Employer Email Can Be Used For Union-Related and Other Protected Communications NLRB Has Ruled

Insights
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In a much-anticipated decision, the National Labor Relations Board (NLRB or Board) ruled today that employees have the right to use their employer's email system on nonworking time to engage in statutorily protected communications, such as discussing wages, hours, conditions of employment and even union organizing. The 3-2 decision overturns the Board's 2007 *Register Guard* decision which held that employees have no statutory right to use their employer's email system for Section 7 purposes. *Purple Communications.*

Background
Purple Communications, Inc., (PC) a provider of sign-language interpretation services, had an electronic communications policy that limited the use of its computers, email systems and other company equipment to business purposes only. The policy prohibited employees from using such systems and equipment for personal emails and for engaging in activities on behalf of organizations with no business affiliation with the company.

In 2012, the Communications Workers of America (CWA) petitioned to represent PC's interpreters at seven of its call centers. After the union lost the elections, it filed objections and unfair labor practice charges against PC, asserting that its electronic communications policy interfered with the workers' freedom of choice in the elections and unlawfully interfered with employees' rights to engage in protected concerted activity. Relying on the *Register Guard* decision, the administrative law judge found that PC's policy was lawful. The CWA and the NLRB's General Counsel filed exceptions, teeing up the issue of the lawful use of company email and possible overruling of *Register Guard* for the full Board.

***Register Guard* Overruled**
The three Board member majority of Chairman Mark Gaston Pearce and members Kent Hirozawa and Nancy Schiffer decided that employees who have rightful access to their employer's email system in the course of their work have a presumptive right to use the email system to engage in Section 7-protected communications on nonworking time. This means that an employer may not totally ban personal use of its email system by employees. The decision does not necessarily permit outsiders or non-employees to use an employer's email system. It also does not require an employer to provide email access to employees who have not previously been given access.

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An employer may rebut the presumption authorizing employee use of company email by showing that special circumstances justify restricting employees' rights, such as restrictions that are necessary to maintain production or discipline. The Board noted that it expects that special circumstances justifying a total ban on employee use of email for Section 7 communications will likely be rare. Merely citing a potential issue or pointing to an existing ban on personal emails will not suffice.

Monitoring and Other Email Restrictions May Be Lawful

The Board stated that today's ruling does not prevent employers from monitoring employee use of computers and email for legitimate management reasons. It would allow monitoring of employee email to ensure productivity, to prevent harassment or other potential problematic behavior or other similar legitimate reasons. The Board stated that employers may notify employees that it reserves the right to monitor computer and email use and that employees should have no expectation of privacy in their use of the company email system. The Board cautioned, however, that employers may not increase its monitoring during a union organizing campaign or focus monitoring efforts on union activists or protected conduct.

The Board also stated that companies may establish and enforce policies related to email use, such as prohibiting large attachments or audio/video segments, if the employer can show that the policy is needed for the efficient functioning of the email system. Any such restriction must be uniformly and consistently enforced and must be necessary to maintaining discipline, productivity or the system.

***Johnson Technology* Also Overruled**

In discussing prior cases dealing with an employee's right to use employer equipment, the Board rejected the broad principle that employees have no right to use employer equipment that they regularly use in their work for Section 7 purposes. In a footnote, the Board also overruled its 2005 *Johnson Technology* decision which held that an employer could prohibit an employee from using a piece of the company's previously-used copy paper for the protected purpose of making a flyer to publicize a union meeting. The Board today rejected the reliance on the employer's property interest in the piece of copy paper as justification for defeating the employee's Section 7 right.

Retroactive Application

The Board decided to apply this decision retroactively to PC and to any other cases currently pending. It sent the PC case back to the administrative law judge to allow the parties to present evidence of special circumstances that would justify PC's restrictions on its employees' use of its email system.

Practical Implications

As the first of many dominos that may fall in the coming months, employee use of company email systems for union organizing efforts can be a game changer. In-house union organizers, who themselves may serve their outside organizer counterparts, now have a powerful communication

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weapon to get out the union message cheaply, quickly and frequently. This then begs a question that seemed inconceivable a few years back, i.e., should you contemplate a return to the stone age by removing email privileges from employees, or doing away with email as a form of inter-unit communication altogether? As far-fetched as that may seem, it is already being discussed in some circles.

There also is the issue of what this means within the broader context of Section 7 discourse within the workplace, regardless of whether a union is involved. The Board has already demonstrated a commitment to expand horizons in this area (e.g., the social media decisions and memos), and this case expressly extends the doctrine further by elevating the traditional water cooler to email communications on working time, and in the process cloaking any number of traditionally inappropriate commentary in a new form of protection.

Lastly, this decision is part of a broader theme by the Board in what is expected to be a busy month for an agency that appears re-dedicated to "leveling the playing field" in favor of organized labor now that it is operating with a full complement of members again. The potent one-two punch this ruling potentially makes when combined with the much anticipated quickie-election rule, (which in all likelihood will compel disclosure of all email addresses in the employer's possession within 72 hours of a representation petition,) will open the door for unions to organize more workers at more workplaces. If you have not recently reviewed your attempts to remain union-free, now may be the time to do so.

If you have any questions about this ruling, please contact your regular Fisher Phillips attorney. Visit our website at www.fisherphillips.com.

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