

# WHAT'S NEXT IN LABOR LAW

## *Forcing Employers to Allow Union Access to E-Mail Systems*

The National Labor Relations Board (NLRB) appears ready to grant organized labor's long-held wish for greater access to non-unionized employees by opening workplace e-mail systems to union solicitations. The agency's General Counsel made this abundantly clear when his office began actively seeking cases involving employee use of work e-mail systems to bring before the full Board, and *Purple Communications* (NLRB Case No. 21-CA-95151) may be just the case that the NLRB has been looking for.

Under current law, employers may prohibit off-duty employees from engaging in union organizing on the employer's property and bar union literature distribution as long as the restrictions are (a) limited to work areas, (b) clearly explained to all employees and (c) applied to all off-duty employees equally, not just those engaged in union activity [*Tri-County Med. Ctr., Inc.*, 222 N.L.R.B. 1089 (1976)]. Without question, work e-mail systems are the property of the employers who have invested time and capital in establishing and maintaining them. Seven years ago, the NLRB upheld an employer's right to ban "non-job-related solicitations," from company e-mail systems, including those related to union matters [*Register Guard*, 351 NLRB. No. 70 (2007)]. But now, that may change.

After a vote to unionize two Purple Communications call centers failed, the company's policy restricting the use of company equipment (laptops, Internet access, voicemail, etc.) to "business purposes only" came under fire. An Administrative Law Judge dismissed the General Counsel's allegation that the employer had illegally prohibited its employees' personal, non-business use of its e-mail system. In the pending appeal, the Board invited the public to file amicus briefs on whether the current law should be changed to mandate greater non-business use of e-mail systems by employees. The briefs, which were due on June 16, 2014, were asked to address the following:

1. Should the Board reconsider its conclusion in *Register Guard* that employees do not have a statutory right to use their employer's email system (or other electronic communications systems) for Section 7 purposes?
2. If the Board overrules *Register Guard*, what standard(s) of employee access to the employer's electronic communications systems should be established? What restrictions, if any, may an employer place on such access, and what factors are relevant to such restrictions?
3. In deciding the above questions, to what extent and how should the impact on the employer of employees' use of an employer's electronic communications technology affect the issue?
4. Do employee personal electronic devices (e.g., phones, tablets), social media accounts, and/or personal email accounts affect the proper balance to be struck between employers' rights and employees' Section 7 rights to communicate about work-related matters? If so, how?
5. Identify any other technological issues concerning email or other electronic communications systems that the Board should consider in answering the foregoing questions, including any relevant changes that may have occurred in electronic communications technology since *Register Guard* was decided. How should these affect the Board's decision?

It is anticipated that the NLRB will use the *Purple Communications* case, instead of a formal rulemaking with notice and comment period, **to grant workers new rights where none before existed**. The new precedent would mandate that an employer must permit employees to use workplace e-mail systems for union organizing and other Section 7 activity, if it allows any incidental, personal e-mail use. An employer would only be able to limit use for Section 7 activities if it can show that the limitations are necessary to maintain production and discipline.

Such a change would present employers with a choice between two impractical policies: completely bar workers' use of workplace e-mail for any non-business purpose or allow unfettered access for all uses, including union organizing.