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You've Got Mail: The NLRB Unlocks Employer Email Systems for Union Organizing and Other Protected Concerted Activity

In a recent and highly controversial decision, *Purple Communications, Inc.*, 361 NLRB No. 126 (2014), the National Labor Relations Board ("Board") declared that employees have a presumptive right to use their employers' email systems during non-working time to engage in communications protected by Section 7 of the National Labor Relations Act ("NLRA"), such as union organizing efforts or discussions pertaining to wages, hours or working conditions. Notably, the Board reached this holding despite the employer's express rule stating that its email system was to be used for "business purposes only."

The Board's Purple Communications decision marks a sweeping departure from its own prior, long-standing precedent affirming an employer's right to regulate and restrict employee use of company property, including electronic communication systems. Indeed, in Register Guard, 351 N.L.R.B. 1110 (2007), the Board previously stated without qualification that employees "had no statutory right to use the [employer's] email systems for Section 7 matters."

In light of the Board's new position, employers—whether unionized or nonunionized—may no longer lawfully restrict the use of company email systems only to "work-related" or "business-related" purposes. Employees afforded access to an employer's email system must instead be permitted to use that access to communicate with coworkers and/or outside parties regarding matters protected by Section 7 of the NLRA, such as terms and conditions of employment or forming, joining or assisting a labor union.

But this is not to say that the Board's holding comes without any limits. First, an employer may restrict when an employee may use his or her company email access for Section 7 communications. An employee's presumed right to such use is limited to non-working time. Note, however, that the Board has traditionally deemed meal periods and work breaks as the type of "non-working time" in which email communications could be permitted. Second, an employer may also lawfully limit which employees may access the employer's email system. The Board's ruling applies only to those employees who already have access to their employer's email system; it does not impose an affirmative obligation on

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employers to extend email access to all employees (or to any outside parties). Third, the Board's holding does not change the fact that employees have no reasonable expectation of privacy when they use company email systems (even for Section 7 activity). Finally, employers may still lawfully monitor employees' use of employer-provided email so long as such monitoring is not increased during a labor organization campaign or targeted towards employees engaging in activity protected under the NLRA.

Despite these minor limitations, the Board's Purple Communications ruling is significant. For better or worse, employer email systems will likely become animated forums for employee complaints about working conditions, gripes about supervisors, and solicitations for union organization.

Employers, in turn, must be prepared to adapt. Among other things, employers should:

- Review and revise any "email" or "electronic communications" policies to account for the fact that employees may now lawfully use company email to engage in Section 7 communications during non-working time. Employers may not impose a blanket rule prohibiting non-work-related use of company email, but they can and should adopt and consistently enforce policies prohibiting employees from sending non-work-related emails during working time.
- Bring supervisors up to speed on the types of employee email communications now protected under the NLRA in order to avoid legal claims that supervisors unlawfully retaliated against employees for engaging in protected communications.
- Be mindful of monitoring. While nothing in the Board's decision prevents employers from conducting nondiscriminatory monitoring of employee email use, employers may be subject to increased legal challenges from employees alleging that such monitoring was imposed in response to activity protected under the NLRA.
- Consider limiting access to company email systems—it may be in an employer's interest to not provide email system access to employees whose jobs do not require the use of email.

If you have questions about the impact of the Board's decision on your employees' email communication, please contact Robert Sholl or your Reinhart attorney. They will be happy to assist you.