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UNION ORGANIZING

NLRB poised to reverse *Purple Communications*, but not for California

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The five-member National Labor Relations Board (NLRB) is the agency charged with developing a uniform and reliable national labor policy, but its structure is designed to be anything but consistent. The president appoints one member a year for a five-year term, guaranteeing the NLRB's political view will change with each administration, yielding reversals of positions on some very important questions. For example, follow the bouncing ball as the Board decides whether private-sector workers have a presumptive right to use company e-mail systems to communicate with one another (and engage in union organizing), even when the employer has a strict policy banning non-business e-mail use. Meanwhile, California's Public Employment Relations Board (PERB) has established its own strong, and more stable, protections for employees' use of employers' e-mail systems.

Purple Communications overruled *Register Guard*

In 2007, when President George W. Bush's appointees controlled the NLRB, a divided Board held in *Register Guard* that employers could lawfully ban all non-business e-mail communications, even those relating to working conditions. The two Democrats on the Board issued a memorable dissent, opining that the NLRB had become the "Rip Van Winkle of administrative agencies" by failing to recognize that e-mail is fundamentally different from "bulletin boards, telephones and pieces of scrap paper."

Seven years later, during Barack Obama's administration, the NLRB revisited the issue in *Purple Communications.* The Board observed that e-mail "has effectively become a 'natural gathering place,' pervasively used for employee-to-employee conversations." E-mail's "flexibility and capacity make competing demands on its use considerably less of an issue," the Board found, because "employee email use will rarely interfere with others' use of the email system or add significant incremental usage costs." Reversing *Register Guard,* the Board held that employee use of corporate e-mail systems was presumptively legal.

Vigorous dissents by the two conservative NLRB members (Philip Miscimarra and Harry Johnson III) maintained that the *Register Guard* standard should be retained because employees have access to many other avenues for electronic communication during non-work time, and the policy at issue did not target protected speech.

NLRB asks 9th Circuit to pause Purple proceedings

Purple Communications, Inc., appealed the NLRB's decision to the 9th

Circuit Court of Appeal (whose rulings apply to all California employers). The Board initially defended its decision, arguing that its new standard was reasonable and consistent with the National Labor Relations Act (NLRA). But there were already signs of trouble when the Board's Republican General Counsel signaled a desire to revisit the decision.

The NLRB now has a Republican majority, which has been primed to reverse *Purple Communications* as soon as an appropriate case presented itself. That opportunity arose in February, when the 9th Circuit remanded (or sent back) to the Board a case (*Caesars Entertainment Corporation*) originally decided in 2016—based, in part, on *Purple Communications.* Seizing its chance, the Board in August issued a call for briefs on whether *Purple Communications* should be adhered to, reversed, or modified. Then, on September 11, the NLRB asked the 9th Circuit to "pause" court proceedings and defer oral arguments in *Purple Communications* until the Board decides *Caesars.*

Predictably, the NLRB's order was accompanied by a pointed dissent from the two remaining Democratic appointees (Mark Pearce and Lauren McFerran). They argued that revisiting the issue is inappropriate because *Purple Communications* is still pending before the 9th Circuit and nothing substantive has changed since that decision was issued. As neatly summarized by Pearce, the dissenters "do not support giving a golfer a mulligan simply because he or she wants to swing another club," and in this case, "the only thing new is the Board's composition."

PERB Trump-proofs Purple Communications

Regardless of the NLRB's vagaries, California employment policy generally steers a more consistent employee-protective course. In May, PERB decided *Napa Valley CCD* (2018) Decision No. 2563-E. That decision not only adopted *Purple Communications* but also took it one step further. "If anything," observed PERB, "the case for finding an employee right to use the employer's email system for otherwise protected communications is even stronger under our statutes than it is under the NLRA."

Again asserting the public sector's uniqueness, PERB stressed there was an "inherent and substantial distinction between the property interest of the private employer which drives access policy under the NLRA and the public nature of facilities operated in the public interest by employers subject to our statutes." The agency also justified *employees'* use of e-mail based on statutory access rights enjoyed by *employee organizations.* The existence of union access rights, said the agency, "necessarily reduces an employer's claim to a unique dominion over its property and its means of communication." Therefore, "employees who have rightful access to their employer's email system in the course of their work have a right to use the email system to engage in . . . protected communications on nonworking time."

By finding that California law provides a distinct and even stronger right to communicate using work e-mail than federal law, PERB effectively insulated that right from any action the NLRB may now take.

Bottom line

In many regards, California remains an island in a sea of federal conservatism. In *Napa Valley CCD,* PERB—an agency immune from federal regulation and with a majority of appointees who previously represented unions—sheltered the *Purple Communications* principle against any changes resulting from presidential elections.

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The NLRB's call for briefs in favor of overturning or modifying *Purple Communications* and its request to "pause" defense of that decision in the 9th Circuit are reminders of the twists and turns of federal labor policy tied to presidential elections. *Register Guard* was decided under George W. Bush. It was reversed under Obama in *Purple Communications.* Now, the labor community awaits the outcome of the NLRB's requested "pause" and reevaluation of the *Caesars* decision under Trump.

If the new NLRB rejects the reality that e-mail is a settled method of universal communication in work and society, it will be a bellwether of a conservative shift in private- and public-sector labor policy. Almost just as surely, however, the winds and rules will shift when a Democrat again resides in the White House.

Practice pointer on the slippery slope of personal e-mail use. Neither *Purple Communications* nor *Napa Valley CCD* approved employees' use of work e-mail for any and all purposes, nor did either case hold that e-mail can be used for nonwork communications during working time. However, most public employers are already tolerant of employees' personal e-mail use, including at least incidental use during work time. Of note for both public and private sectors: Employers that allow employees to use e-mail for personal business cannot then prohibit them from using it for purposes of organizing, concerted activity, and mutual aid and protection.

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