



A NEWSLETTER FROM THE LAW FIRM OF FERRARA, FIORENZA, LARRISON, BARRETT & REITZ, P.C.

Special Clients and Friends Alert

NLRB Rules Employees Can Use Company Email in Union-Organizing Efforts Decision Creates yet another Obstacle for Employers Trying to Remain Union-Free

In what could turn out to be the most anti-employer, pro-union, decision of the Obama-era National Labor Relations Board (“NLRB” or “Board”), the Board ruled Thursday that employees who have access to employer-provided email systems can use that access to communicate with other employees about forming a union. While there will likely be a legal challenge to this decision, employers seeking to comply with this new ruling will need to make some difficult decisions about their email use policies and practices.

Case Facts

In this landmark case (*Purple Communications, Inc. and Communications Workers of America, AFL-CIO*), the NLRB invalidated a fairly standard email use policy maintained by the employer, Purple Communications, Inc. Specifically, the policy required that the Company’s email system be used for “business purposes only.” Further, it prohibited “[e]ngaging in activities on behalf of organizations or persons with no professional or business affiliation with the Company” and “[s]ending uninvited email of a personal nature.”

In overruling a 2007 NLRB decision which expressly permitted such a policy (i.e., *Register Guard*), the Board held that employee use of email for any NLRA-protected communications (i.e., discussions regarding union-organizing and other terms and conditions of employment) during non-working time “must presumptively be permitted by employers who have chosen to give employees access to their email systems.”

The Board stated that its decision in *Purple Communications* is “carefully limited” in two ways. First, it applies only to employees who have already been granted access to the employer’s email system and does not require employers to grant such access. Second, an employer may justify a total ban on non-work use of email, including union-organization use on non-working time, by demonstrating that “special circumstances make the ban necessary to maintain production or discipline”. However, the Board said it would be a “rare case” where special circumstances would actually warrant such a ban.

Bottom Line for Employers

Given the foregoing, employers are left with only one realistic option to prevent employees from using company-owned email systems in union-organizing efforts: i.e., ban all employee use of employer-owned email systems.

Short of a complete ban, employers will need to revise their email use policies and practices to eliminate prohibitions on non-work related communications during non-working hours. Please note that while a policy can still limit an employee’s non-work use of the system to non-working time, there could even be problems associated with enforcing that limit. Specifically, the NLRA prohibits an employer from conducting “surveillance” of employee-union-organizing activities. Accessing and reading employee emails to determine whether an employee is using the company’s email system for non-work purposes during working time, could easily result in a union charge against the

employer for such unlawful surveillance.

The only other option is to hope that the anticipated legal challenge of the *Purple Communications* decision is successful.

It should also be noted that President Obama recently made a new appointment to the NLRB. Given that there are a number of important cases still awaiting decisions by the Board, the *Purple Communications* decision may only be the first of many pro-union decisions yet to come.

What Can you Do?

With this in mind, employers should be taking precautions if they wish to remain union free. Specifically, employers should honestly evaluate their companies with respect to union vulnerability. It is important to remember that union organizing efforts often gain traction when employees feel that they are treated unfairly or without respect or dignity. Efforts to improve fairness and consistency in all aspects of employee management (e.g., wages, hours, assignments, disciplinary actions, etc.) can help foster and maintain a pro-employee, union-free environment. These efforts coupled with a strong employee communication program are perhaps the best way to avoid vulnerability to union-organizing efforts and, to some extent, render the NLRB’s actions irrelevant to your company.

If you have any questions, or need assistance in this regard, please call us at 315-437-7600 or 585-441-0345.

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