NLRB Allows Employee Use of Employer Email Systems

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In a long-awaited and widely-expected ruling, the NLRB held that employee use of company email systems on non-work time for activities protected by the National Labor Relations Act must be permitted if employers have given employees access to their email systems in the course of their work. The decision expressly overturns the Board's 2007 *Register Guard* decision. The Board provided a narrow exception in the decision, but stated that the exception's use will be "rare." *Purple Communications*, 361 NLRB #126 (December 11, 2014).

This decision means that employees with email access now have protection under the National Labor Relations Act for use of company email for union organizing-related communications and other protected activity under the NLRA. Significantly, it also means that many employers' electronic use and email policies now contain unlawful restrictions on email use. All employers should revisit their electronic use and email policies and revise them to comply with this NLRB decision.

The decision arose out of a failed union organizing drive. The employer allowed its employees access to its email system and provided various ways for them to access the system both at work and while off duty from their home computers or smart phones. The employer had an electronic communication policy that prohibited both using email for "engaging in activities on behalf of organizations or persons with no professional or business affiliation with the company" and "sending uninvited email of a personal nature."

In the fall of 2012, the Communications Workers Union filed an election petition to represent the company's hourly employees, and elections were held at several of the company's locations. The Union lost the election at two locations. It then filed objections to the election results and an unfair labor practice charge, all of which alleging that the electronic communications policy interfered with the employees' rights under §7 of the NLRA.

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In a 3-2 decision, the NLRB found that the company's policy violated the NLRA. The Board expressly overturned its prior decision in *Register Guard* stating that the reasoning in *Register Guard* "undervalued employees core §7 right to communicate in the workplace about the terms and conditions of their employment while giving too much weight to the employer's property rights" and "that *Register Guard*, inexplicitly failed to perceive the importance of email as a means by which employees engage in protected communications." The Board held that where employees have been given access to an employer's email system in the course of their work, there is now a presumption that they are entitled to use the system to engage in statutorily- protected discussions about their terms and conditions of employment while on non-working time.

The Board created a narrow exception for employers by holding that an employer may rebut the presumption of access by demonstrating "special circumstances" are "necessary to maintain production or discipline." The Board, however, stated that "we anticipate that it will be a rare case where special circumstances justify a total ban on non-work email use by employees. Yet employers may apply uniform and consistently enforce controls over their email systems to the extent that such controls are necessary to maintain production and discipline."

At a minimum, this decision will likely require many employers to revise their electronic communications policies as they relate to email. Illegal employment policies pose a risk to employers since they can potentially result in a Board charge either during an organizing drive or after the discharge of a non-unionized employee for a violation of an employer policy, such as, for example, an email or social media policy. .

If you have any questions about this decision and its potential effect on your electronic communication or email policy, please contact the author of this Client Alert, your Butzel Long attorney, or any member of the Labor and Employment Law Group.