# BACK TO THE FUTURE: WILL THE NLRB RETURN TO PRIOR PRECEDENT CONCERNING EMPLOYEE USE OF EMPLOYER-PROVIDED TECHNOLOGY?

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## A. Introduction

Email systems became common in many workplaces in the mid-1990s; however, the National Labor Relations Board ("NLRB" or "Board") did not issue a decision squarely addressing the question of whether employers must allow employees to engage in protected activity on employer-provided email systems until more than a decade later. In 2007, the NLRB answered this question in the negative in *Register Guard*, 351 NLRB 1110 (2007). Seven years later, in 2014, the NLRB revisited this question in *Purple Communications, Inc.*, 361 NLRB No. 126 (2014), and answered it in the affirmative. The majority in *Purple Communications* held that employees have a presumptive right to use employer-provided email systems to engage in protected activity on non-working time. [2]

Today, email continues to be a popular tool for employees to communicate and accomplish tasks in the workplace, although it is far from the only one. Electronic messaging systems and social media platforms have proliferated at a faster pace than many employers (and courts and agencies) have been able to keep up. Personal devices now house social media platforms, such as LinkedIn, Facebook, and text messaging, and compete for employee attention while also creating safety, productivity, and information security challenges for employers. As employers update their policies to adapt to and deal with these new technologies, they must now also anticipate how a new NLRB majority might impact how to draft and enforce otherwise neutral policies. This paper provides an overview from the employer's perspective on what the future may hold at the NLRB on three issues: use of employer-provided email and other

[1] This paper was prepared for purposes of facilitating discussion at the section's April 2017, conference, and to the extent any opinions are expressed in this paper, they reflect the opinion of the authors and not Davis Wright Tremaine LLP or any firm clients.

[2] On March 24, 2017, the Board affirmed its decision in *Purple Communications, Inc.* 365 NLRB No. 50 (2017) ("*Purple II*"). The Board had remanded the case back to the ALJ to assess whether the company's policy was lawful under the new standard. The Board adopted the ALJ's order with Acting Chairman Miscimarra dissenting. Unless otherwise noted, all references in this article are to *Purple I*.

employer-provided messaging systems to engage in protected activity; restrictions on the use of personal audio and video recording devices, including cell phones, in the workplace; and the applicable standard for review of facially neutral workplace policies.

### B. Use of an Employer's Email System: Return to the Old Guard?

In *Register Guard*, 351 NLRB 1110 (2007), a divided NLRB held three to two that an employer is not required to allow employees to use the employer's email system to engage in protected activity. Chairman Battista and Members Kirsanow and Schaumber wrote for the majority; Members Liebman and Walsh dissented. Specifically, the Board majority held that an employer's rule prohibiting "non-job related solicitation" on its email system was lawful because the employer had a "basic property right" to restrict employee use of all company tangible property, including telephones, copy machines, and e-mail systems. *Id.* as 1114. The majority expressly rejected the dissent's argument that email systems should be treated differently than other company equipment used to operate the employer's business. The majority also recognized that some employers may allow employees to use their systems for limited non-job related purposes. In such cases, the Board held that employers could not discriminate between uses protected by Section 7 of the National Labor Relations Act ("NLRA" or "Act") and other similar uses. The majority wrote, "unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7 protected status." *Id.* at 1118. Under this test, an employer would violate the Act if it permitted solicitation for one union but not another, or by anti-union but not pro-union employees.

In *Purple Communications, Inc.*, 361 NLRB No. 126 (2014), a different Board revisited *Register Guard*, and reached the opposite result. The Board in *Purple Communications* was also split three to two. Chairman Pearce and members Schiffer and Hirozawa wrote for the majority, members Johnson and Miscimarra dissented separately. The *Purple Communications* majority first rejected a primary premise of the *Register Guard* decision: that because an employer's email system was its property, that it could prohibit non-job related use of this property. However, rather than merely finding email was the modern equivalent of a break room, or an "electronic water cooler," the majority went farther and held that the Board's long-standing employer equipment cases were wrongly decided and should be overruled. *Id.* at 1 ("We believe, as

scholars have pointed out, that the *Register Guard* analysis was clearly incorrect. The consequences of that error are too serious to permit it to stand."). The majority then held that employees have a *presumptive* right to use an employer's email system to engage in protected activity. According to the majority, such use was not unrestricted. An employer was still allowed to monitor use of its system and restrict non job related use to non-working time. An employer could also restrict use if it could establish "special circumstances" justifying restrictions on use.

