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Ambush Elections and Access to Email - A Bad Combination for Employers

Alert
12.17.2014

By Matt Tews

Late last week, the National Labor Relations Board (NLRB) made a combination of moves that present significant challenges for employers. First, the Board issued its decision in Purple Communications, Inc., allowing employees to use employer-provided email accounts for union activity during non-working time. The next day, as we anticipated in our February 2014 Alert, NLRB's One, Two Punch - A Challenging Landscape Ahead for Non-Union Employers, the NLRB finalized its "ambush election" rules, significantly altering and shortening the union representation election process.

The combined decisions are the latest in a growing list of NLRB actions detrimental to employer interests. They highlight the importance—now more than ever—for employers to take proactive steps in labor relations issues.

FW: NLRB SENDS MESSAGE THAT EMPLOYEES MAY USE EMPLOYER-PROVIDED EMAIL ACCOUNTS FOR UNION ACTIVITY

In a dramatic but expected shift, the NLRB opened up a whole new mode of communication for union organization. The Board's Purple Communications decision holds that: "Employee use of email for [union] communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email systems."

In other words, with few exceptions, employees can now use employer-provided email accounts to engage in union activity during non-working time. The new rule rejects the previous Register Guard rule, which allowed employers to prevent employees from doing just that.

While the rule is simple enough – employees may use employer-provided email for union activity during non-work times – the issues it raises are complex and numerous. Below are the

most important:

Legality of Email Policies: Many employers have policies preventing employees from using company email for personal reasons, or on behalf of organizations not affiliated with the company. It is highly likely that such policies will be unlawful under the new Purple Communications rule, and employers should revisit them.

Scope of Exceptions: The *Purple Communications* rule provides for a limited exception allowing employers to completely prohibit non-work emails in "special circumstances." While this exception seemingly provides hope to employers that they will be able to limit usage, its contours are vague and undefined, the Board provided only one example ("protecting its email system . . . from damage or from overloads due to excessive use"), and the Board stressed that showing such circumstances will be "the rare case." Given this uncertainty, employers should proceed cautiously if they intend to invoke the exception.

Legitimate Rules: While the Board's decision allows employers to establish "uniform and consistently enforced" restrictions to the use of its email system, it does little to outline what such rules would look like. Careful consideration must be given to the effect any such rules will have on employees' new right to engage in union activity via employer-provided email.

Pandora's Box of Practical Questions: The rule that employees may only use email for union activity during non-working time raises a host of other questions. Should employers consider beefing-up email monitoring systems? Will monitoring email be considered unlawful surveillance of union activity? What if a message is sent from an employee on non-work time to an employee who is working? How can employers effectively limit non-employee use of employer email systems?

In short, the *Purple Communications* decision raises many questions, and is likely to both improve the ability of union supporters to start organizing, and decrease an employer's ability to effectively monitor and control its email system.

AMBUSH ELECTION RULES A REALITY

As we anticipated in our February 2014 Alert, NLRB's One, Two Punch - A Challenging Landscape Ahead for Non-Union Employers, the NLRB has significantly altered the rules governing the union representation election process. In most cases under the new rules, employees will now have to make the all-important decision of whether or not to unionize between 21 and 24 days after a union files a petition for representation. The NLRB's new "ambush election" rules also severely limit the time an employer has to challenge election issues, and the type of issues an employer can challenge before the election. Among the most important changes:

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- Employers must now give eligible voters' email addresses and telephone numbers to the union two days after the regional director directs an election (in addition to names and addresses as previously required).
- The pre-election hearing will generally be held within eight days of the union's filing of the petition. An employer must file a complete "statement of position" one day before the pre-election hearing. If the employer fails to raise an issue in its statement - which must be completely researched, written, and filed in a week - the issue is forever waived.
- The new rules limit pre-election hearings solely to whether questions concerning representations exist and limits evidence to that issue.
- Parties no longer have a right to file a post-hearing brief to the regional director; briefing is now at the hearing officer's discretion.
- Pre-election appeals to the Board are abolished in almost all cases; employers can no longer appeal regional director decisions until after the vote.
  Currently, elections usually occur about five to six weeks after a union files a petition. Under the new rules, the election will likely take place within just three weeks. This gives employers limited opportunity to respond to the union's petition, inform employees about the pros and cons of unionization, correct misunderstandings about the process and facts of unionization, and generally, inform and educate employees about its position.

A PROACTIVE APPROACH TO POSITIVE EMPLOYEE RELATIONS

Under this new regime – where employees can now use employer-provided email to organize and elections will happen much sooner – it is crucial for non-union employers desiring to stay union-free to take a proactive approach before a petition is filed. Of key importance in this regard is ensuring positive employee relations. Employers must understand their work climates and key factors that may make them susceptible to union organization, and educate their supervisors about unions and early signs of an organizing process. Maximizing positive employee relations and understanding how to prevent conditions susceptible to unionization efforts can help end the "ambush election" process before it starts.

CONTACT US

Stinson Leonard Street's traditional labor lawyers have been counseling employers on these issues, and offering positive employee relations training for more than 20 years. If you would like more information about these services, please contact Matt Tews, Joel Abrahamson, Dominic Cecere, Bob Overman, Richard Pins or the Stinson Leonard Street attorney with whom you usually work.

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