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Employment Law Note

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NLRB To Revisit Employee Use of Company Email

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The Trump National Labor Relations Board (the "Board") has signaled that pro-management changes to the use of company email systems, and perhaps other types of communications on company-owned devices, such as instant messages, text, and posts on social media, are likely on the horizon. Earlier this month, on August 1, 2018, the NLRB invited the public to file briefs on whether it should overrule its 2014 decision in *Purple Communications, Inc.*, 361 NLRB 1050 (2014). There, the Obama Board held that, absent special circumstances, employees who have been given access to their employer's email system for work-related purposes have a presumptive right to use that system for Section 7–protected communications, on non-working time.

The decision in *Purple Communications* overruled *Register Guard*, 351 NLRB 1110 (2007), in which the Board held that, while union-related communications cannot be banned *because* they are union-related activity, facially neutral policies regarding the permissible use of employers' use of email systems are not unlawful, even if those restrictions have the effect of limiting the use of those systems for communications regarding union or other protected activity.

The invitation comes after an administrative law judge's decision, *Caesars Entertainment Corporation d/b/a Rio All-Suites Hotel and Casino*, Case 28-CA-060841, finding that an employer violated Section 8(a)(1) of the National Labor Relations Act by maintaining a policy prohibiting the use of its computer resources to send non-business information. The Board specifically invited the parties in the case and the public to address the following questions:

1. Should the Board adhere to, modify, or overrule *Purple Communications*?
2. If you believe the Board should overrule *Purple Communications*, what standard should the Board adopt in its stead? Should the Board return to the holding of *Register Guard* or adopt some other standard?
3. If the Board were to return to the holding of *Register Guard*, should it carve out exceptions for circumstances that limit employees' ability to communicate with each other through means other than their employer's email system (e.g., a scattered workforce, facilities located in areas that lack broadband access)? If so, should the Board specify such circumstances in advance or leave them to be determined on a case-by-case basis?
4. The policy at issue in this case applies to employees' use of the Respondent's "[c]omputer resources." Until now, the Board has limited its holdings to employer email systems. Should the Board apply a different standard to the use of computer resources other than email? If so, what should that standard be? Or should it apply whatever standard the Board adopts for the use of employer email systems to other types of electronic communications (e.g., instant messages, texts, postings on social media) when made by employees using employer-owned equipment?

Chairman John F. Ring was joined by Members Marvin E. Kaplan and William J. Emanuel in issuing the Notice and Invitation to File Briefs. Democratic Members Mark Gaston Pearce and Lauren McFerran each filed dissents, both arguing that there have been no changes in the workplace or problems caused by the approach in *Purple Communications* to warrant its reexamination. Pearce and McFerran also pointed out that the *Purple Communications* decision is currently pending in the Ninth Circuit Court of Appeals.

Briefs from the parties and interested *amici* must be submitted on or before September 5, 2018. Any responsive briefs by the parties may be filed on or before September 20, 2018. Given the current Republican-led composition of the Board, employers should expect a return to a standard like the one set out in *Republican Guard*.