Employer's Email System

Can it be used to discuss protected activities

By Tyler Volm

In a long-awaited decision in Purple Communications, Inc., 361 NLRB No. 126 (https://t.e2ma.net/click/6n93m/eyigd1/eyqi4c), a divided National Labor Relations Board held in a 3-2 decision that workers have the right to use their employers' email systems to communicate with each other at work regarding union organizing, terms and conditions of employment, and other protected activity under the National Labor Relations Act.

At issue in the case was the employer's Internet, Intranet, Voicemail and Electronic Communication Policy which specifically prohibits usage of systems 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."

While reaching at its decision, the board overruled its 2007 decision in Register Guard. In the earlier case, the board had held that an employer may completely prohibit employees from using the employer's email system to communicate regarding activities protected by Section 7 of the National Labor Relations Act without demonstrating any business justification, so long as the employer's ban was not applied discriminatorily.

However, the board concluded that the Register Guard's decision incorrectly focused "too much on employers' property rights and too little on the importance of email as a means of workplace communication," an importance that has only increased since that 2007 decision.

The board stated that it had "abdicated its responsibility 'to adapt the act to the changing patterns of industrial life" with its decision in Register Guard.

In Purple Communications opinion, the board noted that its decision was limited in three important respects. First, it applies only to employees who have already been granted access to the employer's email system in the course of their work and does not require the employer to provide such access. Second, an employer may justify a total ban on non-work use of email (including Section 7 purposes during non-working time) by demonstrating that special circumstances make the ban necessary to maintain production or discipline.

In the absence of justification for a total ban, the employer may also apply uniform and consistently enforced controls over its email system to the extent that such controls are necessary to maintain production and discipline. Third, the decision does not address email access by non-employees nor does it address any other type of electronic communications system.

Employee handbooks and email use policies should be revised in light of the rights granted to employees today. Where appropriate, employers should detail specific circumstances that justify certain restrictions. After Purple Communications, employers with such restrictions will be required to articulate the interest at issue and demonstrate how that interest supports the email restriction they have implemented. For example, employers must articulate specific, demonstrable, concerns about deceased productivity due to unrestricted email use by employees, and demonstrate that the email restriction imposed is a tailored response given the scope of the employer's concern.

Additionally, while employers retain the right to monitor their email systems to ensure productivity and prevent harassment, the board cautioned that increased monitoring during organizational campaigns or focusing monitoring efforts on protected conduct or union activists would run afoul of its decision. L&C

Tyler Volm's practice focuses on employment litigation and advice. He works with business owners and managers to ensure compliance with changes in the law, and defends employers against complaints when they arise. With a background in business law, he has a unique perspective on how an employer's business needs naturally blend with employment law.
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