THE
NATIONAL LAW REVIEW

The NLRB Shakes Things Up: Purple Communications and the Board's New "Ambush" Elections Rule

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Friday, December 19, 2014

The **National Labor Relations Board (NLRB) made waves** last week in two highly controversial maneuvers: first, its long-awaited **decision in *Purple Communications, Inc.,* which reversed long-standing NLRB precedent and held that employees have a presumptive right to use their employer's e-mail systems** to communicate about workplace issues, including union organizing; and second, its issuance of a final rule amending (and expediting) the agency's representation election process which will require employers to provide an almost-immediate response to an election petition in order to preserve their rights to contest a union election. These developments, if upheld, are likely to have a significant impact on the landscape of union organizing and will make it increasingly difficult for employers to address employee concerns when confronted with a union campaign.

The *Purple Communications* Decision

In *Purple Communications*, the employer maintained an electronic communications policy which prohibited employees from, among other things, using the employer's e-mail system to engage in "activities on behalf of organizations or persons with no

professional or business affiliation with the Company" or send "uninvited email of a personal nature." The union, which sought to represent certain of the Company's employees, filed objections to election results at two of the employer's facilities, asserting that the electronic communications policy had interfered with employees' freedom of choice in the election. The union also filed an unfair labor practice charge alleging that the policy restricted employees' rights to engage in protected concerted activity under Section 7 of the National Labor Relations Act. Relying on the Board's own precedent in *Register Guard* (2007) – which held that an employer may prohibit employees from using the employer's e-mail system for Section 7 purposes as long as the ban is not applied discriminatorily – an administrative law judge found the policy to be lawful and dismissed both the objections and the unfair labor practice charge.

On appeal, the Board reversed, overturning *Register Guard* and holding that employees who have already been granted access to an employer's e-mail system for work purposes have a presumptive right to use the e-mail system to engage in Section 7-protected communications about their terms and conditions of employment during non-working time. An employer may rebut this presumption only by demonstrating special circumstances that make a ban on non-business use of the system necessary to maintain production or discipline among its employees. In reaching its decision, the Board called the majority's analysis in *Register Guard* "incorrect," noting that it undervalued the significance of communication as the cornerstone of Section 7 rights while placing undue emphasis on employers' property rights. It also denounced the*Register Guard* majority's failure to recognize e-mail as an increasingly "critical" mode of communication in the workplace, stating that the modern-day pervasiveness of e-mail has rendered it a natural (albeit virtual) "gathering place" for employees to communicate with one another, including about the terms and conditions of their employment. However, the Board stopped short of finding the employer's electronic communications policy unlawful, remanding that issue to the administrative law judge for determination in accordance with its holding.

The Board stressed that its holding in *Purple Communications* is limited to e-mail only, and does not restrict the employer from monitoring its e-mail systems in furtherance of legitimate management objectives (for example, to prevent harassment) or enacting uniform and consistently enforced constraints on its use (*e.g.,* prohibiting large attachments in order to maximize efficient functioning of the system). Furthermore, the decision applies only to employees who have already been given access to their employer's e-mail system in the course of their work; the opinion makes clear that it is not meant to address nonemployee access to employer e-mail systems or require employers to provide employees with e-mail capabilities. However, the NLRB hinted at the possibility of extending the *Purple Communications* holding to other types of electronic communication systems, stating that it "question[ed] the validity" of the well-established principle (articulated in prior Board decisions referenced in the opinion), that employers may generally prohibit all non-work use of its equipment – a sign that additional changes may be occurring in the near future.

New Expedited Election Rules

One day after handing down its decision in *Purple Communications*, the NLRB voted to issue a final rule revising its procedures with respect to representation elections – that is, the method by which a union is designated the collective bargaining representative for a discrete set of employees (known as the bargaining unit). The election process typically begins with the filing of a petition by the union at one of the NLRB's regional offices, and ends with a secret ballot election in which employees vote on whether they want union representation. The amendments, which have been in the works for some time now, reduce the amount of time between the filing of the petition and the date of the actual election, while imposing additional requirements upon employers during that period and removing several employer-friendly procedural safeguards to boot. The major changes include the following:

- Accelerated Pre-Election Hearings: A pre-election hearing – where issues such as jurisdiction, voter eligibility and scope of bargaining unit are determined – generally must be held eight (8) days after the notice is served. (No set time frame existed under the old rules).

- Mandatory Pre-Election Position Statement: The employer must file, by noon on the business day before the pre-election hearing – that is, a mere *seven (7)* days after receiving the notice of petition for an election – a detailed statement of position on all issues the employer plans to raise at the pre-election hearing. Arguments not raised in the pre-election position statement are deemed to be **waived**. Furthermore, an employer must be able to buttress the arguments in its statement of position with some sort of proof; under the new rules, the pre-election hearing officer has the discretion to ask the parties for an "offer of proof" – *i.e.,* potential evidence – supporting their respective positions if any of the arguments in the position statement are disputed.

- Post-Election Resolution of Voter Eligibility and Inclusion Issues: The new rule generally denies employers a right to hearing on important questions such as individuals' eligibility to vote or inclusion in an appropriate unit until after the election is conducted; the pre-election hearing is limited to issues regarding whether a proper petition has been filed and whether the proposed unit is appropriate.

- Elimination of Post-Hearing Briefs: Under the new rule, employers will no longer have the right to file post-hearing briefs addressing the issues raised at the pre-election hearing, unless briefs are deemed necessary by the NLRB's Regional Director.

- Initial List of Employees: The employer must provide, with its pre-election statement of position, an initial list of employees and their names, job classifications, shifts and work locations. Prior to issuance of the new rule, such a list was required only after the NLRB regional office had directed an election to be held.

- Posting and Distribution of Notice of Petition for Election: Within two (2) business days after the NLRB regional office serves the employer with a notice of a pre-election hearing, the employer must post paper copies of the notice of petition for election conspicuously throughout its workplace and also distribute the notice electronically if the employer customarily communicates with

employees via electronic means.

- Elections Set for the Earliest Date Practicable: Under the old rules, elections were generally held between 25 and 30 days after the direction of an election by the regional office. Now, the NLRB's Regional Director must schedule the election for the earliest date practicable.

- Voting List: The employer must provide the union with a list of eligible voters, including their names, addresses, telephone numbers and personal e-mail addresses within two (2) business days after the direction of an election. Previously, the employer had seven days to furnish the list, and was not required to provide telephone numbers and e-mail addresses.

- Board Review: Board review of post-election disputes is now discretionary, rather than mandatory.

The amendments go into effect April 14, 2015, although they are likely to be challenged by opponents of the new rule before then.

What's an Employer to Do?

Employers should review (and where necessary, revise) their electronic communications, social media and solicitation and distribution policies to comply with the framework set forth in *Purple Communications*, and carefully examine any other e-mail-related work rules to make sure they are not being applied in a manner that will invite scrutiny by the NLRB. Additionally, in light of the NLRB's new streamlined election procedures, employers must be prepared to respond to election petitions *before* any observable organizing activity occurs, as the rapid-fire timeline established by the amended rule is likely to encourage unions to lobby for support among employees surreptitiously and then file a petition for election when the employer least expects it. To effectively combat such tactics, employers should formulate their strategy for responding to union activity ahead of time and consider drafting a template for their pre-election statement of position so that the document can be filled in and finalized at a moment's notice. Other preventative actions, such as monitoring and resolving any areas of employee discontent and training supervisors to identify signs of a campaign, should also be taken. Such measures will put employers in the best position to effectively respond to union organizing efforts, whether they take the form of communications sent using the employer's e-mail system or a full-blown election petition.

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