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The Right To Use Employers' Email To Discuss Workplace Issues

By Trish K. Murphy

The National Labor Relations Board recently created a presumptive right for employees with access to email at work to use their employers' email systems to discuss terms and conditions of employment. The *Purple Communications, Inc.*[1] decision has significant implications for all employers covered by the National Labor Relations Act, including those with nonunion workforces. Employers that maintain policies that restrict employees' use of email for NLRA-protected communications will be at risk for unfair labor practice charges.

Purple Communications provides sign-language interpretation services and assigns an email account to each interpreter. The company's email policy limited employee email use to business purposes only, a lawful restriction under then-existing NLRB precedent.

Under the Board's 2007 *Register Guard* decision,[2] employees had no NLRA right to use employer email systems for protected concerted activity, such as union organizing or discussion of workplace concerns. Accordingly, an employer could lawfully restrict employee email use to business activity only, so long as the employer applied the policy consistently in a nondiscriminatory manner.

In *Purple Communications*, the Board majority reversed course and explicitly overruled *Register Guard* in a sharply divided 3-2 decision. The Board found that *Register Guard* afforded too much weight to employer property interests while undervaluing employees' core NLRA Section 7 rights.

Section 7 affords employees the right to engage in "concerted activities for the purpose of ... mutual aid or protection."[3] Employees' exercise of their Section 7 rights encompasses the right to communicate with one another about union organizing and working conditions.[4]

The Board further concluded that *Register Guard* failed to understand the importance of email as a means of workplace communication. Noting the pervasiveness of work email for employee-to-employee communications in today's workplace, the decision deemed email "such a significant conduit for employees' communications with one another that it is effectively a new ‘natural gathering place'" and a forum for employees to seek to persuade fellow workers in employment-related matters.[5]

Emphasizing its responsibility to adapt the NLRA to the changing work environment, the Board decided that employee use of email for statutorily protected communications must presumptively be permitted by employers that have chosen to give employees access to their email systems.

Scope of the New Analytical Framework

The new standard has a few limitations. The presumptive right to use employer email for protected communication applies only to nonworking time and only to employees already granted access to their employer's email system for work purposes. No employer is required to grant email access to employees where it has not chosen to do so.

The Board left open the possibility for situations where it would be permissible for an employer to ban all non-work use of email, including Section 7 communications on nonworking time. It held that an employer may justify such a rule by establishing that "special circumstances" necessitate the ban to maintain production or discipline. Notably, the Board expects few employers to meet this standard, cautioning that "it will be the rare case" where special circumstances justify a total ban on non-work email use by employees.[6]

Additionally, an employer may apply uniform and consistently enforced restrictions on email use if the employer can demonstrate that the restrictions are necessary to avoid interference with the email system's efficient functioning. For example, an employer may establish a necessity to prohibit large attachments or audio/video segments to prevent such interference.

Monitoring and Surveillance

Employers commonly monitor their computers and email systems for legitimate business purposes, such as ensuring productivity, preventing misuse of email that could give rise to employer liability, and investigating alleged misconduct. While *Purple Communications* does not prohibit such monitoring, employers will need to navigate carefully to minimize their vulnerability to allegations of unlawful surveillance of employees' Section 7 activity.

In *Purple Communications*, the Board characterized use of employer email as analogous to public union activity, noting that NLRB precedent has established that employees who choose openly to engage in union activities at or near the employer's premises cannot be heard to complain when management observes them. Employer surveillance of employee protected activity becomes problematic when the observation is conducted in a way that is out of the ordinary. In the context of email monitoring, unlawful surveillance could involve increased monitoring during an organizing campaign or a targeted focus on protected conduct or known union activists.

Prudent employers will be mindful that even where no unlawful surveillance has occurred, a perception of out-of-the-ordinary employer monitoring may stem from erroneous information or unrelated contemporaneous events. Avoiding such a perception may prove especially difficult where an employer must investigate allegations involving specific employees' email communications through the use of a targeted focus that departs from the employer's standard monitoring protocol.

Furthermore, in some situations, protected activity and communications may be intertwined with the issues under investigation, which is not always known at the outset of the inquiry. For these reasons, employers should anticipate the possibility of needing to defend their email monitoring and plan accordingly.

Takeaways for Employers

Because the *Purple Communications* standard applies retroactively, the decision's impact on employers covered by the NLRA is immediate. Employers should consider taking the following actions promptly:

- Evaluate existing policies and practices addressing employee access to and use of employer email, including any rules concerning email solicitation or distribution. If necessary for compliance with the Board's new standard, make revisions and communicate the changes to company staff.
- Determine whether detailed policy language on non-work use of email would support the employer's particular needs. By illustration, a policy could include explicit language stating that non-work use of email is permitted only during nonworking time. Or some employers may opt to prohibit or restrict non-protected email communications, such as offers for Girl Scout cookies.
- Review policies and practices for monitoring email and other electronic communications and revise as necessary to ensure monitoring is performed in a nondiscriminatory manner. Take steps to ensure that monitoring protocols are well documented in case a need arises to show that monitoring has not changed in response to union organizing or other protected activity.
- Confirm that employees have clear notice that they do not have an expectation of privacy in email messages and that the employer reserves the right to monitor and review all communications and attachments received from or sent to its email system.
- When investigating employee activities or communications that potentially may carry Section 7 protections, have and document a legitimate business justification for any related email review.
- Provide manager and supervisor training on the company's email and monitoring policies, as well as training on how to identify and accommodate Section 7 protected communication and activity.

Trish K. Murphy is an attorney with Northwest Workplace Law PLLC. Her practice focuses on management-side labor and employment law and independent workplace investigations. She can be reached at trish@nwworkplacelaw.com.

1 361 NLRB No. 126 (2014).

2 351 NLRB 1110 (2007), *enf'd in relevant part and remanded sub nom.*, *Guard Publishing v. NLRB*, 571 F.3d 53, 387 U.S. App. D.C. 53 (D.C. Cir. 2009).

3 29 U.S.C. 157.

4 *Purple Communications*, Slip op. at 5.

5 *Id*. at 8, 12.

6 *Id*. at 14.