Legal Update Article

Labor Board: Employers May Prohibit Employee Nonwork Use of Computer Systems – With Caveats

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Overturning a controversial 2014 ruling by the Obama-era National Labor Relations Board (NLRB), the NLRB has restored an employer's right to control employee nonwork use of its information technology and email systems — with important exceptions — without violating the National Labor Relations Act (NLRA). *Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino*, 368 NLRB No. 143 (Dec. 16, 2019). The new standard applies retroactively.

Chairman John Ring and Members Marvin Kaplan and William Emanuel were in the majority. Then-Member Lauren McFerran dissented.

The NLRB also reaffirmed that "there is no Section 7 right to use employer-owned televisions, bulletin boards, copy machines, telephones, or public-address systems."

The Board overruled *Purple Communications,* 361 NLRB 1050 (2014), in which the Obama NLRB found that employees who were given access to employer email had the right to use that email system for nonwork-related purposes, including union organizing and protected concerted activity. In *Caesars Entertainment,* the current Board returned to the rule of *Register Guard,* 351 NLRB 1110 (2007), that was overruled by *Purple Communications.* In *Register Guard,* the NLRB found that employer property rights extended to control over its email system (and therefore, it was lawful for an employer to maintain a blanket ban on employees' nonwork-related use of employer's email systems).

The NLRB's review of its standard for evaluating employee nonwork-related use of employer-owned IT systems has been watched closely by business and labor groups. In addition to filings from the parties, *amicus* briefs were filed on behalf of 33 persons or groups.

Caveats

However, the NLRB placed two important caveats on an employer's right to control IT resources and email systems. First, like all other employer rules, employer rules governing IT resources and email systems must not be enforced in a discriminatory manner.

Second, the Board created what it called a "rare" exception permitting employees to use employer-owned IT systems for nonwork purposes where there are no other reasonable means for employees to communicate. Although it opined that this exception will be rarely applied because employees at most work locations have adequate avenues of communications, the NLRB majority declined to otherwise define the exception, leaving it to be "fleshed out" in subsequent cases.

Board Ruling

In *Caesars Entertainment,* the Board overruled *Purple Communications* because that case impermissibly shifted the balance between employers' right to control their property and employee Section 7 rights by giving employees the right to use employer-owned email systems for Section 7-protected activities, including union organizing. The Board cited *Republic Aviation Corp. v. NLRB,* 324 U.S. 793 (1945), in which the U.S. Supreme Court prohibited employers from banning all union solicitations and distributions of literature on employer premises because it sought to balance two "undisputed" rights: organizing rights protected by Section 7 of the NLRA and an employer's right to maintain discipline at workplaces. The Board interpreted *Republic Aviation* to require that employees have "adequate" avenues of communication to exercise Section 7 rights to avoid creating an unreasonable impediment to organizing.

Applying this premise, the Board found that employees had many other ways to communicate with one another in the workplace, such as "free time" oral solicitations and distribution of literature in nonworking areas on nonworking time, that were effective and available means of communication. The NLRB also noted that employee access to personal electronic devices, personal email accounts, and social media afforded employees other means of Section 7-protected communications.

Dissent

In her dissenting opinion, then-Member McFerran said the majority was aiming to "turn back the clock" in declining to recognize email as a "natural gathering place" used for employee face-to-face conversations. She also said the majority was overruling *Purple Communications* in favor of a standard out of touch with the modern workplace and labor law principles regarding employee rights to discuss organizing.

Employer Guidance

Employers seeking to gain control over nonwork-related use of their IT resources, including email systems, should refer to *Caesars Entertainment.* However, this NLRB ruling does not affect the limitation on enforcement of employer rules and policies: employers still may not maintain or enforce handbook rules or personnel policies restricting use of IT systems in a manner that discriminates against communications related to unions or organizing.

Employers should review and consider revising their handbook rules and personnel policies related to email and other IT resources to be consistent with applicable law, the realities of communications in their workplaces, and other factors.

Please contact a Jackson Lewis attorney with any questions about this case, the NLRB, and workplace rules.