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Client Alert

Labor & Employment Practice Group

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NLRB Provides Employee Access to Employer Email Systems

On December 11 in a 3-2 ruling, the National Labor Relations Board (the "Board") held in **Purple Communications, Inc.**,[1] that employees may use their employer's email systems during non-work time in furtherance of their rights under Section 7 of the National Labor Relations Act ("NLRA"). In other recent rulings the Board has held that activities such as disciplining employees for negative Facebook posts and promulgating handbook provisions discouraging "discourteous or inappropriate" behavior may violate the NLRA. In essence, the current ruling means that employees may use their employer's email systems for union organizing activities and non-union related protected concerted activity.

Background and Prior Law

Purple Communications provides sign language-based video interpretation services for the hearing impaired. The video interpreters have employer-assigned email accounts, but the employer's handbook contained a policy limiting use of email to business purposes only. The policy prohibited, among other things:

- Engaging in activities on behalf of organizations or persons with no professional or business affiliation with the Company.
- Sending uninvited email of a personal nature.

Last year, a NLRB administrative law judge ("ALJ") was tasked with determining whether this ban on email use for non-work related reasons violated the NLRA by interfering with the employees' Section 7 rights. The ALJ held that it did not. His ruling was based on the 2007 **Register Guard**[2] decision where the Board held that an employer "may lawfully bar employees' non-work related use of its e-mail system, unless the [employer] acts in a manner that discriminates against Section 7 activity."[3]

The NLRB's *Purple Communications* Decision

Purple Communications overrules **Register Guard** and articulates the following new standard:

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- There is a presumption that employee use of employer email systems for Section 7 protected activities during non-working time is permitted.
- The presumption only applies to employees with rightful access to the employer's email system and there is no requirement that an employer provide email access for all employees.
- The presumption does not apply to any other form of electronic communications.
- An employer may rebut the presumption by establishing special circumstances that make this broad email access inappropriate due to production or discipline concerns.
- The opinion does not prevent employer monitoring of its computer systems. Of course, the monitoring must be for legitimate, non-discriminatory business reasons.

Important Considerations for Employers

1. **Purple Communications** applies to most private sector employers, not just those with a unionized workforce or who are the subject of union activity. Under Section 7 of the NLRA, employees have a right to engage in protected concerted activity for the purposes of mutual aid and protection. This means that employees may use the employer's email system for communications related to wages, hours or other terms and conditions of employment. The opinion does not require employers to grant unions access to their email systems.
2. There is a strong likelihood that **Purple Communications** will spur related litigation and ultimately may not stand. In the interim, however, employers should consider revising "business use only" email policies and other policies that would prohibit employee use of employer email systems during non-working time.
3. Employers should periodically audit their policies governing computer and email monitoring to ensure that the policies are not enforced in a discriminatory manner. Employers contemplating computer monitoring policies should implement the policies prior to any suspected union activity.
4. Employers should be cognizant of the interplay between **Purple Communications** and other recent Board rulings expanding the NLRA's reach into non-unionized workplaces. In particular, the Board has held that various social media policies violated the NLRA based on vague prohibitions against disseminating confidential information, overly broad and ambiguous no-gossip policies, and blanket prohibitions on derogatory or unprofessional language. Employers who have not already scrutinized their email policies to determine if they should be modified in light of these rulings should do so in the near future.

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King & Spalding's Labor & Employment Practice

King & Spalding's Labor & Employment Practice Group provides comprehensive labor and employment services to employers ranging from preventive advice and training to litigation and representation under federal and state labor and employment laws. The Group is committed to providing the highest quality legal services in the most timely and cost-effective manner possible.

[1] 361 NLRB No. 126 (2014).
[2] 351 NLRB 1110 (2007).
[3] **Id.** at 1116.