

# The Bennett Law Firm

## *Client Update*

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### **NATIONAL LABOR RELATIONS BOARD MANDATES THAT EMPLOYERS ALLOW EMPLOYEES USE OF WORK EMAIL FOR UNION ORGANIZING AND RELATED ACTIVITIES**

In a much anticipated decision, the National Labor Relations Board ruled last Thursday that employers must permit employees the right to use work email systems for union organizing and other concerted activities relating to terms and conditions of employment. As is typical, the Board was divided and issued the ruling on a 3 to 2 vote. This decision overrules prior NLRB precedent holding that employers could prohibit employees this type of access to their work email systems. In *Purple Communications, Inc.*, 361 NLRB No. 126 (Dec. 11, 2014), the NLRB held that email has become a critical means of communication and that therefore, the Board's previous position on this issue undervalued employees' rights to communicate in the workplace about their terms and conditions of employment and gave too much weight to employers' property rights.

The NLRB has now adopted "a presumption that employees who have been given access to the employer's email system in the course of their work are entitled to use the system to engage in statutorily protected discussions about their terms and conditions of employment while on nonworking time." The NLRB's ruling included a finding that employees generally should be entitled to use the work email systems during non-work time for the purpose of trying to gain support for union representation. The NLRB gave a preview of possible rulings in the future as it not only minimized an employer's property right to its email system, but further suggested that the Board may in the future disregard the property interests of employers in their phone systems and bulletin boards.

We expect that the NLRB's ruling will be challenged in the federal courts. However, unless the courts reject the NLRB's decision, employers should be aware of the following:

- The NLRB does not require employers to provide employees with email access generally. Therefore, employers should evaluate whether an employee needs email access to perform his or her job. If email is not needed, an employer may want to eliminate email

access generally.

- Employers do not need to allow non-employees access to its email system.
- Employers may limit access to the email system for non-job related communications to nonworking time. However, employers must enforce this type of restriction in a uniform, consistent manner. A failure to do so will expose employers to unfair labor practice charges.
- Employers may continue to monitor computers and email systems for legitimate management purposes, such as ensuring productivity and preventing use of email for the purposes of harassing others or for purposes that could create liability for the employer.
- Employers may still maintain uniform and consistently enforced restrictions such as prohibiting large attachments or audio/video segments, provided the employer can demonstrate that allowing such attachments would interfere with the employer's email system's efficient functioning.
- Finally, employers are entitled to rebut the NLRB's established presumption that employees should be able to use work email for organizing and related activity provided the employer can demonstrate the existence of special circumstances. It is not clear what an employer will need to show to establish special circumstances. The NLRB provided little guidance on this point and further indicated that a finding of special circumstances will be a rare occurrence.

Some employers may delay any modification of their email policies until the federal courts have ruled on this issue. However, doing so will expose employers to unfair labor practice charges. The more conservative approach is to revise your email policies. For assistance in revising your email policies, please contact Peter Bennett ([pbennett@thebennettlawfirm.com](mailto:pbennett@thebennettlawfirm.com)) or Rick Finberg ([rfinberg@thebennettlawfirm.com](mailto:rfinberg@thebennettlawfirm.com)).