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NLRB Rules Employees Have Right to Use Company Email for
NLRA-Protected Activity

Section 7 of the National Labor Relations Act, or NLRA, gives employees the right to organize, to bargain collectively, and “to engage in other concerted activities.” More simply put, by operation of Section 7, employees enjoy the right to act for the benefit of, or on behalf of, themselves and their co-workers regarding wages, hours and other terms and conditions of employment. This includes activities such as complaining about pay and benefits or discipline to coworkers and taking more assertive action such as seeking union assistance, walking off the job, picketing, or filing a formal petition with the NLRB for a union election. Section 7 is broadly written and it is an unfair labor practice under the NLRA to “interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.”

Recently, in the case of *Purple Communications, Inc.*, 361 NLRB No. 126 (Dec. 11, 2014), a divided National Labor Relations Board decided that employees have the right to use their employers’ email systems as a vehicle for exercising their Section 7 rights. The ruling overturns *Register Guard*, 351 NLRB 1110 (2007), which held that employees do not have a statutory right to use their employers’ email systems for such purposes.

The ruling in *Purple Communications* stems from a case the Communications Workers of America brought in 2012 after failing in its efforts to organize the

employees of Purple Communications, Inc., a California company that provides interpreting services for the deaf and hard of hearing. Like many employers, Purple Communications had an “Internet, Intranet, Voicemail, and Electronic Communication Policy” that allowed employees to use company-owned electronic equipment and systems, including its email system, for “business purposes only,” and prohibited employees from engaging in activities on behalf of organizations not affiliated with the company, as well as sending uninvited email of a personal nature. The union filed an unfair labor practice charge with the NLRB alleging that the policy violated the Section 7 rights of Purple Communications’ employees.

The NLRB agreed with the CWA and ruled that, going forward, it will presume that employees who have been given access to their employer’s email system for business reasons (non-business reasons, too) have the right under the National Labor Relations Act to use it to engage in Section 7 communications and activities, subject only to the following:

- Employers may be able to justify a total ban on the non-work use of email, including Section 7 communications, if they can demonstrate that special circumstances make the ban necessary to maintain production or discipline. However, the NLRB cautioned that such a ban would be justified in only “rare”

CONTINUED ON NEXT PAGE

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circumstances, albeit without offering any guidance as to what that might mean.

- Where a ban is not justified, employers may apply uniform and consistently enforced controls over their email system but only to the extent such controls are necessary to maintain production and discipline (e.g., no oversized attachments or audio/video segments, etc.).

The NLRA also prohibits employers from engaging in surveillance of employees' Section 7 activities. This means that employers are not allowed to spy on or otherwise monitor employees when they engage in Section 7 activities or even create the impression of doing so. In reaching its decision in *Purple Communications*, the NLRB recognized it was creating a degree of uncertainty for employers regarding how they might be able to lawfully monitor their email systems in the future now that employees may be using email to engage in Section 7 activities. The NLRB offered the following limited guidance:

- Employers may monitor employee use of their email systems so long as the monitoring is not discriminatory or tailored to impede protected use, i.e., "so long as 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."
- While an employer may not change its monitoring practices in response to protected activity, "an employer is not ordinarily prevented from notifying its employees ... that it monitors (or

reserves the right to monitor) computer and email use for legitimate management reasons and that employees may have no expectation of privacy in their use of the employer's email system."

Employers are advised to revisit their existing policies and practices on the use of email and monitoring to ensure compliance with *Purple Communications*, while also taking care to apply their email system policies (including monitoring) uniformly and consistently. First, and foremost, employers will want to consult with counsel to determine whether special circumstances exist that would warrant a total ban on email usage for non-work purposes. Failing that, any policy containing a "business purposes only" restriction on employee use of company email systems should be modified to allow for communications during non-working time regarding wages, hours, and other conditions of employment. Employers may also want to consider eliminating email access for employees whose jobs do not entail email communications or require such access. Finally, employers should double-check to make certain that company policies relating to email and social media usage make it abundantly clear that monitoring may take place and as a result employees have no expectation of privacy with respect to electronic communications. Keep in mind though that any such monitoring must be conducted even-handedly with a legitimate business purpose in mind and otherwise in accordance with the *Purple Communications* decision.

Stay tuned for further developments, as court challenges of the NLRB's ruling are expected.

This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.