A Timely Analysis of Legal Developments

ASAP®

December 15, 2014

# NLRB Creates Right to Use Corporate E-Mail to Organize and to Complain About Work: Ten Key Implications for Employers

**By Philip Gordon and Noah Lipschultz**

In a precedent-setting ruling, the National Labor Relations Board (NLRB or the "Board") held last week in *Purple Communications* that Section 7 of the National Labor Relations Act (NLRA) requires employers, except in very limited circumstances, to open their corporate e-mail systems to union organizing by employees and to group discussions among employees about the terms and conditions of employment during non-work time. The 3-to-2 decision overturns the Board's December 2007 decision in *Register Guard*, holding that because a corporate e-mail system is the employer's property, an employer could ban all non-business e-mail communications, including communications protected by Section 7. Significantly, because Section 7 applies to all employers, not just unionized ones, the Board's decision affects almost every U.S. employer that provides a corporate e-mail system.

Although the Board majority characterized its decision in *Purple Communications* as "carefully limited", the practical impact of the decision is far-reaching. Virtually every U.S. employer has based its e-mail policy on the premise — endorsed by *Register Guard* — that the employer owns the corporate e-mail system and, therefore, has the right to ban or otherwise regulate, in a nondiscriminatory manner, employees' nonbusiness use of that system. The decision in *Purple Communications* stands that premise on its head. As a result, virtually all employers will be required not only to rewrite their policies on nonbusiness use of corporate e-mail, but also to reconsider a wide range of other rules commonly found in policies governing the use of corporate e-mail. The Board made it clear that employers will be required to meet a heavy burden to justify a total ban on nonbusiness use of corporate e-mail and that regulations on nonbusiness use short of a total ban will be closely scrutinized.

While the Board expressly limited its holding to corporate e-mail, employers that implement other types of corporate communications platforms, such as enterprise text messaging or internal social media, will need to consider whether to take into account the Board's decision in *Purple Communications* when developing policies to regulate the use of these emerging employer-provided communications platforms. In short, nothing in *Purple Communications* suggests the Board would analyze other types of employer-provided electronic communications platforms any differently than corporate e-mail.


©2014 Littler Mendelson, P.C. All rights reserved.

## Procedural Background: The Board Tees Up *Register Guard*

At issue in *Purple Communications* was an employer's electronic communications policy providing, in part, that the employer's electronic systems and equipment "should be used for business purposes only." The policy also specifically prohibited employees from using the employer's equipment to "engag[e] in activities on behalf of organizations or persons with no professional or business affiliation with the Company" and from "sending uninvited email of a personal nature."

On April 30, 2014, the Board invited the parties and interested *amicus curiae* ("friends of the court") to file briefs addressing specific questions surrounding employees' use of corporate e-mail for Section 7 purposes. The Board asked these parties to address, among other things, whether *Register Guard* should be overruled and if so, what standard should apply to nonbusiness use of corporate e-mail. The Board also invited briefing on the impact of technological advancements (including personal electronic devices and social media) on the questions presented.

The parties and *amici* advocated different standards, but the primary fault line was whether to treat e-mail systems like other employer-owned equipment that employees have no right to use for Section 7 activities, or whether a balancing test, under the framework established by *Republic Aviation*, 324 U.S. 793 (1945), should be applied. *Republic Aviation* involved an employer policy banning all oral solicitation, at any time, on the employer's property. The Supreme Court adopted a presumption that such a complete ban created an "unreasonable impediment" to employees' Section 7 rights, and the employer could justify such a ban only by demonstrating special circumstances that made the ban necessary to maintain production and discipline. Thus, if *Republic Aviation* were applied to corporate e-mail, employees would have a right to use corporate e-mail during non-working time absent a particularized showing by the employer of special circumstances necessary to maintain production and discipline.

## The Board's Ruling and Rationale

The Board majority attacked *Register Guard* on two primary grounds. First, it found that decision gave too much weight to employer property interests and not enough weight to employees' "core Section 7 right to communicate in the workplace about their terms and conditions of employment."

Second, the Board's majority argued that *Register Guard* inappropriately analogized corporate e-mail to the Board's precedent addressing other types of employer-owned equipment, such as bulletin boards, copiers, and telephones. In the Board's view, e-mail is distinguishable from these other categories of employer-owned equipment because its "flexibility and capacity" make its non-work use less costly and disruptive than non-work use of other employer property. Overall, the majority seemed skeptical that allowing a statutory right to use e-mail for Section 7 purposes would cause any hardship to employers.

