CLIENT ALERTS & INSIGHTS

NLRB Turns Attention to Employer Email Systems

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After a busy eight months since December of 2017 that saw the National Labor Relations Board ("NLRB") issue a number of important decisions addressing topics such as joint-employers (rescinded), company policies, micro-units, and others, while also exploring rule-making regarding joint-employers, quickie elections, and blocking charges, the use of employer email systems is next in line for attention.

On August 1, 2018, the NLRB issued a Notice and Invitation to File Briefs regarding whether it should overturn the 2014 *Purple Communications* (361 NLRB No. 126) decision that allowed workers to use company email for union organizing purposes. The case at issue is *Caesars Entertainment Corporation d/b/a Rio All-Suites Hotel and Casino*, 28-CA-060841. In April of 2018, the Ninth Circuit remanded the case back to the NLRB for consideration in light of *Boeing Co.*, 365 NLRB No. 154 (Dec. 14, 2017), which revised the NLRB's evaluation of company policies (see prior alert here). At issue in *Caesars* is whether the company's computer usage policy prohibits employees from using the company's email system to engage in Section 7 communications during nonworking time.

In *Purple Communications*, the NLRB determined that employees were permitted to use the employer's email system to engage in concerted protected activities, even if the employer maintained a published policy prohibiting the use of company email for a non-business purpose. The NLRB defined email as the new "natural gathering place" for employees to congregate and the "predominant means of employee-to-employee communication", i.e., the new "water cooler." Although the NLRB acknowledged that special circumstances would "make [a] ban [on email] necessary to maintain production and discipline," it would be rare for circumstances to justify such a ban.

Purple Communications may face a second challenge, as well. An Administrative Law Judge decision issued on May 10, 2017 in *Newmark Grubb Knight Frank*, No. 28-CA-178893 (2016), is ripe for a decision. In *Newmark*, an ALJ ruled that the company's policy that limited employees' use of the company's telecommunication and electronic communication resources to "business purposes only" violated the NLRA under *Purple Communications*. Newmark appealed to the NLRB, asking it "to reverse its decision in *Purple Communications* and instead to reaffirm, consistent with decades of prior precedent … that employees do not have a statutory right to use their employer's email systems" for NLRA-protected reasons. Briefing in *Newmark* was completed in July 2017, so the case is ready for a decision from the NLRB.

For more information on this topic, contact a member of the firm's Labor & Employment Practice Group.

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