the employer is required to maintain production and discipline.

The Decision

In 2007, the Board specifically ruled that employees had no right under the Act to use an employer's email system for communications with each other about Section 7 activities, such as union organizing. However, in *Purple Communications, Inc.*, a majority of the current Board overruled that precedent in a 3-2 decision. Suggesting that email systems are most akin to telephones, the majority (Members Pearce, Hirozawa and Schiffer) wrote that "[t]here is little dispute that email has become a critical means of communication, about both work-related and other issues, in a wide range of employment settings," and is "different in material respects from the types of workplace equipment the Board has considered in the past." The majority noted that "[e]mployee email use will rarely interfere with others' use of the email system or add significant incremental usage costs, particularly in light of the enormous increases in transmission speed and server capacity."

Moreover, the majority concluded that:

> We conclude that it is consistent with the purposes and policies of the Act, with our responsibility to adapt the Act to the changing work environment, and with our obligation to accommodate the competing rights of employers and employees for us to . . . presume that employees who have rightful access to their employer's email system in the course of their work have a right to use the email system to engage in Section 7-protected communications on nonworking time. . . . Employee 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."

While "special circumstances" may justify a total ban on email use, the majority noted that they "anticipate it will be the rare case where special circumstances justify a total ban on nonwork email use by employees." The majority noted that employers could still monitor employees' email use for legitimate reasons and warn employees that they should have no expectation of privacy in the employer's e-mail system. However, such policies would be lawful only when "the employer does nothing out of the ordinary, such as increasing its monitoring during an organizational campaign or focusing its monitoring efforts on protected conduct or union activists." Finally, the majority ruled that it would apply this decision retroactively to other pending cases. The two dissenting members (Miscimarra and Johnson) wrote lengthy rebuttals and instead would have upheld the 2007 ruling.

What This Decision Means

- This decision cannot be minimized. While there may be an appeal, this is the law the Board, its General Counsel's Office and its Regional Directors will enforce for the foreseeable future.

- As long as employees have access to company email as part of their jobs, they can use it to discuss workplace issues, including union organization, during their non-working time.

- As hinted by one of the dissenting opinions, it is not unreasonable to conclude that the majority's rationale could "extend beyond email to any kind of employer communication network (be it instant messaging, internal bulletin boards, broadcast devices, video communication or otherwise) that employees have access to as part of their jobs." Thus, such communication means should be considered in any policy revisions, given the potential for a far-reaching impact in this technology-driven age.

- While the decision focused on employee use during non-work time, the majority noted that it is common for many employers to tolerate some level of personal email use during the work day even if an employee is not formally on non-work time. The Board majority certainly suggested that this use is also protected under Section 7. Accordingly, particular care should be taken in imposing any disciplinary action on the basis of non-work related email use during work time.

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- Among issues the decision does not address are employees using an employer's email system to communicate with third parties, or third parties being able to send emails to employees. These issues will likely be the subject of future cases.

- It should be noted that nothing in the decision prevents an employer from monitoring the employer's 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, provided that the employer does nothing out of the ordinary, such as increasing its monitoring during an organizational campaign and/or focusing its monitoring efforts on protected conduct or union activists.

What Do You Need To Do?

- Revisit your personnel policies and revise electronic-use policies to conform to the new rule, such as revising any policy that universally prohibits non-work-related messaging through employer-provided email systems. A policy that violates the Board's new rule could, among other things, be used by a union to attempt to invalidate an election won by the employer.

- If you do not have email monitoring in place, it may be prudent to implement a carefully drafted policy, since without such a policy the likely Board position would be that you cannot rely on any right to monitor – or any unstated "special circumstances" - in defending an unfair labor practice charge. Moreover, once an employer has knowledge of organizing activity the sudden implementation of or changes to such a policy could be problematic.

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This Alert was prepared by Geoffrey P. Wermuth, a partner in the law firm of Murphy, Hesse, Toomey & Lehane, LLP. If you have any questions or concerns with regard to this alert, please contact Attorney Wermuth, the attorney assigned to your account, or your own labor counsel.

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