

NLRB: Work e-mail not just for business purposes anymore

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Employers should review and update their policies regarding nonbusiness use of work e-mail following a recent decision from the National Labor Relations Board (NLRB). The alternative is exposure to potential liability for unfair business practices.

Purple Communications decision

In *Purple Communications Inc.*, the NLRB released a divided decision in which the Board majority held that in most cases, employers must let employees use company e-mail systems to discuss workplace issues during nonwork hours. The decision focused on statutorily protected communications regarding self-organization, unions, terms and conditions of employment, and other topics within the scope of Section 7 of the National Labor Relations Act (NLRA).

Purple Communications is an about-face from the Board's 2007 *Register Guard* decision, which held that employees did not have the right to use work e-mail for Section 7 purposes. The NLRB now says the *Register Guard* decision was "clearly incorrect" with consequences that were "too serious to permit it to stand." Namely, the NLRB said the decision did not adequately protect employees' rights and failed to fulfill the Board's duty to adapt to changing patterns of industrial life.

Limited parameters

The NLRB acknowledged the need to accommodate two significant competing interests: employees' right to communicate about workplace issues and employers' property interest in their e-mail systems. Attempting to find middle ground, the Board

limited the *Purple Communications* decision as follows:

1. The decision applies only to employees who use an employer's e-mail system for work. It does not require employers to provide e-mail access to employees who would not otherwise have it.
2. It is possible to implement a total ban on nonwork use of e-mail, but only if the employer can prove that special circumstances make the ban necessary to maintain production and discipline. The decision does not provide examples of special circumstances. Rather, it appears that the issue will be decided on a case-by-case basis. The employer must be able to articulate a legitimate interest and demonstrate how that interest supports a restrictive e-mail-use policy.
3. The decision is limited to communications sent via an employer's e-mail system. It does not extend to other forms of electronic communication.
4. The decision is limited to employees only. It does not address nonemployee use of an employer's e-mail system.

Privacy considerations

The NLRB's decision does not prevent employers from monitoring employees' e-mails for legitimate management reasons. Examples of legitimate reasons include ensuring productivity, preventing misconduct, and monitoring activities that could expose the company to liability (e.g., harassment or discrimination). If you intend to monitor employees' e-mails or want to preserve your right to do so, notify employees that they have no expectation of privacy when using your e-mail system.

Bottom line

The *Purple Communications* decision may eventually be overturned by a court, but unless that happens, employers should ensure compliance by reviewing and updating policies governing the permissible use of e-mail. Failing to act could result in liability for unfair labor practices under the NLRA.

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