Labor and Employment Alert: Employers Must Allow Employees to Use Employer Owned and Operated Email Systems for Union Organizing Activity

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Since 2007, as a result of the NLRB's *Register Guard* decision, an employer could lawfully limit the use of its email system by employees for certain non-business related activities, assuming that it applied the rule non-discriminatorily. On December 10, 2014, in a 3-2 decision, the NLRB reversed the old rule established in *Register Guard* and established a new rule. Now, employees must be permitted to use employer email for statutorily protected communications during nonworking time if they have access to employer computer systems for work.

The decision arose out of the NLRB's review of the employer's electronic communications policy. The policy prohibited employees from using its email system to send uninvited emails of a personal nature and engage in activities on behalf of outside organizations with no work-related affiliation. The employer assigned each of its employees an individual email account on its email system. The employees used those accounts every day to perform their job duties.

Because the policy was lawful under *Register Guard*, the NLRB found that the old rule in that case was "clearly incorrect." The NLRB relied upon three major points:

- The old rule placed too much importance on employers' property rights and too little importance on employees' right to communicate about the terms and conditions of their employment.
- The old rule failed to take into account the importance of email as a vital means of communication in today's society.
- Email systems are different from other types of workplace equipment, such as bulletin boards and copy machines that have limited space and capacity. The NLRB has long permitted employers to prohibit non-business use of copiers and employer bulletin boards, again assuming that those rules are not applied in a discriminatory fashion.

The newly announced rule *presumes* that employees who have been given access to their employer's email system in the course of their work are *entitled* to use the system for statutorily protected discussions during *nonworking* time. The NLRB recognized a limited exception if an employer can show "special circumstances" that justify a specific restriction necessary to maintain production and discipline.

Employers should not be too hopeful about the utility of this exception. First, the NLRB noted it will be a "rare case" where special circumstances justify a total ban on non-work email use by employees. Second, the mere assertion of an interest that could theoretically support a restriction "will not suffice." Third, a similar exception for the wearing of union insignia – like buttons, hats, etc. – has existed for many years and the NLRB very infrequently finds that "special circumstances" are satisfied.

Both Member Miscimarra (R) and Member Johnson (R) filed lengthy dissenting opinions, attacking the majority holding on a broad range of grounds. For example, Member Miscimarra disagreed with the majority's presumption that the *Register Guard* rule created an unreasonable obstacle to union organizing. He noted that there is no need for employees to use employer email systems where most employees today have access to electronic communications and public forums such as Facebook and Twitter outside of work.

Member Johnson argued that the majority's rule was a violation of employers' First Amendment rights. The rule forces employers to pay for speech that is not their own and that they may not support. Further, Member Johnson contended the new rule potentially extends far beyond email systems to other employer-owned property, such as instant messaging, broadcast devices and video communication.

Whether the decision will be appealed is uncertain, but in the meantime, it is clear that the NLRB will apply this new rule both prospectively and retroactively. Employers wanting more information on this most recent, significant development at the NLRB should call their Vorys attorney or visit the firm's labor law blog at www.vorysonlabor.com.