In dissent, then-Member Miscimarra criticized the majority presumption that limiting an employer's email system to business use constitutes an "impermissible impediment to self-organization." *Id.* at 18. He also found the majority's decision in direct conflict with prior decisions finding that employers provided unlawful support to organizing efforts when they provided employees with pencils, paper, and telephones. Both Miscimarra and Member Johnson criticized the majority for not adequately considering available alternatives to company emails for protected activity, including text messaging and private email and social media accounts. They further criticized the majority for undervaluing the potential financial costs to employers of complying with the Board's decision.

Miscimarra's dissent makes another important observation: the *Purple Communications* Board had replaced a clear test with an ambiguous and unworkable one. He wrote:

> The majority today replaces a longstanding rule that was easily understood. In its place, the majority substitutes (i) a presumption giving all employees the right to engage in Section 7 activities using employer email systems to which they otherwise have access, and (ii) unspecified "special circumstances" that, if proven by the employer in after-the-fact Board litigation, will mean employees did not have the majority's presumed statutory "use-of-email" rights.

*Id.* at 19.

Member Miscimarra continued:

> In summary, I believe my colleagues' created statutory right will create significant problems and intractable challenges for employees, unions, employers and the NLRB. This will mean more work for the NLRB and the courts. However, the losers will be parties who must endure years of litigation after… issues arise with (literally) lightning speed, and then trudge towards resolution at a pace that, by comparison, appears to be standing still.

*Id*. at 26.

The issues highlighted by the now Acting Chairman of the NLRB in his *Purple Communications* dissent remain largely unresolved. The Board has yet to decide what other types of employer equipment will be subject to the new presumption of *Purple Communications* and what facts constitute "special circumstances" to rebut this presumption. These issues continue to wind their way through the Division of Advice and ALJs to the Board. By the time they reach the NLRB, though, they may be resolved by an NLRB receptive to reinstituting the bright-line standard of *Register Guard* for email and other forms of employer-provided communications and messaging systems.

As noted by Member Miscimarra, *Register Guard* accommodated any conflict between protected employee conduct and employer property rights "with as little destruction of one as is consistent with the maintenance of the other." *Id.* at 22; quoting *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976). This observation is consistent with the majority's holding in *Register Guard* that Section 7 "does not require the most convenient or most effective means of conducting those communications, nor does it hold that employees have a statutory right to use an employer's equipment or devices for Section 7 communications. *Register Guard*, 351 NLRB at 1115. Social media sites, text messaging, and free non-business email services (Gmail and Yahoo! Mail) provide more than adequate alternative platforms for Section 7 communications and do so without infringing on an employer's property rights.

Over 20 years after email became common in the workplace, the Board's decision in *Purple Communications* leaves unresolved many questions about the extent of an employer's property rights. Returning to the standard of *Register Guard* restores clarity to this issue and provides a framework that can be used on a going forward basis without repeatedly revisiting the issue each time a new technology takes hold—and in doing so disrupting the status quo for both employees and employers in the process.

### C. Restrictions on Audio or Video Recording: Revisiting *T-Mobile* and *Whole Foods*

The iPhone was introduced in 2007, the same year *Register Guard* was decided; as of July 2016, nine years later, over one billion iPhones had been sold globally. *Apple Celebrates One Billion iPhones*, July 27, 2016 (http://www.apple.com/newsroom/2016/07/apple-celebrates-one-billion-iphones.html). While "smart phones" are often employee property and do not belong to the employer, this does not make their use in the workplace any less vexing for employers. Cameras in smart phones have largely replaced personal still or video cameras and digital recorders. They are used by individuals to remember where they parked and capture personal memories, and by professionals to record interviews and document progress on the job site. In several recent cases, the NLRB has upended employer rules prohibiting employees from using cell phones to record conversations in the workplace.

In *Whole Foods Market Group, Inc.*, 363 NLRB No. 87 (2015) ("*Whole Foods*"), the employer had two rules that prohibited employees from secretly recording conversations without prior approval. At least one of the rules explicitly made clear that its intent was to "eliminate the chilling effect on the expression of views" that might occur when someone is being recorded. Whole Foods did not want to "inhibit spontaneous and honest dialogue especially when sensitive or confidential matters are being discussed." Only one witness testified at the hearing; Whole Food's vice president for human resources. He generally testified about the purpose of the rule and how it reflected the company's values and culture. Not a single employee testified that they had been penalized under the rule for recording otherwise protected activity or had refrained from recording protected activity because of the rule. Nonetheless, the Board held that the rule was unlawful because a hypothetical, "reasonable" employee might construe the rule to prohibit Section 7 activity. The Board reasoned that in certain circumstances, the right to take photography and make audio or video recordings is protected by Section 7 of the Act and, therefore, any rule that limits recording necessarily must impede on that right. Whole Food's rules were problematic because they did not differentiate between recordings protected by Section 7 and those that are unprotected. It did not matter that the purpose of the rule—to promote open communication and dialogue—would have, in many instances, encouraged protected activity.

