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NLRB Holds That Employees Have the Right to Use Company Email Systems for Union Organizing—Union and Non-Union Employers Are All Affected

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By Steven M. Swirsky

In its *Purple Communications, Inc.,* decision, the National Labor Relations Board ("NLRB" or "Board") has ruled that "employee use of email for statutorily protected communications on nonworking time must presumptively be permitted" by employers that provide employees with access to email at work. While the majority in *Purple Communications* characterized the decision as "carefully limited," in reality, it appears to be a major game changer. This decision applies to all employers, not only those that have union-represented employees or that are in the midst of union organizing campaigns.

Under this decision, which applies to both unionized and non-union workplaces alike, if an employer allows employees to use its email system at work, use of the email system "for statutorily protected communications on nonworking time must presumptively be permitted . . . ." In other words, if an employee has access to email at work *and* is ever allowed to use it to send or receive nonwork emails, the employee is permitted to use his or her work email to communicate with coworkers about union-related issues.

In *Purple Communications*, the NLRB rejects its analysis in its 2007 decision in *Register Guard*, which the Board now finds "was clearly incorrect." In *Register Guard*, the Board held that "employees have *no statutory right* to use the[ir] [employer's] e-mail system" to participate in pro- or anti-union activity protected under the National Labor Relations Act ("Act") (emphasis added).

Register Guard's reasoning was based on principles respecting the right of employers to control access to, and use of, their property. In *Purple Communications*, the Board majority not only argues that the use of email systems is not a matter of property but goes on to say that *Register Guard* gave "too much weight to employers' property rights" and "undervalued employees' core Section 7 right to communicate in the workplace about their terms and conditions of employment."

Purple Communications establishes a new presumption that employees who have access to email at work must be permitted to utilize the systems for communication

about terms and conditions and otherwise exercise their Section 7 rights during "nonworking" times. This presumption, however, ignores the likelihood that such emails, which may have been written or sent outside of working time, will likely be opened or read during working time. The decision also suggests that if employees are allowed to use their employers' email systems for nonwork emails during working time, they must be able to use the systems for communication about unions and the terms and conditions during working times as well. Further, if an employer is inconsistent in the application of such policies (e.g., permits other nonwork emails to be sent during working time, but does not permit union-related emails to be sent during this time), it is likely to be found to have violated employees' rights under the Act and have committed an unfair labor practice.

The decision is also a major departure from established Board law that considered, on the one hand, employees' need for access to or use of employer property (whether real property or business equipment) for the exercise of their Section 7 rights, against, on the other hand, the employer's right to limit access to or use of its property. Not only does the decision hold that employees are presumptively permitted to use their employers' email systems to communicate in a union organizing campaign or concerning terms and conditions, it allows employees, in most circumstances, to use company email systems to send documents—such as authorization cards, videos, flyers, and other attachments—in most circumstances.

While the majority opinion in *Purple Communications* states that employers may be able, in certain circumstances, to restrict or prohibit the use of the systems for communications concerning terms and conditions where such a restriction is necessary to "maintain production and discipline," the burden will be on an employer to establish why such a prohibition or restriction is necessary. That burden is likely to be a heavy one.

As the Board has stated, while an employer may rebut the presumption (of the right to use the email systems) "by demonstrating special circumstances necessary to maintain production or discipline justify restricting its employees' rights," the burden will be steep. "It will be the rare case where special circumstances justify a total ban on nonwork email use by employees," and an employer seeking to meet that burden "must demonstrate the connection between the interest it asserts and the restriction."

The Board has declared today's email systems to be "the primary means of workplace discourse," and that *Register Guard* "undervalued employees' core Section 7 right to communicate in the workplace about their terms and conditions of employment, while giving too much weight to employers' property interests." Although the *Purple Communications* decision appears to try and explain why the holding in *Register Guard* was "wrong," the majority's reasoning is actually based on the notion that "everyone uses email." Further, emailing at work is an important means of communication for workers to communicate with one another and, therefore, the Board members think that they should be allowed to use it to "talk" about their terms and conditions of employment, including union organizing and a broad range of other topics.

As the decision points out, an important challenge that employers will now face is the balancing of, on one hand, their responsibilities for monitoring content and usage of

their systems to ensure adherence to workplace rules and policies concerning compliance matters and inappropriate and prohibited uses of the email system with, on the other hand, possible claims of unlawful surveillance stemming from efforts to ensure that employees do not violate legitimate rules and standards relating to their use of the email systems.

In this regard, the Board states that the "decision does not prevent employers from continuing, as many already do, to monitor their computers and email systems for legitimate management reasons, such as ensuring productivity and preventing email use for purposes of harassment or other activities that could give rise to employer liability." While the *Purple Communications* decision states that "an employer's monitoring of electronic communications on its email system will . . . be lawful so long as the employer does nothing out of the ordinary, such as increasing its monitoring during an organizational campaign or focusing its monitoring efforts on protected conduct or union activists," it is easy to foresee the burdens that employers are likely to face in defending against unfair labor practice charges alleging such discriminatory monitoring.

