

NLRB clamps down on employers' email policies

By: Kimberly A. Ross

In yet another pro-employee decision, the National Labor Relations Board (NLRB) has held that company policies that limit the use of the company's email for only business related purposes violates Section 7 of the National Labor Relations Act (NLRA), because they unduly interfere with employees' rights to communicate with one another regarding self-organization and other terms and conditions of employment. In, *Purple Communications, Inc.*, Purple Communications, Inc. had a policy that provided that company emails were for "business purposes only." Its policy also prohibited employees from using company email to "engag[e] in activities on behalf of organizations or persons with no professional affiliation or business with the company," and to "send uninvited email of a personal nature."

The NLRB found that employee use of email for statutorily protected communications on non-working time must presumptively be permitted by employers who have chosen to give employees access to their email systems. This decision, recorded on December 11, 2014, specifically overturned a 2007 NLRB decision that held that an employer could limit the use of its emails to business purposes no differently than the employer could limit the use of its other communications *equipment* (such as copy machines, bulletin boards and telephones) to business purposes only. The *Purple Communications* decision found that an email is not "equipment," but rather, email is "fundamentally a forum for communication." Thus, the NLRB determined that there is a presumption of the right to communicate in the workplace on nonworking time, whether verbally or through a company's email system.

The decision appears to be limited to employees who already have been granted access to the employer's email system in the course of their work and *does not require employers to provide such access*. Although undefined, the NLRB also stated that an employer may attempt to justify a total ban on non-work use of email *if* it is able to demonstrate that "special circumstances" make the ban necessary to maintain production or discipline. Finally, even in the absence of "special circumstances," the employer may apply uniform and consistently enforced controls over its email system to the extent such controls are necessary to maintain production and discipline.

Although the NLRB specifies that the *personal use of company email must be off work time*, it ignores the fact that an email authored during non-working time can be read by its intended recipients during work time. Further, to enforce the policy would require the company to actively monitor employees' use of its email system to know whether an email was drafted (or read) during working hours. Although not prohibited under this decision, such monitoring could lead to an employer being accused of unlawful surveillance of Section 7 activity.

The NLRB's decision only addresses policies that limit use of email "for business purposes only" (or similar wording), and does not address personal use of the

employer's email beyond Section 7 activity, such as online shopping, or signing up for news alerts. Therefore, one possible solution to avoid interference in Section 7 activity, but still prohibit this other personal use, would be to have a policy prohibiting non-business usage of email, *but to provide a clear disclaimer regarding an exception for Section 7 activity* (including limiting to sending or reading during non-working hours).

Although the *Purple Communications* decision is likely to be appealed, it is fully enforceable for now and applies to all workplaces, not just those where unions are present. Moreover, the new law will be applied retroactively, which means that for employers who currently have a total prohibition of personal use of their email system, those policies must be amended immediately.