Similarly, in *T-Mobile USA, Inc.*, 363 NLRB No. 171 (2016) ("*T-Mobile*"), the employer had a rule that prohibited employees from making recordings in the workplace. The rule expressly stated that its purpose was to prevent harassment, maintain individual privacy, encourage open communication, and protect confidential information. Again, the Board held that the rule was unlawful because, despite the rule's language to the contrary, an employee might reasonably construe the rule to prohibit Section 7 activity. Like the rule found unlawful in *Whole Foods*, T-Mobile's rule did not make an express exception for protected conduct. To the extent that the employer wanted to advance otherwise legitimate interests—such as protecting employee privacy or preventing harassment—the Board held that the employer needed to more narrowly tailor its rule to those interests.

Member Miscimarra's dissent in *Whole Foods* explains the many reasons why the Board's rule in *Whole Foods* (and subsequently *T-Mobile*) is unworkable and may, in fact, impede upon Section 7 rights. First, the Board has long held that no-recording rules *foster* collective activity and free expression. The Board prohibits any party to insist to impasse on recording or verbatim transcription of collective bargaining negotiations or grievance meetings. As the Board held more than 30-years ago, "[t]he presence of a recording device may have a tendency to inhibit free and open discussions. This may be especially true when sensitive or confidential matters will be discussed." *Pennsylvania Telephone Guild*, 277 NLRB 501 (1985). Indeed, as Miscimarra observes in *Whole Foods*, "[e]mployees would most likely refrain from stating their views candidly if they were being recorded." 363 NLRB at 8. Board precedent also prohibits employers from installing hidden surveillance cameras without first providing notice and an opportunity for the employees' bargaining representative to bargain on behalf of the employees. *Anheuser-Busch, Inc.*, 351 NLRB 644 (2007); *Colgate-Palmolive Company*, 323 NLRB 515 (1997).

Second, many conversations in the workplace involve confidential information—whether it be the employer's proprietary information, customer information, or information about an employee's own private matters. In many instances, employers are legally required to keep certain information private, such as with patient information under HIPPA. The Board's holding

makes it more difficult for employers to protect such confidential information from disclosure. While confidentiality is a legitimate interest that can be used to prohibit some recording, the Board's decisions suggest that employers should draft policies that address each and every instance where confidential information might be at issue to avoid a perceived overlap between confidential information and Section 7 conduct.

As demonstrated by *Virtua Health, Inc.* (Advice Memo, Case 04-CA-165272, Mar. 4, 2016) drawing bright lines in this area will prove difficult. In *Virtua Health, Inc.*, the employer, a nonprofit healthcare system, maintained a policy restricting recordings in the workplace. The policy included a detailed list of procedures to be followed when engaging in recording in the workplace. The policy referenced patient privacy and also provided that employees may refuse to be recorded. The General Counsel concluded that the policy was unlawfully overbroad because it went beyond patient privacy concerns and in practice prohibited recordings of employee meetings with managers without their consent.

Third, cell phones in the work place are a distraction, and an employer's interest in limiting such distraction during working time is a legitimate one. A recent study found the average person spends almost an hour per day on Facebook and its related sites. *Facebook Has 50 Minutes of Your Time Each Day. It Wants More*, New York Times, May 5, 2016 (https://www.nytimes.com/2016/05/06/business/facebook-bends-the-rules-of-audience-engagement-to-its-advantage.html?_r=1). Unlike most other leisure activities, people tend to use Facebook while they are engaged in other activities…such as working. Facebook is, of course, just one of the many mobile applications competing for employees' attention in the workplace. Distractions from mobile apps result in productivity losses and can even pose serious safety concerns. An employee checking his or her text messages while driving a forklift through a warehouse is just as dangerous as an individual texting while driving their car. Both the employer and employees benefit from bright-line policies that prohibit such risky behavior.

Fourth, nonconsensual recording is unlawful in many states. The Board's decisions do not address whether a policy that prohibits workplace recording would be lawful in a state that prohibited recording a conversation without the consent *of both* parties to the conversation.

*Whole Foods*, 363 NLRB No. 87, fn. 13. Instead, the Board's recent decisions put the onus on an employer to create different policies that accurately reflect individual state laws. Even then, however, the Board has not squarely addressed a policy which requires consent and which is expressly limited to states where two-party consent is required.

