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Can Workers Use Their Employer's Email Address for Collective Action?

By Jay Wallace of Bell Nunnally & Martin – (Feb. 10, 2015) – The National Labor Relations Board thinks the answer is "YES," that workers may utilize the company's own email system for unionizing purposes.

As all practitioners in the labor and employment law field are aware, the NLRB is working to increase the ranks of unionized workers. In doing so, the board is increasingly relying on email, web pages and other avenues of social media to spread their message.

As the result, there have been several decisions addressing an employer's ability to monitor traditional methods of communication, such as meetings, protests, and printed communications through letters, posters and leaflets.

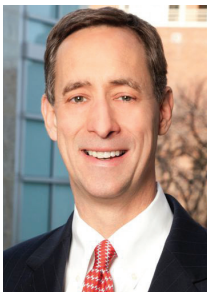
A recent decision, however, will bring to the forefront the issue of the employer's ability to control employees' use of the company's email system.

Companies have historically viewed company email accounts as the company's property. Email accounts are created on company equipment, maintained at the company's expense and the company pays the service provider for monthly operation of the account.

This could all change based on the recent ruling in *Purple Communications, Inc.* (www.nlrb.gov/case/21-CA-09151).

Following this decision, the NLRB announced that it will decide whether employers must allow employees access to the company's email account for collective action that is presumably protected by Section 7 of the NLRB. This includes communications regarding hours, working conditions, and wages, as well as group emails regarding possible union organization of employees within the organization.

In *Purple Communications,* the administrative law judge followed current case law by finding that the employer did not have to permit use of its email system for union activity, or any other conduct protected by Section 7 of the National Labors Relation Act.



Jay Wallace

In response to the decision the NLRB has expressed its intent to protect employee activity on company email and overturn the principal case on this decision *(Register-Guard).*

The historical perspective by which company-sponsored email systems have been treated is best illustrated by the 2001 NLRB decision, *The Guard Publishing Company d/b/a Register-Guard,* 375 NLRB No. 27 (2011).

In that case involving a newspaper in Eugene, Oregon, some of the employees were represented by the Communication Workers of America, Local 37194. In August 2011, a Local president circulated two emails to the workforce. The emails generally encouraged employees to support union collective bargaining efforts and if necessary participate in a community parade on behalf of the union.

The employer disciplined the union president for violating the company's communication systems policy which forbid the use of the company's email system to solicit for commercial ventures, religious or political causes or outside organizations, or other non-job related matters.

After the union filed an unfair labor practice charge, the NLRB concluded the Local president was not improperly disciplined for the emails because the company was not treating the president's support of union activity differently ›

from solicitation to oppose union activity, which also would have been prohibited by the company's policy.

As the Board recognized "an employer could violate Section 8(a)(1) by prohibiting employees to send anti-union emails without prohibiting pro-union emails…but it would not be unlawful discrimination for an employer to permit, for example, email solicitations for charitable organizations but not email solicitations for other kinds of organizations."

After an appeal to the U.S. Court of Appeals for the D.C. Circuit, the NLRB revisited *Register-Guard* on the limited issue of selective use of the company's email system and concluded that the company had previously permitted the employees to email solicitations, such as party invitations, baby announcements, offers of sports tickets and requests for services, such as dog walking.

As such, the NLRB found the employer had illegally discriminated against the union president when it disciplined her for using its computer system to solicit its own employees on behalf of the union.

As a result of the *Register-Guard* decision, the concern for employers that even though they own the computers and email accounts and may be paying their employees to work a specific job, the Board will zealously guard a union's right to email employees on the company's computer in order to protest certain aspects of the company's business and even encouraging union organization, all while on company time.

Despite the Board's position in Register-Guard, the theory has always been that employers could prohibit collective action in their email systems by ensuring that it did not allow any communications unrelated to company activity.

The question has now become whether, despite the company's policy, employees have the right to utilize its email system for collective action.

In *Purple Communications,* the administrative law judge followed an established precedent in finding that the employer did not have to permit use of its email system for union purposes.

The Board, however, identified an opportunity to expand the Register-Guard decision by overturning the court's announcement that "employees have no statutory right to use their employer email system for Section 7 purposes."

The 7th Circuit previously addressed the same issue in *Fleming Companies v. NLRB,* 349 F.3d 968 (7th Circuit 2003), concluding that employers could prohibit the use of the company's email system for collective action by its employees.

In *Fleming,* the 7th Circuit determined that employees did not have the unrestricted right to utilize the company's email system for collective action purposes, but could have that right under certain circumstances. This decision represented a split of authority from *Register-Guard.* In *Purple Communications,* the NLRB has invited briefing on this issue from interested parties.

Based on the decisions in *Register-Guard* and *Fleming Companies,* the NLRB has cautioned that while an employer may prohibit employee use of email for union related communications, it must do so in a neutral non-discriminatory manner.

In particular, the Board examines whether the company's discipline for an employee who uses an email for union related communications was discriminatory, such that the employees disciplined for exercising their Section 7 rights are treated differently than employees sending other non-work related communications, such as those for social events, fantasy league sports teams, or fundraisers.

In the Board's view, the employer cannot pick and choose those non-work related emails that it allows and doesn't allow. ›

As for now, the Board is weighing its options on whether to overturn *Register-Guard* by finding that the company is required to provide access to employees seeking to collectively bargain or communicate concerning matters protected by Section 7 of the Act impacting wages, hours and working conditions.

So what are employers to do in the meantime?

The first line of defense against such activity is to examine the workplace. Identify those areas that a union might latch onto to create traction for an organizing effort. Are your working conditions consistent with not only the industry standard, but the industry's best practices? Is equipment properly maintained and safe? Is your workplace generally the type of place that employees enjoy working?

With respect to wages, are your wages consistent with those paid in to workers in your industry? Are you paying for overtime worked by your employees? Are employees properly categorized so that only those who are management level employees or certain professionals receive overtime?

Beyond that, employers should develop and consistently enforce an electronic communications policy. Employers do not have to inhibit all personal email usage outside of work matters. Instead, you can restrict certain categories of non-work related emails, such as allowing charitable organizations while prohibiting non-charitable organizations.

By contrast, allowing communications with political content while prohibiting communications regarding collective action, would be more difficult to enforce. Finally, strictly enforce the email policy. Inconsistent application of that policy will invite a challenge to the validity of the policy when it is selectively enforced against an employee urging collective action.

Jay M. Wallace is a labor and employment attorney and partner at Dallas-based Bell Nunnally & Martin LLP. He can be reached at jayw@bellnunnally.com, or via the firm's website – www.bellnunnally.com.

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