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NLRB Puts Unionization on the Fast Track

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The National Labor Relations Board (NLRB) has delivered several significant changes for employers and employees as 2014 draws to a close. Two of those major changes that came in the last week will make it easier for employees to organize into labor unions.

On Thursday, December 11, 2014, a divided NLRB issued its decision in *Purple Communications, Inc.*, overruling existing Board precedent by concluding that employees presumptively have a right to use an employer's email system to engage in protected, concerted activity, including union organizing. While there are nuances to this new Board position, the ruling stands as another major shift in Board policies that puts more focus on employee rights at the possible expense of employer property rights.

The primary rulings from the NLRB majority in *Purple Communications* are:

Employees presumptively may use an email system for statutorily protected communications on non-working time, where an employer has chosen to give the employees access to their email systems;

This ruling only applies to employees who have already been granted access to the employer's email system in the course of their duties, but does not require employers to provide such access;

An employer may justify a total ban on the use of email, including Section 7 (i.e., protected and concerted) use on non-working time, by demonstrating that "special circumstances" make the ban necessary to maintain production or discipline; and

Even absent justification for a total ban, the employer may apply uniform and consistently enforced controls over its email system to the extent such controls are necessary to maintain production and discipline.

The Board went on to state that it was not addressing whether or not non-employees had a right to access employer email, nor was it addressing communications on any other types of employer-maintained electronic communication systems.

The Board focused on and rejected as "clearly incorrect" its prior analysis in the *Register Guard* decision delivered in 2007, which dealt with employee rights in the more traditional setting of no-solicitation and no-distribution policies. In *Register Guard*, the Board analyzed the compromise between employee Section 7 rights and employer property rights, and ultimately ruled that "employees have no statutory right to use the[ir] [employer's] e-mail system." Now, in *Purple Communications*, the Board stated that the *Register Guard* Board failed to perceive the importance of emails as a means by which employees engage in protected communications, and that such importance had increased dramatically during the seven years since *Register Guard* was issued. As a result, employee Section 7 rights now presumptively outweigh employer property rights.

There will likely be an attempt to prevent this decision from being implemented, pending further review by a Court of Appeals. Moreover, it is very likely that there will be a flood of charges on this topic, which will result in the need for the Board to hold all cases on this issue in abeyance pending further review by the Division of Advice and/or review by a Court of Appeals. At this point, the decision will be applied retroactively, so a review of email policies is advised – especially for those limited exceptions noted in the decision. If discipline is contemplated in the context of an employee utilizing an employer's email system for Section 7 activity, caution should be noted regarding lengthy suspensions or discharges that might result in significant economic damages, until we receive more clarity in this area of the law.

The second recent NLRB ruling is the Final Rule that it published on Monday, December 15, 2014. This Final Rule has been termed an "ambush rule" and "quickie election" rule because it will expedite the process of holding union representative elections. The Final Rule, scheduled to go into effect on April 14, 2015, tilts election procedures in favor of unions by reducing the amount of time between a union filing a representation petition and the holding of an election. As a result of this accelerated election process, elections could be held in as few as 13 days from the date of filing the petition. The consequence of this shortened time frame is that employers will have less time to respond to the petition, tell their side of the story to employees, and provide information critical to employees as they decide whether to vote in favor of unionization. With employers having less time to formulate a response to organization efforts, this "fast track" election process also reduces the amount of time that employees will have to make an informed decision of whether or not to support unionization.

The Final Rule also charges the NLRB regional director with the responsibility to determine "which, if any, voter eligibility questions should be litigated before an election is held." In essence, the regional director can limit the issues in pre-election litigation to those solely concerned with whether it is appropriate to conduct an election. All other issues regarding voter eligibility questions are now reserved for a post-election hearing which is contrary to the previous rule where these questions were litigated before the election was held. The Final Rule also makes it easier for unions to directly contact employees in attempt to persuade them to organize. Pursuant to the Final Rule, employers must file an "*Excelsior* list" of all eligible voters and disclose each employee's name, address, available personal cell and home telephone numbers, personal email addresses, work location, shift, and job classification. Consequently, unions now have direct access to employees' personal contact information to facilitate organization efforts, and employee privacy is compromised.

What This Means to You

The combined effect of these recent NLRB rulings is that by allowing employees to use an employer's email system to engage in protected, concerted activity, reducing the amount of time an employer has to respond to a union petition for an election, and mandating disclosure of employee personal contact information, unions can more easily attempt to persuade employees to organize, and employees may potentially have less than full information. While the Final Rule could face legal challenge, employers should prepare to act expeditiously upon a representation petition being filed.