The Board majority also concluded that *Register Guard* failed to appreciate the predominance of e-mail as a workplace communications tool. The Board emphasized the pervasiveness of e-mail as a means of communication among employees at work, deeming e-mail "effectively a new 'natural gathering place'" where employees can congregate to share interests. The Board further noted that given the configuration of many workplaces and the rapid expansion of the remote workforce, e-mail "is the predominant means of employee-to-employee communication." In the Board's view, because e-mail serves as the predominant form of workplace communication nowadays, and because workplace communication among employees is the backbone of Section 7 rights, restrictions on such communication inherently interfere with Section 7 rights in an unlawful way.

The majority rejected the dissenting members' contention that the pervasiveness of personal electronic devices and social media sites obviate any need to open corporate e-mail systems to Section 7 activities. In the Board majority's view, these alternative avenues of communication afforded by social media, texting, and personal e-mail accounts using personal electronic devices are irrelevant to the question whether employees have a statutory right to use *corporate e-mail* for Section 7 purposes. According to the majority, the Supreme Court's decision in *Republic Aviation* does not require the Board to consider the availability of alternative means of communication when addressing whether employers must permit employees to use the employer's property to communicate with each other about matters protected by Section 7.

After rejecting *Register Guard*'s rationale, the Board embraced *Republic Aviation*, which concerned wholesale bans on workplace oral solicitations, reasoning that e-mail is the modern equivalent of the face-to-face solicitations addressed in *Republic Aviation*. Under *Republic Aviation*, a ban on such activities is presumptively invalid absent special circumstances required to maintain production and discipline. The



ASAP® is published by Littler Mendelson in order to review the latest developments in employment law. ASAP® is designed to provide accurate and informative information and should not be considered legal advice.
©2014 Littler Mendelson, P.C. All rights reserved.

Board also refused to treat e-mail as analogous to distribution of literature or solicitation, finding that in most cases e-mail communications fit into neither category neatly. The Board also found it unnecessary to characterize any e-mail system as a work or non-work area, for purposes of analogizing e-mail restrictions to traditional solicitation and distribution restrictions.

## The Board's New Framework: Ten Implications For Employers

Putting aside the legal theories and the obvious ideological divide separating the majority and the dissents (discussed below), what exactly does the Board's decision in *Purple Communications* to overrule *Register Guard* mean for employers? We discuss below ten key implications.

1. **This may not be the last word.** The Board's decision remains subject to appeal to a federal court of appeals and then potentially to the U.S. Supreme Court. In the event of an appeal, the Board's decision could be stayed for several years and ultimately overturned. The scathing dissents suggest an appeal would be hotly contested. If the Board does not stay its decision on appeal or the appeals court does not issue a stay, the decision will be enforceable against employers during the appeal process.
2. **Act promptly if *Purple Communications* is not stayed on appeal.** Even though the Board majority announced a brand new rule that is diametrically opposed to the rule that had prevailed since *Register Guard* was decided in December 2007, the Board concluded it would not work a "manifest injustice" to apply its ruling retroactively. In other words, employers that do not revise their policies governing corporate e-mail to conform to the Board's decision promptly after the appeal period expires likely will be at risk of an unfair labor practice charge. Remedies for a meritorious charge can include a notice posting and, if the charge arises during an organizing drive, possible invalidation of election results.
3. **Employers are <u>not</u> required to open their corporate e-mail system to union organizers/unions and other non-employees for union organizing or any other Section 7 activities.** The Board explicitly made this point as follows: "[W]e do not find that nonemployees have rights to access an employer's email system." However, the ruling severely restricts the employers' ability to restrict employees from exchanging emails with such non-employees. As a practical matter, unions, union organizers, and employees seeking to organize a union or develop union strategy may be wary of communicating through the employer's corporate e-mail system if they place a premium on secrecy. On the other hand, given the anticipated shortened election time periods, the efficiency and speed of e-mail communication for organizing purposes will be an attractive method of communication to adapt to those new rules.
4. **Employers are <u>not</u> required to give employees who do not use corporate e-mail to do their jobs access to the corporate e-mail system for union organizing or other Section 7 activities.** The Board expressly stated that the right to use corporate e-mail for Section 7 purposes applies "only to employees who have already been granted access to the employer's email system in the course of their work." While a substantial majority of employees will benefit from this new right, certain categories of employees likely will not. For example, employees who work on the sales floor at retail establishments and factory workers on the plant floor typically do not access corporate e-mail "in the course of their work." Employers may want to re-think whether to allow e-mail access at *all* to employees and to consider the specific job duties of the employee and whether such access is necessary to perform the employee's job functions.
5. **Most employers that ban all nonbusiness use of corporate e-mail will be required to rescind that policy.** The Board suggested that a total ban on nonbusiness use of corporate e-mail would be permissible if the employer could demonstrate "special circumstances" that "make the ban necessary to maintain production or discipline." In the same breath, however, the Board expressed skepticism that any employer could meet that burden, stating, "[W]e anticipate that it will be the rare case where special circumstances justify a total ban on nonwork email use by employees." The Board also emphasized that to establish "special circumstances," the employer would be required to make a particularized showing: "We emphasize, however, that an employer contending that special circumstances justify a particular restriction must demonstrate the connection between the interest it asserts and the restriction. The mere assertion of an interest that could theoretically support a restriction will not suffice."
6. **Employers most likely will need to rescind policies prohibiting use of corporate e-mail for solicitation.** Particularly in the wake of *Register Guard*, employers commonly included in their policy governing corporate e-mail a provision that prohibits use of corporate e-mail to solicit on behalf of other businesses, religious groups, political campaigns, or membership organizations. Because



