BURR ALERT

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Purple Communications Update

By now, you have probably heard about *Purple Communications, Inc.*, the NLRB's December 11, 2014 decision concerning company email accounts. The agency ruled that employees with access to company email systems "in the course of their work," should, in most instances, be allowed to use the email system to discuss workplace issues. This decision overrules *Register Guard*, which, in essence, gave employers the right to ban all solicitation by email so long as the ban was consistently enforced. Unfortunately for employers, *Purple Communications, Inc.* leaves many important questions unanswered.

We will monitor this decision closely to see if it is appealed and keep you apprised of any changes. However, regardless of whether the decision ultimately survives appellate review, employers should consider how their existing email-use policies may be impacted by this decision. Employers can now expect unions and employees to file a wave of new unfair labor practice charges challenging employers' existing email policies.

HERE ARE THE MAIN POINTS OF THE DECISION:

1. An employer may choose to deny company email access to employees for all purposes.

2. An employer who grants employees access to the company email system can no longer prohibit employees from using the email system to communicate with coworkers regarding workplace concerns during non-working time.

3. Like verbal solicitation, an employer may still prohibit an employee's (email) solicitation of another employee during the working time of either employee.

4. Employers can only justify a blanket prohibition on non-work time email use by demonstrating "special circumstances make the ban necessary to maintain production or discipline." However, in *Purple Communications, Inc.*, the Board majority observed that it would "be the rare case where special circumstances justify a total ban on non-work time email use by employees."

5. An employer may review emails on its own system for a "legitimate business reason" without being accused of surveillance. According to the Board, allegations of unlawful employer surveillance of email will be assessed using the same standards as non-email-based surveillance. That is, in order to monitor emails sent using their own email systems, employers may now need to show that such monitoring was in place before a

union campaign and that such monitoring does not specifically target union activity or other concerted activities protected by the National Labor Relations Act.

6. The Board did not opine on email solicitations by nonemployees, such as union organizers or other third parties. However, nonemployees might potentially be allowed to use an employer's email system if the employer allows other nonemployees to do so.

WHAT SHOULD YOU DO TODAY?

1. If you provide employees with company email accounts, review your existing policies regarding use of the company's email system.

2. Review your solicitation rules and consider extending these rules to cover the use of a company email system (if applicable). Make sure to enforce solicitation rules non-discriminately without regard to content. Employees can now email each other as long as everyone involved is on break or lunch.

3. Be sure all employees know they have no expectation of privacy in any company email. Review your procedures for reviewing the content of employee emails. If you review the content of emails your employees send using the company system, such review must be supported by legitimate business reasons, such as litigation retention, policy violation investigations, and non-work time enforcement.

4. Make sure that your policy non-discriminately bars outsiders from emailing employees at work for reasons unrelated to job duties.

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