
Employees May Use Company Email for Protected Concerted Activity

By Thomas P. Brady / Dec 15, 2014

The National Labor Relations Board (Board) held that an employer must "presumptively" permit employees' use of the employer's email for statutorily protected communications on nonworking time, if the employer gives employees access to the employer's email systems. *Purple Communications*, 361 NLRB No. 126 (2014).

Purple Communications provided sign-language interpretation services. Purple's employee handbook contained an "Internet, Intranet, Voicemail And Electronic Communication Policy." The policy stated that the company owned the various electronic communications systems and limited the employees' use of the systems to business purposes. The policy prohibited employees from "[E]ngaging in activities on behalf of organizations or persons with no professional or business affiliation with the Company" and "[S]ending uninvited email of a personal nature."

In 2012, the Union filed a representation petition seeking to represent Purple's employees located in seven of Purple's call centers. When the union lost the election, it filed objections and unfair labor practice charges alleging, in part, that Purple's communications policy interfered with the employees' free choice because it prevented employees from using the email system to communicate about the union. Citing the Board's decision in *Register Guard*, 351 NLRB 1110 (2007), the administrative law judge found the policy lawful because employers had a right to limit employees' use of company email. The union and the Board's General Counsel took exceptions to the Board.

Overruling *Register Guard*, the Board found that the employees' right to communicate about Section 7 rights outweighed the employer's interest in limiting its employees' use of the company's email system. The Board held that "it will presume that employees who have rightful access to their employer's email system in the course of their work have a right to use the email system to engage in Section 7 - protected communications on nonworking time."

The Board announced several "limitations" on its new rule:

It applies only to employees who have already been granted access to the employer's email system in the course of their work and does not require employers to provide such access.

An employer may justify a total ban on nonwork use of email, including Section 7 use on nonworking time, by demonstrating that special circumstances make the ban necessary to maintain production or discipline. However, the Board anticipates "that it will be the rare case where special circumstances justify a total ban on nonwork email use by employees." The Board recognized that, "where special circumstances do not justify a total ban, employers may nonetheless apply uniform and consistently enforced controls over their email systems to the extent that such controls are necessary to maintain production and discipline."

Absent justification for a total ban, 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.

The Board did not address email access by non-employees, nor did it address any other type of electronic communications systems.

The Board's decision does not prevent employers from continuing to monitor their computers and email systems for legitimate management reasons, such as ensuring productivity and preventing email use for purposes of harassment or other activities that could give rise to employer liability. It also permits employers to inform employees that the employer may monitor their business email for legitimate purposes.

The Board will apply its new rule retroactively.

Email systems have become an important and integral part of business communication strategy. According to *Email Statistics Report, 2014-2018, Executive Summary*, The Radicati Group, Inc., "[I]n 2014, the majority of email traffic comes from the business world, which accounts for over 108.7 billion emails sent and received per day." The Board's ruling in *Purple Communications* has a profound effect on an employer's communication and union free strategies. Given this effect, employers should immediately review their email communication policies to limit the effect of the *Purple Communication* decision and to ensure that the employer can effectively respond to employees' use of the email system to communicate about their rights under the Act.

If you have any questions about employees' use of a company's email system, you may contact Thomas P. Brady at (313) 965-2891 | tbrady@clarkhill.com, or another member of Clark Hill's Labor and Employment Practice Group.