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NLRB Issues Ruling on Non-Business Use of Email

As you may have heard, the NLRB recently overturned years of precedent by ruling that employees who are granted access to their employer's email system for their jobs must be permitted to use that email system during nonworking time for protected non-business reasons, including engaging in union activity, discussing terms and conditions of employment, and other communications protected by Section 7 of the NLRA. While this ruling is a departure from precedent, it is not inconsistent with the legal parameters the Board has previously established for policies governing communications on social media and employee solicitation in the workplace.

The case is called *Purple Communications, Inc.*, and all 70-plus pages of the order are available here (go to link and click on Board Decision). To summarize, the rule before this case was that an employer's email system was the employer's property, and that the employer had the right to restrict non-business use of it so long as it did so in a non-discriminatory fashion. In *Purple*, the Board held that email is actually analogous to a physical location, like a cafeteria, and employees must be granted access to use it during nonworking time to engage in protected activity, such as discussing terms and conditions of employment. Whether the Board's legal analysis is entirely sound or not, the upshot is that employers with a strict rule that work email is for business use only will need to change their policy. In other words, ***if your policy governing the use of technology prohibits all non-business use of company email, you must revise it to permit employees to use company email during nonworking time to engage in union activity or other protected concerted activity.***

There is some limited wiggle room here, for situations where non-business use of email during nonworking time inherently causes production or discipline problems. The Board in *Purple* said that where "special circumstances" make it necessary to restrict access in order to "maintain production or discipline," employers may, in whole or in part, ban non-business use of their email systems during nonworking time. The Board added that any such restrictions would need to be "uniform and consistently enforced." Because this decision is so new, we don't yet know what would qualify as special circumstances, or what kind of use is so disruptive as to warrant restrictions on access to email. If you think that allowing unfettered access to email during nonworking time for union communications or other protected activity will seriously impact your business, let us know, and we will work with you to figure out what limitations might be successful.

If, like many employers, you already allow employees to use their work email for union or other protected activity during nonworking time, this decision still impacts you. Most employers have a policy that regulates employee activity on the company's email and other communication systems. Because the *Purple* ruling requires employers to allow employees to engage in protected activity via company email during nonworking time, restrictions that infringe on this right are no longer permissible. This essentially means your policy governing the use of technology needs to align more with your no-solicitation and social media policies. As discussed in the blog posts available here, the Board has already issued a series of rulings and memoranda explaining how it will evaluate social media policies.

Generally speaking, a policy will be struck down if it could be read by a reasonable employee to prohibit protected activity, such as engaging in collective action or discussing conditions of employment. For example, a restriction against making "negative" or "disparaging" statements about the company is improper because an employee could read this to mean he cannot use company email to complain to coworkers about his working conditions or his boss. On the other hand, restrictions against harassment, discrimination, divulging trade secrets, obscene material, and other clearly improper activities are allowed. Employers should take another look at their policies to make sure that none of them could reasonably be interpreted as prohibiting protected activity. If you are not sure whether a particular policy of your company would comply, please contact us.

Finally, employers should be alert to what *Purple* might mean moving forward. This case dealt only with employer email, but the Board signaled that it is unlikely to stop there. The principles in *Purple* could easily be applied to other employer-provided means of communication, such as electronic bulletin boards, instant messaging, and telephones. If you have restrictions in place against use of these other items for union or other protected activity, it is a good idea to review them now and to ensure that any restrictions are tied to a legitimate business need.

Please contact us if you have any questions.