

KD Alert: A New Compliance Target and a New Risk: NLRB Takes Aim at Employee E-Mail Use

by Philip R. Voluck, Esq. and Anna M. Darpino, Esq.
(May 12, 2014)

As if the National Labor Relations Board's (the "NLRB") still recent intrusion into companies' social media policies were not enough of a new exposure, the NLRB is now focusing on regulating, i.e., expanding, employee use of their employer's e-mail system to engage in "free speech" as protected by Section 7 of the National Labor Relations Act (the "NLRA"). More specifically, in *Purple Communications, JD-75-13 (Bogas, ALJ, Oct. 24, 2013)* the NLRB is seeking to overturn the Administrative Law Judge's ("ALJ") decision (which follows NLRB precedent) upholding an employer's right to prohibit employees from using company e-mail for anything other than legitimate business-related purposes.

Current State of the Law—E-Mail is Off-Limits for Section 7 Activities

The NLRB's current analysis can be found in *Register-Guard*, 351 NLRB 1110 (2007) where the agency held that employers "may lawfully bar employees' nonwork-related use of its e-mail system" as long as the employer's policy prohibits any form of nonwork-related use, as opposed to prohibiting only Section 7 activities. In a split decision, the majority likened e-mail systems to other company-owned property (such as televisions and bulletin boards), the use of which employers have long enjoyed the right to restrict and regulate.

Conversely, the *Register-Guard* dissent—which may soon become the majority—argued that e-mail is not like the standard "property" underlying prior Section 7 cases. Rather, e-mail has "revolutionized communication both within and outside the workplace," to the point of replacing face-to-face discussions with electronic communications. Based on this distinction, the dissent asserted that a ban on employees' use of e-mail for Section 7 activities is unlawful, absent special circumstances.

Register-Guard Under Attack

The Purple Communications company restricted employees' use of its computers, internet and e-mail system to prevent the effects of computer viruses. Noting that he is bound to follow the Board's *Register-Guard* precedent, the ALJ found that Purple Communications' policy did *not* violate the NLRA.

General Counsel for the Board has since filed an appeal, known as "exceptions", asking the Board to overrule Register-Guard and adopt a new rule that employees who are permitted to use their employer's e-mail for work purposes have a right to use it for Section 7 activity, subject only to the need to maintain production and discipline. In furtherance of its evaluation, the Board has invited the parties and interested amici to file briefs by June 16, 2014.

The Employer's Dilemma

Policies related to the use of company-owned e-mail systems by employees during certain times of the workday are akin to commonly-used "No Solicitation/No Distribution" policies that appear in most companies' handbooks. Current NLRB law allows employers to restrict the solicitation and distribution of materials by employees regarding their terms and conditions of work to non-working areas and on non-working time. Perhaps, this is where employee use of their company's e-mail system is headed.

Register-Guard provides valuable insight into the dilemma underlying this debate. E-mail has in many ways replaced the need for personal discourse (e.g., solicitation and distribution of informational materials) providing a platform through which staff can quickly and efficiently communicate with multiple people at one time. However, most employees carry and use their own smartphone or tablet at work—much to their employers’ frustration. If employers permit employees to use personal phones/tablets to communicate during non-work time (e.g., meal periods), then, arguably, the utility of employer-provided email for purposes of Section 7 activities is lost. On the other hand, if employers prohibit personal phones/tablets from their premises, then employer-provided e-mail gains value inasmuch as it is the only means of electronic communications available to employees. Such a scenario places employers between the proverbial “rock” and “hard place”—to permit use of personal cell phones or not, that may just be the question.

Policy Suggestions

If the NLRB overturns Register-Guard, employers will be required to permit the use of their electronic communications systems for Section 7 activities during non-work time, unless such use interferes with the “need to maintain production and discipline,” which may prove a difficult hurdle. It may be awhile before the full NLRB issues a ruling, and possible further appeals wend their way through the federal courts, thereby allowing employers time to consider the possible implications associated with this issue. At a minimum, employers should take this opportunity to review their current electronic communications policies and consider whether revisions will be necessary.