

NLRB Allows Employees to Use Employer Email Systems for Organizing Purposes, and Issues New Speedy Union Election Rule

Background

The National Labor Relations Board (NLRB) has implemented dramatic changes that will greatly limit the ability of employers to respond to union organizing efforts. Last month, the NLRB held in *Purple Communications, Inc. and Communications Workers of America, AFL-CIO*, 361 NLRB No. 126 (2014), that, effective immediately, employees who have been granted access in the course of their work to their employer's email system will be presumed to have the right to use email for union organizing and related purposes, so long as the communications occur during "nonworking time." One day later, the NLRB adopted a rule that, when it takes effect in April 2015, will substantially shorten the time between the filing of an organizing petition and the holding of a union election, and will require employers to disclose more information that aids unions in preparing for and winning union elections.

These changes have significant implications for both unionized and union-free employers. While the NLRB's email decision may be appealed, and while the quick election rule already faces a legal challenge initiated by the US Chamber of Commerce, employers should, until further notice, address the concerns raised by these changes, as suggested below.

NLRB Email Access Decision

On December 11, 2014, a 3-2 majority of the NLRB held in *Purple Communications* that employees who have been granted access to an employer email system in connection with their work can use the system for union organizing during "nonworking time," unless the employer can demonstrate narrowly defined "special circumstances" supporting a uniformly applied ban on nonbusiness email use.

This new ruling overturned the NLRB's 2007 decision in *The Guard Publishing Company d/b/a The Register-Guard and Eugene Newspaper Guild, CWA Local 37194*, 351 NLRB No. 17 (2007), which held that an employer may ban employees' uses of email for union-organizing purposes and other activity ordinarily protected by Section 7 of the National Labor Relations Act (which applies to both unionized and union-free employers). The majority in *Purple Communications* declared that the earlier ruling was "flawed" because it analogized email restrictions to restrictions on the use of physical equipment (such as copying machines and bulletin boards) and did not adequately recognize that email has become the predominant means of employee communication.

The *Purple Communications* majority states that total bans on nonwork email use (by employees authorized to use email for business purposes) may be permitted in "special circumstances." However, the Board has made clear that these circumstances will be narrowly defined (for example, where an employer could show that a ban on nonwork emails was needed to avoid network damage or overloads due to excessive use), and will only be permissible if *all* nonwork use is proscribed. Even where a total ban would not be permissible, the Board acknowledges that employers may still apply uniform and consistently applied controls over use of the email system to the extent necessary to maintain production and discipline.

The decision raises, but does not answer, questions including whether employees will in the future be held to have the right to use employer email to communicate directly with unions and other outside parties concerning workplace issues, and whether employer policies governing the use of bulletin boards, copying machines, telephone networks and other types of employer equipment and resources will be revisited.

NLRB Quick Election Rule

On December 12, 2014, the NLRB adopted, again by a 3-2 majority, a rule that will significantly speed up the union election process. The final rule will become effective April 14, 2015, and will greatly limit the time employers have both to mount a response to a union's efforts to organize, and to provide employees with full information concerning the choice to unionize or to remain unrepresented.

The rule implements the following important changes (among others) in election procedure:

- Employers must file a "Statement of Position" one business day before the hearing on a union election petition, and those hearings will be scheduled within eight days of when the regional director issues the hearing notice (which it typically does on the same day the petition is filed with the NLRB). The employer's statement must include a list of prospective voters and their names, job classifications, shifts, and work locations. The statement must also describe in detail the ways, if any, in which the employer takes issue with the petitioned-for bargaining unit.
- An employer who fails to include arguments or defenses in its Statement of Position may waive those arguments or defenses going forward.
- Pre-election hearings will be limited in scope. Regional directors and hearing officers can exclude evidence or prevent pre-election litigation over voter eligibility, supervisory status, and the inclusion or exclusion of particular positions, meaning that those issues will be resolved only *after* the election has occurred.
- Written briefs, including post-hearing briefs, will be allowed only if the regional director determines they are necessary.
- Elections are no longer automatically stayed a minimum of 25 days following the regional director's decision to order an election to be held.
- Employers must provide personal telephone numbers and email addresses for eligible voters (if that information is already available to the employer), in addition to their names and addresses, within two business days (rather than seven calendar days) of the election agreement or decision directing an election.
- Election petitions, election notices and voter lists can be electronically filed. The NLRB can also deliver notices and documents electronically.

Cumulatively, these changes will likely reduce the time from the filing of a representation petition to the holding of an election from the current average of approximately 38 days to somewhere between 10 and 20 days.

What These Changes Mean for Your Organization

As a result of the changes, unions will be able to organize employees more easily. The *Purple Communications* decision presumptively requires employers to change their policies to allow employees who have otherwise been granted access to company email to use that email to organize, and to discuss wages, hours, and other terms and conditions of employment (in the absence of narrowly defined “special circumstances” justifying a total ban on nonwork email use). The new quick election rule will disadvantage employers by limiting the time they have to provide employees with complete information concerning union organizing campaigns, and will advantage unions by requiring earlier, and broader, disclosure of information concerning potential voters.

Employers should check (and likely revise) their email policies and practices to ensure they conform to the requirements of the *Purple Communications* decision, the mandates of which are effective immediately. To address the limited time they will have to respond to union organizing petitions once the new speedy election rule becomes effective on April 14, 2015, employers should take a number of steps now. These steps include: being even more proactive about assessing and addressing workplace issues; establishing clear rapid response plans geared to the possibility that a petition may be filed; possibly explaining to employees, in advance of a union organizing petition, the reasons for remaining union-free; assembling in advance the data that would be required to be produced in the event of a representation proceeding; and determining the employer’s position with respect to the supervisory, managerial, or confidential status of employees, and with respect to appropriate bargaining units.

For more information, see the *Purple Communications* decision [here](#), and the new quick election rule [here](#). For advice or assistance in dealing with these changes, contact any member of the Ropes & Gray [Labor & Employment Group](#).