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NLRB Broadly Expands Employee Rights to Use Company Email for Union Organizing and Other Protected Activity

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The National Labor Relations Board (NLRB) has found that employees have the right, during "nonworking time," to use company email systems for union organizing and other activity protected under the National Labor Relations Act (the Act).

In its *Purple Communications* ***decision issued yesterday***, the NLRB overturned its 2007 *Register Guard* decision which had found that employees have no right under the Act to use their company's email system for union organizing and other concerted activities protected by Section 7 of the Act.

In yesterday's decision, the Board sharply reversed course and held that employee use of email for union organizing and other protected purposes must be permitted by an employer absent proof by the employer of special circumstances that would justify a total ban on nonwork use of the company's email system.

The Board emphasized that its decision does not restrict an employer's right to prohibit nonwork related use of its email system during "working time." Importantly, however, the Board has traditionally viewed meal periods and work breaks as "nonworking time."

The Board fails to address in the decision how employers are to manage the many practical difficulties that will flow from this new rule. For instance, even if an employee sends an email during nonworking time, such as during a break, presumably, the recipients will often be other employees who are working.

Also, the Board never explains how an employer actually can determine whether the employee sent an email during working or nonworking time – particularly given the fact that the Board views even informal breaks as nonworking time.

The new decision also complicates the issue of employer monitoring of email messages. While the Board explained that the new rule would not prevent employers from continuing to conduct nondiscriminatory monitoring of email use for legitimate business purposes, employers are now subject to potential legal challenges from employees that monitoring occurred in a

particular instance in response to protected activity such as union organizing.

Additionally, although the Board noted its decision only concerns email and not other electronic communications such as telephone calls, electronic bulletin boards and voicemail, the decision still has potentially broader implications for employee use of electronic systems generally. Specifically, the Board called into question the legitimacy of its past "equipment" decisions that had permitted employers to prohibit the use of communications equipment such as company telephones for nonwork-related purposes.

Not surprisingly, the two Republican members on the Board strongly dissented from the majority opinion issued by the three Democratic members.

Action Items for Employers

1. Companies need to promptly review and, as appropriate, revise their electronic systems policies to make their rules on use of email systems consistent with yesterday's decision. To the extent employers want to prohibit emailing concerning union organizing and other protected activity during working time as permitted by the Board, those employers presumably will need to adopt strict policies prohibiting all nonwork-related emails by employees during working time and then strictly enforce that rule.

2. Additionally, employers need to alert their managers and supervisors to (i) these newly recognized rights of employees to use email systems during nonworking time for union organizing and other protected activities and (ii) any related changes in company policy.

3. Employers need to assure that any monitoring of email system use does not occur, and does not appear to be occurring, in response to any protected activity by employees including union organizing or communications among employees about working conditions.