

NLRB Rules Employees Have Statutory Right to Use Business Email Systems for Non-Work Purposes, Including Union Organizing

DECEMBER 12, 2014

In a much-anticipated decision, a divided National Labor Relations Board (Board or NLRB) ruled that employees have a presumptive statutory right to use their employers' email systems for non-business purposes, including communicating with one another about union organizing. The decision, *Purple Communications, Inc.*, issued December 10, 2014, overturns the Board's prior precedent in *Register Guard*, which previously held that employees do not have a statutory right to use their employers' email systems to engage in "Section 7 activities" like union organizing. In *Purple Communications*, a three-member Board majority concluded that *Register Guard* was "clearly incorrect," reasoning further that email usage in the workplace has dramatically changed in the years since it was decided.

Purple Communications arose in the wake of union representation elections held at 16 Purple Communications' call centers. The union seeking to organize the call center workers, the Communications Workers of America (CWA), objected to the election results at two facilities where employees had voted against representation, arguing that the employer's electronic communication policy – which prohibited personal use of the company's email system – unlawfully obstructed employees' ability to choose freely in the election. Relying on *Register Guard*, an NLRB administrative law judge rejected the CWA's arguments, finding Purple Communications' policy to be lawful.

Overturning the ALJ and *Register Guard*, a majority consisting of the three Democratic Board members determined that *Register Guard* focused too much on the employers' interests in controlling access and usage of their electronic communications systems, and too little on the fact that email has become a common and important form of workplace communication. In an attempt to reconcile the competing interests at stake, the Board majority held that "employee use of email for statutorily protected communication on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email systems."

The majority called its decision "carefully limited," explaining: (1) the decision applies only to employees who have been granted access to an employer's email system, and does not require that such access be granted in the first place; (2) employers retain the ability to impose and justify a total ban on all personal use of email, including activity protected under Section 7, under special circumstances; and (3) the decision does not address access to email systems by non-employees or other types of electronic communications. Further, the Board explained that an employer retains the ability to establish controls over email systems to maintain discipline and production, provided that such controls are enforced consistently and in a non-discriminatory fashion.

Republican Board Members Johnson and Miscimarra dissented. Member Johnson, in particular, argued that the Board’s new standard violated the First Amendment by forcing companies to pay for speech they do not support. Further, he criticized the majority opinion as “creat[ing] a sweeping new rule that interferes with an employer’s well-established right to restrict employee use of its property based on convenience. This new framework threatens to undermine an employer’s right, as recognized by Board and court precedent, to have a productive workforce.”

The Board’s decision in *Purple Communications* necessitates review and possible revision of personnel policies addressing employee use of email in the workplace. In addition, the majority’s opinion warns that cases on the near horizon may address similar issues involving other forms of electronic communication, including social media and instant messaging. We will keep you abreast of future developments in this area as they occur.

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