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Legal Alerts

NLRB: Employers Cannot Ban Employees From Using Company's Email System for Union-Related Communications

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On December 11, 2014, the National Labor Relations Board (NLRB) issued a decision with major implications for employers that gives employees access to company email systems. While most employee handbooks prohibit personal use of company resources, employers commonly allow minor use of company email, such as employees selling Girl Scout cookies and charity raffle tickets or communicating about upcoming parties or events.

In *Purple Communications, Inc. & Communication Workers of America, AFL-CIO*, the NLRB acknowledged that workplace email has expanded to become a natural gathering place where employees communicate, and the agency declared that uneven enforcement of email policies that distinguish between union communications and other personal communications, violates the requirement that employer not discriminate against union-related activities. The NLRB therefore ruled that many employees have a statutory right to use company email to discuss a range of workplace issues, so long as they do it on their own time and do not hurt productivity or office discipline. As such, employers may no longer ban employees from using the company's email system for union-related communications during non-work times.

This decision overrules the 2007 decision in *Register Guard*, which held that employees do not have a legal right to use their employers' email for union activity or discussing wages or other workplace issues. The NLRB found the rule change necessary after acknowledging that email was now a common forum of workplace communication-the modern day version of a “water cooler” where employees discuss workplace issues-and found electronic means of communication critical to employees' exercise of their rights.

In *Purple Communications*, the Communications Workers of America challenged a California-based company's policy of banning the use of its email system for "activities on behalf of organizations or persons with no professional or business affiliation with the company" and "sending uninvited email of a personal nature." Although the policy did not single out or even mention union activity, the union argued that the policy interfered with the employees' right to unionize under Section 7 of the National Labor Relations Act. The majority of the NLRB agreed, and stated that employers who choose to give their employees access to their company's email system must allow their employees to use the email system for statutorily protected communications, including those related to unionization, during non-working times.

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Even though this ruling makes it harder for employers to regulate employee use of company email systems, the NLRB noted that employers are not obligated to allow email access to employees, and that the decision did not apply to any other form of communication. Additionally, employers may monitor company emails for legitimate management purposes. And finally, the NLRB stated that employers may justify a ban on non-work related emails if they can show that special circumstances make the ban necessary to maintain productivity or discipline.

Nonetheless, the *Purple Communications* decision is a win for unions. The NLRB made it clear that employers may no longer ban specific communications through email (e.g., targeting union-related emails), and more importantly, may not ban non-work related emails without a stringent showing of special necessity.

Some pundits believe the *Purple Communications* ruling will not survive court review, but rather than taking the wait-and-see approach, prudent employers will consider the following measures:

- Revise email policies that categorically limit employee use of email systems or target specific types of email communications
- Make sure policies are applied and enforced in a way that does not discriminate against certain types of communications
- If employers wish to have a total ban on non-work emails, make sure the ban is strongly supported by legitimate business interests, such as a discernible reduction in production, a need for discipline, to prevent damage, or to avoid a system overload
- Notify employees of any monitoring of the email system
- Monitor emails only for legitimate managerial reasons, such as ensuring productivity or work quality, preventing harassment, or reducing employer liabilities
- Make sure employees understand they do not have a right to privacy in messages sent through the company email system

If you have any questions regarding compliance with the NLRB's rules or any other employment law or labor issues, please contact Foster Pepper's Employment & Labor Group.

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