At least the Board still recognizes that an employer is not "ordinarily prevented from notifying its employees, as many employers also do already, that it monitors (or reserves the right to monitor) computer and email use for legitimate management reasons and that employees may have no expectation of privacy in their use of the employer's email system."

While the majority in *Purple Communications* noted that the rule only applies to email systems at this time and that they are not addressing other systems and means of communication, it is almost certain that when the Board looks at instant messaging and other electronic communications systems in the workplace, it will reach the same conclusion. If employees are given access to instant messaging and other tools, such as Microsoft Lync and the like and they are allowed to send nonwork related messages, then the Board will likely apply its *Purple Communications* rationale to those modes of communication as well.

One thing that is obvious is that every employer that uses and allows its employees to use email at work will now need to review its policies and practices concerning access to and use of email systems and the manner in which it carries out such policies.

What Employers Should Do Now

The *Purple Communications* decision will be applied retroactively to pending charges and representation cases involving issues of employee email use. The ruling means changes for every company that uses email. There are a number of steps that employers should take now:

- Review all existing policies and practices concerning use of and access to email, and revise as necessary to conform to the new realities.

- Determine not only what the policies and practices say but how they are being applied and enforced throughout the company.

- Review and consider all policies and practices that involve the monitoring and preservation of email and other electronic communication.

- Confirm that the company's policies and practices clearly notify all employees that the company reserves and exercises its right to monitor and review all communications and attachments that are sent from or received on its email systems both internally and externally.

- Make sure that employees are on notice and understand that they do not have a right to privacy with respect to emails and attachments and that they understand what this means.

- Consider what the company's policy should be on limiting the sending, receiving, and reading of nonwork messages during "work time."

- Determine whether there are positions within the company where restrictions on the use of email for nonwork purposes is necessary to maintain productivity and discipline. If such positions exist, consider what restrictions are truly needed, how broad they really need to be, and, perhaps most importantly, how the company would meet its burden to prove that the restrictions are truly necessary and as narrowly drawn as they can be.

- Train supervisors and managers about these policies and practices and how to communicate with employees about them.

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Management Memo
MANAGEMENT'S INSIDE GUIDE TO LABOR RELATIONS

EPSTEIN BECKER GREEN

Posted on August 28th, 2015 by Allen B. Roberts, Steven M. Swirsky and D. Martin Stanberry

NLRB Redefines and Expands "Joint-Employer" Status

The National Labor Relations Board ("NLRB" or "Board") has issued its long-anticipated decision in *Browning-Ferris Industries*, 362 NLRB No. 186 (pdf), establishing a new test for determining joint-employer status under the National Labor Relations Act ("NLRA" or the "Act"). Because this revised standard will resonate with businesses relying on contractors and staffing firms throughout the economy and across industry lines, employers should be wary of its potential impact upon relationships with service providers that are supportive of, or critical to, their enterprise.

By fashioning a new standard in *Browning-Ferris*, the Board springs open new questions of which legally distinct entities will bear responsibility in NLRB cases addressing union recognition and bargaining obligations, as well as for any unfair labor practices that may follow. Given the Board's lead in fashioning a new standard, described as based on common law principles, it is likely to be relevant as well to other agencies, such as the Equal Employment Opportunity Commission and Department of Labor.

The majority opinion in this 3-2 decision makes clear that its objectives are far reaching: to address "the diversity of workplace arrangements in today's economy," including the increase in "[t]he procurement of employees through staffing and subcontracting arrangements, or contingent employment," and fulfill a "primary function and responsibility."

A New Standard for a Different Economy

Under the new standard enunciated by the majority, "[t]he Board may find that two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment." *Browning-Ferris* jettisons the long standing requirement that not only must a party have the means to influence such matters, but it must also have exercised that right in a meaningful way. If the decision is upheld and followed, no longer will the Board need to find that an employer retains and exercises direct control over another employer's employees to be liable as a joint employer of those employees.

In the decision and press release, the Board suggests that "the current economic landscape", which includes some 2.87 million people employed by temporary agencies, warrants a "refined" standard for assessing joint-employer status. As the majority puts it: "If the current joint-employer standard is narrower than statutorily necessary, and if joint-employment arrangements are increasing, the risk is increased that the Board is failing what the Supreme Court has described as the Board's 'responsibility to adapt the Act to the changing patterns of industrial life.'"

What Is the New Test for Finding Joint Employer?

So what exactly is changed? Previously, an employer had to *exercise* direct and immediate control over the terms and conditions of employment to be found to be a joint-employer. Under the new standard, what matters is whether the purported joint-employer *possesses* the authority to control the terms and conditions of employment, either directly or indirectly. In other words, the actual or potential ability to exercise control, regardless of whether the company has in fact exercised such authority, is the focus of the Board's inquiry. As the Board puts it, "*reserved authority* to control terms and conditions of employment, *even if not exercised*, is clearly relevant to the joint-employment inquiry." (emphasis added).