ASAP® is published by Littler Mendelson in order to review the latest developments in employment law. ASAP® is designed to provide accurate and informative information and should not be considered legal advice.
©2014 Littler Mendelson, P.C. All rights reserved.

a union is a membership organization, such a non-solicitation provision effectively barred employees from using corporate e-mail for union organizing. The Board emphasized in *Purple Communications* that such bans likely would be unlawful: "In the vast majority of cases, an employer's system will amount to a mixed-use area in which the work-area restrictions permitted on literature distribution will not apply."

7. **Employers should consider drafting more detailed policies addressing nonbusiness use of corporate e-mail.** Employers that rescind a ban on nonbusiness use or that currently permit nonbusiness use but do not specify parameters for such nonbusiness use should consider establishing specific guidelines for nonbusiness use of corporate e-mail. To begin with, *Purple Communications* expressly limits employees' right to use corporate e-mail for Section 7 activity to "nonworking time." Consequently, employers should consider expressly imposing that restriction in their policy governing corporate e-mail. *Purple Communications* also recognizes that an employer has the right to establish "uniform and consistently enforced controls over its email system to the extent such controls are necessary to maintain production and discipline." The Board provided only one example of such a control, *i.e.*, "prohibiting large attachments or audio/video segments, if the employer can demonstrate that they would interfere with the email system's efficient functioning." Employers should consider other controls, such as reminding employees that nonbusiness use of corporate e-mail is not private and is subject to monitoring in the same way as business e-mail. Any such controls would have to be enforced in a way that would not discriminate against Section 7 activity.

8. **Employers <u>can</u> maintain broad rights to monitor corporate e-mail but <u>cannot</u> change their monitoring practices in response to Section 7 activity.** In one of its few nods to employers, the *Purple Communications* majority noted that "[o]ur decision does not prevent employers from continuing, as many already do, to monitor their computers and email systems for legitimate management reasons, such as ensuring productivity and preventing email use for purposes of harassment or other activities that could give rise to employer liability." Along the same lines, the majority also stated its decision does not prevent an employer "from notifying its employees, as many employers also do already, that it monitors (or reserves the right to monitor) computer and email use for legitimate management reasons and that employees may have no expectation of privacy in their use of the employer's email system." The Board warned, however, that "[a]n employer that changes its monitoring practices in response to union or other protected, concerted activity, however, will violate the Act."

9. **Employers should consider conducting an overall review of their policies governing corporate e-mail for compliance with Section 7.** While the Board expressly addressed several key points employers should consider reviewing in light of its decision, the Board was silent on one key point that could become an Achilles heel for many employers. By conferring on employees the right to use corporate e-mail for Section 7 purposes, the Board arguably opened all policies governing corporate e-mail to the same type of scrutiny the Board has been applying since early 2011 to employers' social media policies. For example, the Board has attacked social media policies that generally prohibit employees from posting "confidential information" on their personal online accounts where the employer does not narrowly define "confidential information" to exclude information about employees' own wages or other terms and conditions of employment. Similarly, employers routinely prohibit employees in their policies governing corporate e-mail from using corporate e-mail to disclose "confidential information" unless specifically authorized to do so. By way of analogy to the Board's "social media jurisprudence," such a provision arguably would violate employees' Section 7 rights if it did not include a narrowing definition of "confidential information."

10. **Consider the impact of *Purple Communications* on other employer-provided electronic communications platforms.** The Board majority expressly stated "we do not decide" whether employers are required to open other corporate communications platforms, such as enterprise instant messaging or texting or employers' social media accounts, to employees' Section 7 activity. However, the majority strongly suggested it would extend Section 7 rights to such platforms in the following passage: "The supposed principle that employees have no right to use, for Section 7 purposes, employer equipment that they regularly use in their work is hardly self-evident. We reject its application here, *and we question its validity elsewhere*" (emphasis supplied). Consequently, when drafting guidelines for other corporate electronic communications platforms, employers should consider applying the takeaways from the majority's decision to corporate e-mail systems.



