NLRB “Deletes” Company E-Mail From an Employer’s Property Rights

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If you think an employer has an absolute right to control its own email systems, think again – at least according to the National Labor Relations Board. On December 11, 2014, the NLRB declared that employees may generally use their employers’ email for union organizing purposes – and that employers who generally prohibit employees from using work email for these purposes, or for all non-work purposes, violate federal labor law. The case, Purple Communications, Inc., 361 NLRB No. 126 (2014) is a stunning about-face from the NLRB’s prior precedent in The Register Guard, 351 NLRB No. 70, which held that employers may lawfully bar employees’ nonwork-related use of email systems.

The case is remarkable in that, now, employers’ property rights in their own electronic systems – systems they pay for, create, maintain, and are liable for – are trumped by employees’ rights to proselytize in favor of labor unions. Even more remarkably, a neutral employer policy prohibiting employee email use for all non-work purposes now violates federal law because at least one among “all” purposes could include union organizing.

Although the rights of workers to express and solicit support for unions have long been sacred under federal law, the NLRB has created an expansive presumption under federal labor law 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” – and, unavoidably, that employers have exceptionally limited rights to control that use.

Lest there be any doubt that the NLRB’s holding is far-reaching and creates substantial new burdens on employers, the NLRB also made clear that “it will be the rare case where special circumstances [will] justify a total ban on non-work email use by employees.”

Diminishing Employers’ Property Rights

Most employers would reasonably believe they have a right to control email systems, like any other physical thing they own. In Purple Communications, however, the NLRB distinguished email from other things employers own, reasoning that email systems are “materially different” from other employer-owned equipment that, under traditional property law, naturally give employers a right to restrict employee use. The NLRB analogized a ban on email communication to general bans on oral solicitation during nonworking time which, under traditional NLRB precedent, are viewed as barriers to employees’ efforts to organize.

Put simply, a restriction on use of email is now viewed by the NLRB as the same as a restriction on

any other kind of oral communication. Purple Communications therefore creates a presumption 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 non-working time." And in this context, "rightful access" means virtually any access.

No Real Limits

In holding that employees can use employer e-mail for non-work purposes, the NLRB has opened a can of worms – though the NLRB's decision takes pains to deny this. The NLRB went out of its way to say that the principle of Purple Communications is "narrow" and "limited," because an employer may justify a general ban on nonwork-related email use by showing that "special circumstances necessary to maintain production or discipline justify restricting its employees' rights [to email use]." The NLRB's decision also purports to limit its own reach by protecting employee emails about union organizing on "nonworking" time. But these limits are more theoretical than real, for at least two reasons.

First, the NLRB's new rule shifts from an assumption that an employer can control its own email system (provided that it does not discriminate specifically against "union talk") to an assumption that an employer can't lawfully control its own email unless it can affirmatively show that the control is necessary to protect "production or discipline." Employers will now have to work much harder in justifying policies limiting email use.

Second, the notion of "nonworking" time is slippery at best, and provides almost no guidance to employers on how to comply with the new state of the law. It seems clear that an employee who is not at work, and who is not permitted to use work email during such nonworking time, is on "nonworking" time for purposes of the NLRB's new rule. But what about an employee who is walking down the hall to the break room with an iPhone and shoots off an all-employee email blast in support of a union – is that "nonworking" time? And what about an employee who is expected, like many employees nowadays, to have access to and use employer email systems after hours? Particularly with a pro-union and highly politicized NLRB, it is difficult to imagine more than a few very limited circumstances in which employee solicitation by email for organizing purposes is not authorized and protected by the NLRB's new decision.

Looking Ahead

Many, if not most, employers restrict employee use of email systems for nonwork-related purposes. Purple Communications means that thousands of U.S. employers will now need to examine, reevaluate, and revise such policies, whether or not those policies were specifically aimed at union organizing activity.

Employers should review their employee handbooks and other relevant policies governing employee use of company email, and determine whether they restrict employee use during nonworking time. To the extent such restrictions exist, they must be carefully analyzed so that they fit within the narrow exceptions the Board laid out in its decision. For instance, enforcement of such restrictions must now be consistent, uniform, and protect an employer's interest in maintaining "production" and "discipline" by the least restrictive means. If the restrictions do not help maintain production or discipline, cannot be consistently and uniformly enforced, or are not the least restrictive means to achieving that protection, they may need to be removed altogether.

Finally, in gray areas the Board's decision has created – such as how to justify restrictions as being for production and discipline as well as the definition of "nonworking time" – employers should

actively work with counsel to find ways to defend against the unfair labor practices that will no doubt come their way

Kelley Drye & Warren will continue to monitor the developments in subsequent Board rulings. In the meantime, please contact our Labor and Employment group for any questions related to compliance with the NLRB’s new rule in Purple Communications.