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Employment Law Monthly

February 2015

# YOU'VE GOT MAIL: NLRB RULES THAT EMPLOYEES CAN USE COMPANY EMAIL DURING NON-WORK TIME FOR SECTION 7 COMMUNICATIONS

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Recently, in *Purple Communications Inc.*, 31 NLRB No. 126 (2014), the National Labor Relations Board entered a decision holding that employees can access their employers' email system during non-work time to engage in protected communications under Section 7 of the National Labor Relations Act ("NLRA"), such as discussions regarding self-organization, the terms and conditions of employment, and other workplace issues. In a strongly divided 3-2 decision, the Board overruled a previous decision, *Registered Guard*, 351 NLRB No. 1110 (2007), which held that employees had no statutory right to use their employers' email system for activities covered under Section 7 of the NLRA.

## FACTUAL BACKGROUND

The employer, Purple Communications, Inc., provides sign-language interpretation services. Purple Communications' employees, known as video relay interpreters, provide two-way interpretations of telephone communications between deaf or hearing-impaired individuals and hearing individuals. The interpreters worked at 16 call centers on a nation-wide, around-the-clock basis. Purple Communications assigned its interpreters individual email accounts on its email system. The employees used those accounts every day while at work. The employees were able to access their work email addresses from the computers at their work stations, on the computers in the call centers and break areas, and on their personal computers and smartphones.

Purple Communications had an employee handbook, which stated that its email system could be used for "business

purposes only." In the fall of 2012, unfair labor practice charges were filed alleging that the policy was unlawful as the policy's broad prohibition on the employees' personal use of electronic communications substantially interfered with Section 7 activity. The administrative law judge below found that the policy was lawful under Registered Guard, which previously held that an employer can prohibit employees from using the employer's email system for Section 7 purposes, even if they are otherwise permitted access to the system and without demonstrating any business justification for the prohibition, as long as the employer's ban is not applied discriminatorily.

**THE DECISION**

Upon review of the policy and consideration of Section 7, the Board overruled *Registered Guard* and held that "employee use of email for statutorily protected communications on non-working time must presumptively be permitted by employers who have chosen to give employees access to their email system." The Board determined that "[t]he necessity of communication among employees as a foundation for the exercise of their Section 7 rights can hardly be overstated." The Board stated that, with the continuing development of technology, email is an increasing means of employee communication in many workplaces for both work-related and non-work related purposes.

The Board found that the previous controlling decision, *Registered Guard*, failed to fully acknowledge the significant role email plays in employee workplace communications, including communications protected by Section 7. As a result, the Board concluded that *Registered Guard* adopted an "outmoded assessment of workplace realities," focused "too much" on the property rights of employers and "too little" on the importance of email as a means of workplace communication, and failed to adapt the NLRA to the "changing patterns of industrial life."

The Board, however, did set several parameters on the scope of its decision. First, the decision applies only to employees who have already been provided access to their employers' email system and does not require that employees be provided such access. Second, an employer can justify a total ban on non-work use of email, including use for Section 7 purposes during non-working time, by demonstrating that special circumstances exist which make the ban necessary. The Board noted, however, that it will be the "rare case" where special circumstances justify a complete ban on non-work email use by its employees. When "special circumstances" do not exist, employers may apply uniform and consistently enforced controls over their email systems to the extent necessary to maintain production and discipline.

Finally, the Board held that the decision does not prevent employers from continuing to monitor computers and email systems for "legitimate management reasons" such as ensuring productivity and preventing harassment or other activities that could result in employer liability. The Board stated that such monitoring will be lawful as long as the employer does nothing out of the ordinary, such as increasing its monitoring during a union campaign or focusing its monitoring efforts on Section 7 protected activity. Notably, the

Board did not find the policy unlawful, but remanded that issue back to the administrative law judge who previously found the policy lawful.

**TAKEAWAYS**

While the NLRB takes a recognizable stance in favor of protecting Section 7 communications through email, the decision creates several unanswered questions, such as: (i) the definition of "special circumstances" that would allow a ban on non-work time email use; (ii) how this decision relates to the well-established right of employers to restrict employee use of its property; and (iii) to what extent would business-only email policies be considered unlawful under the NLRA.

Nonetheless, we are not without guidance. The decision suggests that employer policies affirmatively precluding Section 7 email communications are unlawful. In addition, employers that have adopted "business-only" policies should consider modifying their policies to avoid language that could be interpreted to prohibit concerted activity protected under Section 7. Notably, the decision preserves the ability of employers to monitor an employee's computer and email use for "legitimate management reasons."

This is an issue that should be monitored as the decision may be appealed. In the meantime, you should consult your attorney if you have any questions about how to comply with the NLRA's current stance on employee email use.

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