ASAP® is published by Littler Mendelson in order to review the latest developments in employment law. ASAP® is designed to provide accurate and informative information and should not be considered legal advice.
©2014 Littler Mendelson, P.C. All rights reserved.

## Scathing Dissents Take Issue With Majority's Conclusion

Members Philip Miscimarra and Harry Johnson issued lengthy and sharp dissents rebuking the majority's decision. Member Miscimarra raised four points in dissent:

- Limiting an employee's use of email to business purposes does not pose an unreasonable impediment to self-organization because alternative means of communication are available to employees as a result of technological advances (*e.g.*, personal e-mail accounts, personal social media, and personal mobile devices);
- The majority fails to give proper attention to the consequences of giving employees access to corporate e-mail systems, including the implications for longstanding Board rules and other federal precedent regarding providing unlawful assistance or things of value to employees in connection with union activities;
- The email access rule creates tension and compliance problems with respect to other NLRA provisions, such as those prohibiting surveillance, and make practical enforcement of a working time v. non-working time prohibition impossible; and
- The statutory presumption/special circumstances rule is unpredictable and unworkable.

Member Miscimarra attacked the foundation of the majority's ruling by noting that in cases where the Board had previously invalidated employer bans, including *Republic Aviation* itself, the Board had proven that the restriction at issue actually impeded employees' exercise of their Section 7 rights. Member Miscimarra questioned such a premise in the context of a work-time e-mail ban, particularly because, in contrast to prior Board cases, there was absolutely no evidence that the employer restricted employee Section 7 activities during non-work time. Moreover, the multitude of alternative means of communication afforded by modern technology, available to employees both within the workplace and outside of it, as well as other non-email modes of protected activity, made it highly unlikely that a ban on e-mail use during working hours would serve as an "unreasonable impediment" to Section 7 activities. Rejecting the majority's position, Member Miscimarra argued that alternative means of exercising Section 7 rights should be considered in any balancing test assessing employee rights to use corporate e-mail for Section 7 purposes.

Member Miscimarra also pointed out the potential Hobson's choice faced by employers that may need to monitor e-mail for legitimate reasons (*i.e.*, harassment investigations), yet be subject to an unlawful surveillance charge, based on review of e-mails exhibiting Section 7 activity. Moreover, the mere act of determining which types of e-mails are protected by Section 7 is becoming an increasingly difficult exercise in light of the Board's recent precedent on social media. Injecting this complex framework into corporate e-mail creates new layers of uncertainty and complexity that an outright ban of nonbusiness use avoids.

Member Johnson dissented on many of the same grounds, and several additional ones. For example, he argued the majority's email access rule in effect requires the employer to pay for and "host" speech on its e-mail systems, raising First Amendment concerns (this is perhaps a nod to recent Supreme Court activity on the issue).

Member Johnson also challenged the majority's effort to analogize e-mail to a traditional water cooler or other physical "natural gathering place[s]" because e-mail has no boundaries in terms of time, space, or audience. Therefore, an exchange of e-mail cannot be analogized to face-to-face conversations in terms of disruption and impact on the workplace. In Member Johnson's view, the ubiquitous nature of e-mail, along with the ease of use and dissemination, make it a more disruptive force when used for nonbusiness purposes, rather than a less disruptive one as the majority assumed.

Moreover, like Member Miscimarra, Member Johnson questioned the premise that e-mail has effectively replaced face-to-face communication, such that Section 7 rights cannot be adequately protected by traditional rules governing such communications, let alone the extensive alternative modes of communication afforded by modern technology. In light of these alternative modes of communication, "access to an employer's email system is simply unnecessary for employees to effectively engage in Section 7 activity."

The dissenting views serve as a potential preview to how a more conservative federal appeals panel (or, ultimately the Supreme Court) might analyze the issue in future appeals.



ASAP® is published by Littler Mendelson in order to review the latest developments in employment law. ASAP® is designed to provide accurate and informative information and should not be considered legal advice.
©2014 Littler Mendelson, P.C. All rights reserved.

## Conclusion

*Purple Communications* represents a tectonic shift that will have an impact on almost every employer that provides a corporate e-mail system to employees. Unless the Board's decision is stayed on appeal, employers should consider acting promptly to review their policies governing corporate e-mail in light of the ten implications of *Purple Communications* discussed above.

Philip L. Gordon, Co-Chair of Littler's Privacy and Background Check Practice Group, is a Shareholder in the Denver office, and Noah G. Lipschultz is a Shareholder in the Chicago office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, or Mr. Gordon at pgordon@littler.com or Mr. Lipschultz at nlipschultz@littler.com.



ASAP® is published by Littler Mendelson in order to review the latest developments in employment law. ASAP® is designed to provide accurate and informative information and should not be considered legal advice.
©2014 Littler Mendelson, P.C. All rights reserved.