

Small Business Notes

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In this issue:

- **National Labor Relations Board (NLRB) Issues Invitation to File Briefs on Questions of Employee Use of Employer E-Mail and Communications Systems for Protected Activity**

National Labor Relations Board (NLRB) Issues Invitation to File Briefs on Questions of Employee Use of Employer E-Mail and Communications Systems for Protected Activity

Section 7 of the national Labor Relations Act provides employees with the right of self organization, collective bargaining and other “concerted activities” for the purposes of collective bargaining or other mutual aid or protection. Section 8(a)(1) makes it unlawful for an employer to interfere with, restrain, or coerce employees in the exercise of those rights. Among the specific provisions of Section 8 is a prohibition on an employer maintaining workplace rules that would reasonably be seen as chilling employees in the exercise of the rights.

Recent cases have focused on situations where an employee used *personal* social media accounts (e.g. Facebook) to make comments relating to union organizing or conditions of work which resulted in the employees being fired from their jobs. For example, in *Pier Sixty, LLC*, NLRB 59 (2015) the NLRB determined that an employer had violated the act when it terminated an employee who posted on Facebook a profanity filled rant about disrespectful treatment at work and which concluded, “Vote Yes for the Union.” In short, the NLRB held that Section 7 protections extended to Facebook postings by employees when those postings related to workplace conditions.

On August 1, 2018, the NLRB asked interested an affected parties to provide briefs that commented upon the question of whether an employees had Section 7 rights to use their *employer’s* computer resources (e.g., email) during non-working hours for Section 7 protected communications. The NLRB has in the past answered this question differently: in *Register Guard*, NLRB 571 (2009) the Board decided that employees do not have a statutory right to use their, employers’ email for Section 7 activity. In *Caesar’s Entertainment Corporation* in May 2016 a Board administrative law judge issued a decision based on *Purple Communications, LLC*, NLRB 1050 (2014) that employees who have been given access to the employer’s email system have a presumptive right to use that system for Section 7 protected activities.

Continued...

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Page 2 of 2

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Specifically the NLRB seek comment on:

1. Should the Board adhere to, modify, or overrule *Purple Communications*?
2. If the Board overrules *Purple Communications*, what standard should the Board adopt in its place, that of *Register Guard* or some other standard?
3. If the Board returns to the standard of *Register Guard*, should it carve out exceptions for circumstances that limit employees' ability to communicate with each other by some means other than use of the employer's email?
4. To date the Board has limited its holdings to use of employer email. Should the Board extend that standard – or develop a different standard – for use of non-email communications like texts, instant messages, social media postings?

Briefs in response to the invitation are due on or before September 5, 2018.

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