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Purple Communications – An Employer's Guide to the NLRB's New Ruling on Email Use

As we all get started on our New Years resolutions, employers should add one more to their list revising any email policies. In the waning days of 2014, the National Labor Relations Board (NLRB) issued an important email ruling that affects all employers, whether unionized or not. In the *Purple Communications* case, the NLRB held that non-management employees with access to their employers email system have a presumptive right to use that system during non-working time to communicate about union organizing or about other topics related to improving their wages and working conditions. The NLRBs year-end decision upended and reversed an earlier 2007 decision in the *Register Guard* case holding that employees did not have these workplace email rights.

The email policy at issue in *Purple Communications* limited use of the employers system to business purposes only and banned its use for engaging in activities on behalf of organizations or persons with no professional or business affiliation with the Company. Sound familiar? In fact, many employers have similar policies prohibiting non-work use of email and electronic resources. The NLRB has now held, however, that such policies violate federal labor law rights of non-management employees because email is ubiquitous in the workplace and non-work use of email doesn't unduly infringe on or burden the employers technology systems.

Much ink has been spilled over the *Purple Communications* decision, but here is the short synopsis of what the NLRB did and did not hold:

The NLRB did hold that:

- Non-management employees who have **already been granted access** to the employers email system are presumptively **permitted** to use it during **non-working time** for communications protected under the labor law.
- An employer may be able to justify a complete ban on non-work use of email by demonstrating that **special circumstances** make the ban necessary to maintain production or discipline, but the need must be more than theoretical and the employers interests in having the ban must not be similarly affected by employee email use that is permitted.
- Employers can apply **uniform and consistent controls or monitoring** of its email system in order to maintain production and discipline. These controls must be uniform, however, and must not target or discriminate against individuals for exercising labor law rights.

The NLRB did not hold that:

- **Employer technology systems or property beyond email** must be made available for employee non-work use during non-working time (although stay tuned, as this could be coming soon from the NLRB). As such, employers can, for now, still limit employee use of copy machines and bulletin boards for labor communications.

- **Outside parties** (like a union) can use an employers email system. As such, an employer can still limit third party access to and use of the email system.

- Employees can use an employers email system during **working time** for **non-work purposes** (such as union communications). As a practical matter, though, it may be difficult to distinguish between working and non-working time when it comes to email use.

Future litigation is bound to build on and fine-tune the impact of the *Purple Communications* decision. In the meantime, employers have the unenviable task of trying to distinguish non-working time from working time and of determining whether and how to monitor employee email use. One thing is for certain the *Purple Communications* decision is a good reason to take a red pen (or perhaps a purple crayon if you prefer) to your email policy.