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REPORT OF LEGAL COUNSEL
January 15, 2020

No More Use of Employer's Email System for Protected Communications

A December 17, 2019, NLRB decision issued in *Caesar's Entertainment d/b/a Rio All-Suites Hotel and Casino*, 368 NLRB No. 143, overruled an earlier Board decision in *Purple Communications, Inc.*, 361 NLRB 1050 (2014), and in so doing the Board returned to its 2007 decision in *Register Guard*, 351 NLRB 1110, *enfd. in part and remanded at Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009). Lone Democratic Board Member McFerran dissented, stating she would uphold the Board's 2014 decision in *Purple Communications, Inc.*, 361 NLRB 1050, which dealt with the same issue.

The issue in *Caesar's Entertainment* was determining the appropriate balance between an employer's property right in controlling use of its equipment and an employee's right to form, join, or assist a union, and to engage in other "concerted activity" that is protected by Section 7 of the NLRA.

Previously, in *Purple Communications*, the Board held that if an employer gives employees access to an email system, it must allow them to use that system on nonworking time to communicate with each other for Section 7 purposes, unless the employer can show special circumstances related to the need to maintain production or discipline. Through *Caesar's Entertainment* however, the Board overruled *Purple Communications*, and held that employees do not have a statutory right to use employers' email and other information-technology (IT) resources to engage in non-work-related communications. Rather, according to the Board, employers have the right to control the use of their equipment, including their email and other IT systems, and they may lawfully exercise that right to restrict the uses on those systems, provided that in doing so, they do not discriminate against union or other protected concerted communications.

Recognizing that employees must have adequate avenues to engage in communications protected by Section 7 of the NLRA, the Board's decision created an exception for circumstances where the use of employer-provided **email is the only reasonable means for employees to communicate with one another on non-working time during the workday**.

Accordingly, employers in private industry may now lawfully prohibit employees' use of employer-provided email for nonbusiness purposes unless:

(1) the employees have no other reasonable way to communicate with each other regarding potential union organizing and other NLRA Section 7-protected, concerted activity; or,

(2) there is proof of discrimination by the employer in enforcing its rules selectively against Section 7-protected activity. For example, prohibiting employees' use of employer provided email for Section 7 activity (*e.g.*, union organizing) while allowing use for other nonbusiness purposes likely will be found to violate the NLRA

In the end, due to the omnipresent use of cell phones, employees in the vast majority of workplaces will be unable to credibly argue that employer-provided email is the only reasonable way to communicate.

Respectfully Submitted,

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