Labor Board Recalls its Previous Email Message: Employees Now Have Protected Right to Use Company Email System for Union Organizing

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On December 11, 2014, the National Labor Relations Board reversed course on the question of whether employees may use a company's email system for union organizing and similar communications. Just seven years ago, the Labor Board held that employers who prohibited personal use of a company email system could also prohibit use of that system for union organizing or similar purposes. Now, even if personal use is prohibited, the Labor Board has decreed that any employee who has use of the company email for work purposes also has a protected right to use that email for union purposes.

The issue before the Labor Board in *Purple Communications*, its December 11 decision, and in *Register Guard*, its 2007 decision, was the same: when an employer prohibits personal use of the company email system, does that ban include employee communications about union organizing and other terms and conditions of employment?

In 2007, the Labor Board's *Register Guard* decision squarely held that a prohibition on personal email use by employees would validly include a prohibition of communications about union organizing and about terms and conditions of employment. Thus, a company could legitimately prohibit all personal emails, including emails between employees advocating for union representation, complaining about pay or policies or managers, or otherwise discussing working conditions.

In 2014, the Board's *Purple Communications* decision says that "*Register Guard* was clearly incorrect." By failing to give sufficient weight to the "importance of email as a means of workplace communication," the current Labor Board felt that the *Register Guard* Board had "abdicated its responsibility" to adapt its rules to changing technology.

Thus, *Purple Communications* announced a new rule: any employee who is given access to the company email system must be allowed to use that email for discussing union organizing and other terms and conditions of employment – even if other personal use is prohibited.

The *Purple Communications* decision says this rule is limited. (1) It does not give a non-employee access to the company email system. (2) The communication can be limited to non-work time. (3) The employer would

be allowed to prevent all non-work emails if it could show “special circumstances.” (4) The decision only addresses email and not any other electronic communication. (5) The rule only applies if the employee already has access for work purposes; it does not require employers to give everyone a work email account.

However, these limitations may be of little comfort. (1) While a non-employee would not have direct access, it would seemingly not be difficult for a non-employee to send an email to an employee, who then could mass-forward it to other employees. (2) While it might be easy for an employer to determine whether an email was sent during break time or lunch time, it will likely be difficult, in a workforce of any size, to effectively restrict a recipient from opening and reading those emails during the recipient’s work time. (3) The decision itself says the “special circumstances” justifying a total ban will exist only in “rare cases.” (4) While the only system specifically at issue in the case was email, the dissenting opinion points out that the same rationale used to establish this rule would seem to apply to any other employer-provided device, equipment or facility used for work.

The Labor Board in recent years has been very active in protecting employee comments and discussions about all manner of workplace complaints and issues through channels such as Facebook. The decision in *Purple Communications* means that those comments and discussions, and overt union organizing messages, will be protected even when they occur at work, on the employer’s own email system. There will likely be further legal challenges to this rule, but until that occurs, employers should review their email usage policies, and the enforcement of those policies, to assess whether they are consistent with the new rule announced in *Purple Communications*. A non-compliant policy is, in and of itself, a violation of the National Labor Relations Act; but perhaps more importantly, any discipline or discharge for an employee’s violation of a non-compliant policy could result in reinstatement of the employee and back pay liability.

If you have questions, please contact your Lathrop Gage attorney or the attorney listed above.