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NLRB Reverses Precedent and Requires Employers to Permit Non-Work Email Use by Employees

Recently the National Labor Relations Board (NLRB) held in the *Purple Communications* case that an employee generally has the right to use her company email account for the purpose of self-organizing and communicating regarding the terms and conditions of employment. The 3-2 decision marks an important reversal of a 2007 ruling by the NLRB and will likely result in a wave of challenges to employers' computer use policies. The case gives employers another important reason to review employee use of company equipment and their policies relating to the same.

Overview of the NLRB and the NLRA

The NLRB enforces the National Labor Relations Act ("NLRA"). The NLRA was enacted in 1935 to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain employment practices. Section 7 of the NLRA provides that all employees (not just employees of unionized employers) have the right to self-organization; to form, join or assist labor organizations; to bargain collectively through representatives of their own choosing; and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. Under Section 8(a)(1) of the NLRA, it is an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act. The NLRB enforces Sections 7 and 8 of the Act to prohibit employers from restricting employees' ability to self-organize and discuss the terms and conditions of their employment, even if they are not in a union. Over the past several years, NLRB enforcement activity involving non-unionized work places has been significant.

The *Purple Communications* Decision

The employer in the *Purple Communications* matter maintained a policy that prohibited employees from using company computers, internet access or other company resources to send personal email and prohibited employees from "engaging in activities on behalf of organizations or persons with no professional or business affiliation" with the employer. The policy also banned "sending uninvited emails of a personal nature."

Historically, the NLRB has permitted bans on non-work uses, including uses for Section 7 purposes, of employer equipment such as bulletin boards, copiers and telephone systems. In prior opinions, the NLRB had permitted restrictions on employee use of company email for Section 7 purposes by likening employer email systems to other types of company equipment. However, in *Purple Communications,* the NLRB rejected this notion in large part because a non-work use of company email allegedly does not interfere with employer resources and operations to the same extent non-work uses of company bulletin boards or copiers interferes. Applying this reasoning, the NLRB held that an employee's non-work use of email generally must be permitted.

There are some limitations on the NLRB's decision. First, the protection only applies to employees who have already been granted email access by the employer. The decision also only allows employee to engage in non-work activity on company email accounts on their own time. The opinion specifically notes that the NLRB does not require employers to extend email access to those employees who do not already have it. The opinion also allows for a ban on all non-work uses of email if the employer can show special circumstances that such a ban is necessary to maintain production or discipline. Finally, shy of a total ban, an employer may apply "uniform and consistently enforced" restrictions on the use of email that are necessary to maintain production and discipline. Overall, however, the limitations are of marginal help to the typical employer who grants the majority of its employees access to company email.

Action for Healthcare Employers

This ruling could easily be interpreted to affect most employers in the United States. Employers should review and update any policies prohibiting or limiting non-work use of company email systems. Employers may want to reconsider any total bans on non-work email, and they should be prepared to demonstrate special circumstances necessitating such a ban.

Employers with policies limiting (but not completely banning) non-work email use should ensure those policies are consistently enforced. Such employers should also be prepared to show that the policies are needed to maintain production and discipline. Employee use of email for Section 7 organizing purposes is an option that certainly will be tested until and unless the courts overturn the *Purple Communications* decision.

If you have questions or need assistance regarding compliance with NRLB guidance and other employment laws, please contact Kimberly Daniel or Jonathan Sumrell at (866) 967-9604, kdaniel@hdjn.com, or jsumrell@hdjn.com. Additional information about Hancock, Daniel, Johnson & Nagle, P.C. is available on the firm's website, www.hdjn.com.