Arkansas Association of Defense Counsel

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If You Build It, They Will Come (and Use It Against You)—

NLRB Holds that Employers Cannot Prohibit Non-Business Use of Email Networks

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In *Purple Communications, Inc. and Communications Workers of America, AFL-CIO,* (December, 2014), the NLRB overruled its prior decision in *Register Guard*, and held that a blanket ban on the personal use of an employer's email system was improper. The ruling applies to employers whether or not they have unions.

The Board found that an employer who provides its employees with access to email must also permit those employees to use the company email system for statutorily protected communications under Section 7 of the NLRA. This statute gives employees the right to act together to improve pay and working conditions with or without a union. There are some important limitations to the Board's ruling.

- Employers are not required to provide employees with email access.
- The use of email for protected communications is presumptively permissible only when it occurs during nonworking time.
- An employer may be able to justify a blanket ban on nonbusiness use of email.
- An employer may apply "uniform and consistently enforced controls" over its email system.

The Background

The Board's ruling is a departure from its prior holding in the 2007 *Register Guard* decision. In that case, the Board held that employees did not have any statutory right to use their employers' email systems for Section 7 communications, and that an employer was permitted to completely ban the use of its email system for such purposes. The majority found that the *Register Guard* case was wrongly decided in that the Board focused too much on the employers' property rights and undervalued the importance of email as a means of communication among employees. The Board's recent decision reflects its attempt to balance the competing considerations.

The NLRB relied heavily upon the pervasiveness of email use in today's business world. The Board cited a 2004 survey indicating that 86% of employees sent and received nonbusiness-related emails at work and a 2008 survey reflecting that 96% of employees reported using email outside of normal work hours. Citing the prevalence and effectiveness of email as a means of communication in the workplace, the Board held that email systems were not entitled to the same protection as other employer-owned equipment. The majority reasoned that unlike other equipment, email systems could accommodate multiple and simultaneous exchanges such that the use of email for protected activity would not cause the equipment to be unavailable for the employer's use.

. **The New Analytical Framework**

The Board adopted a presumption that employees who have access to their employer's email network in the course of their employment have a statutory right to use the email system to engage in protected communications during nonworking time. An employer may rebut the presumption only by showing that special circumstances justify curtailing these rights in order for the employer to maintain production or discipline. The Board predicted that it would be difficult to justify a total ban, but that it was more likely that "consistently enforced controls" over the use of email systems could be upheld.

The Result

Employers should review and consider revising any existing policies to the extent those policies contain a blanket prohibition against personal email use. Employers will also need to exercise caution in monitoring employees' email.

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