The Board's decision also extends joint-employer status to employers that only exercise a degree of indirect control over the work performed by the employees of another. By way of example, in support of its holding that Browning-Ferris Industries ("BFI") was a joint-employer of the employees of its contractor, Leadpoint Inc., a supplier of temporary labor, the Board emphasized that BFI had "communicated precise directives regarding employee work performance" to Leadpoint supervisors.

Why This Matters

As former NLRB Chair Wilma Liebman told Noam Scheiber of *The New York Times*, the Board's decision changes the critical fact of which company is required to negotiate when employees unionize: "This is about, if employees decide they want to bargain collectively, who can be required to come to the bargaining table to have negotiations that are meaningful,"

One significant indicator of how broadly the *Browning-Ferris* decision will be applied may be seen when the decisions issue in the pending unfair labor practice charges in which McDonald's is alleged to be a joint-employer of the employees of various franchisees. While the full import of *Browning-Ferris* may unfold over years of administrative litigation and court review, we know that the obvious (and intended) effect of the decision is to permit the Board to find joint-employer status where it did not previously exist. Indeed, the Board majority notes that extending joint-employer status is necessary to "encompass the full range of employment relationships wherein meaningful collective bargaining is … possible." Notwithstanding the arrangements employers and contractors have made in years past to guard against joint-employer exposure, unions will be at the ready with unfair labor practice charges and representation petitions as vehicles for the Board to apply its new standard and examine or reexamine relationships forged before the pronouncements of *Browning-Ferris*. Thus, employers should anticipate a role in newly filed proceedings alleging joint-employer status – even as they contemplate reforming or redefining terms by which they engage with contractors and other providers of services supportive of their business.

Especially troubling is the prospect that the Board, in its zeal to create new applications for its joint-employer criteria, will ignore existing facts showing no actual exercise of control by one employer over employee relations of another, and instead look for control that potentially could be exercised in an ordinary arm's length business relationship.

Given these circumstances, even those employers who do not exercise *any* direct or indirect control over the employees of their contractors should review carefully the terms of such arrangements, keeping in mind the Board's stated intention of expanding joint-employer status.

What to Do Now

It is not an exaggeration to say that the new standard for determining joint-employer status will impact employers in almost every industry across the country. As a first step, employers will want to closely examine their relationships with those who provide them with temporaries and other contingent workers, and their contracts and relationships with those other businesses that provide integral services and support, to assess whether there is a vulnerability to findings of joint-employer status.

Tags: Allen B. Roberts, Browning-Ferris, D. Martin Stanberry, joint employer, McDonalds, NLRA, NLRB,

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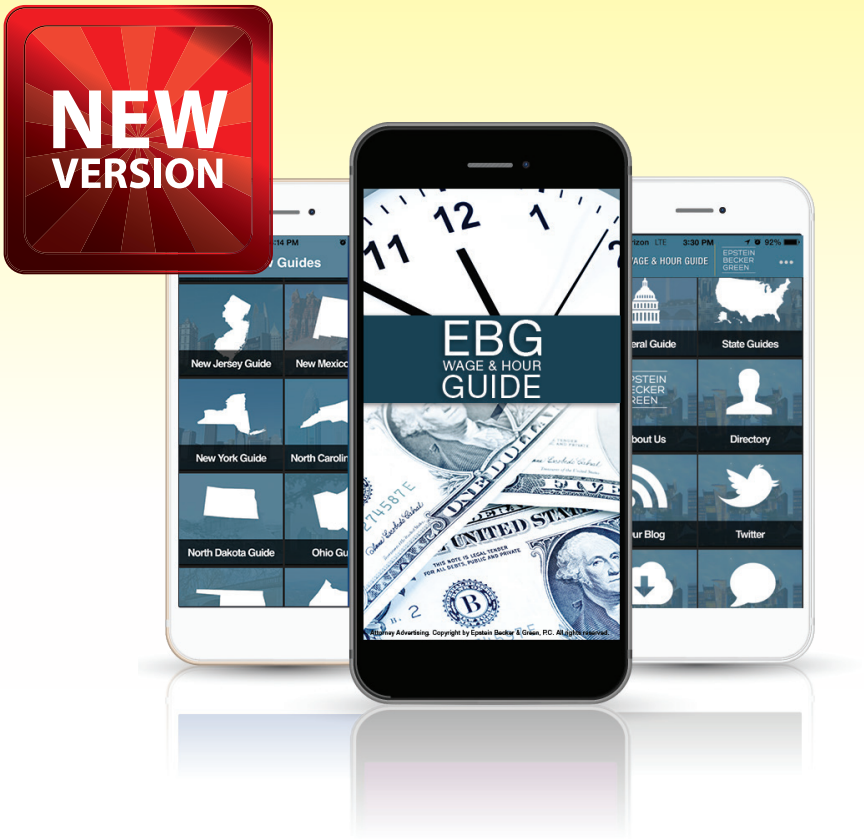

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