Finally, the present day ubiquity of mobile phones in the workplace—and their increased use as recording devices, often surreptitiously—only enhances the Board's concerns about inhibiting discussions among employees when they believe their conversations might be recorded. Just because employees ***can*** use a mobile phone to record Section 7 activity does not mean that they must be allowed to do so unconditionally. Employees are able to document protected activity though proven alternative methods, including note taking (either with old-fashioned pen and paper or digitally) or relying on the recollection of witnesses. While not perfect, such methods avoid the confidentiality concerns of cell phone recording and do not have the same deleterious effects on free expression.

Both *Whole Foods* and *T-Mobile* are pending review in appellate courts. (W*hole Foods Market Inc. v. NLRB*, Nos. 16-2 and 16-346 (2nd Cir.); *T-Mobile USA Inc. v. NLRB*, No. 16-60284 (5th Cir.); and *NLRB v. MetroPCS Communications Inc.*, No. 16-60497 (5th Cir.)). If enforced, blanket prohibitions on recording will likely violate the Act on the grounds they are overbroad. Regardless of outcome, though, employers will still be left with little guidance as to what business interests will support restrictions on recording. These legitimate interests are substantial and include patient safety, employee and customer privacy, protection of trade secrets (including manufacturing methods and equipment) and compliance with other state and federal laws, such as HIPPA. At least two options exist to provide answers to these questions: one, apply *Register Guard* to rules concerning use of personal devices in addition to employer-provided devices; the other, revisit the Board's test for review of facially neutral rules.

### D. Revisiting *Lutheran Heritage Village-Livonia:* A Potential New Standard for Evaluating Workplace Rules

In *Lutheran Heritage Village-Livonia*, the Board held that employment policies, work rules, and handbook provisions are unlawful whenever any employee "would reasonably

construe the language to prohibit Section 7 activity." 343 NLRB 646 (2004) ("*Lutheran Heritage*"). *Lutheran Heritage* applies to those policies, rules, and provisions that do not expressly restrict Section 7 activity, were not adopted in response to protected activity, and have not been applied to restrict such activity. The mere existence of a rule or policy may violate the Act.

In a recent decision, *William Beaumont Hospital*, 363 NLRB No. 162 (2016), then-member Miscimarra laid out several reasons why he believes the *Lutheran Heritage* standard should be changed. He reiterated these reasons in *Verizon Wireless*, 365 NLRB No. 38 (2017). First, Miscimarra did not believe that the *Lutheran Heritage* standard took into account the legitimate justifications behind particular policies. As Miscimarra noted:

> [T]he *Lutheran Heritage* 'reasonably construe' standard is contrary to Supreme Court precedent because it does not permit *any* consideration of the legitimate justifications that underlie many policies, rules, and handbook provisions. These justifications are often substantial, as illustrated by the instant case. More importantly, the Supreme Court has repeatedly required the Board to take these justifications into account.

*William Beaumont Hospital*, 363 NLRB at 11.

For example, in *Verizon Wireless* the Board struck down an employee privacy policy because employees would "reasonably read" the rule to prohibit them from discussing the terms and conditions of their employment. 365 NLRB No. 38 (2017). This holding does not fully consider the substantial and legitimate interest employers ***and employees*** have in maintaining the privacy of certain business and employee information. According to the FTC, 17.6 million Americans (7% of the US population) were victims of identity theft in 2014. Employment data contains much of the personal information coveted by identity thieves, and increasingly employers are being held liable for any harm their employees suffer because of a workplace breach of their confidential information. An employee privacy policy serves the legitimate purpose of protecting against such breaches, and it is not a stretch for employees to reasonably understand and appreciate such a purpose. *Lutheran Heritage*, however, rejects such a result and instead assumes that employees are more likely to assume a policy restricts their protected activity.

Second, *Lutheran Heritage* discourages employers from having necessary policies, rules, and handbooks for fear of running afoul of the Act. Again as Miscimarra states:

> The broader premise of *Lutheran Heritage*, which is even more seriously flawed, is the notion that employees are better served by *not* having employment policies, rules, and handbooks.

*William Beaumont Hospital*, 363 NLRB at 14.

*Lutheran Heritage* also invalidates neutral work rules solely because they are ambiguous. As Miscimarra states: "One can hardly suggest that it benefits employees to deny them general guidance regarding what is required of them and what standards of conduct they can expect or demand from coworkers." *Id.* at 8. Such policies should not be discouraged merely because they do not carve out every possible overlap with the Act.

Third, Miscimarra held the *Lutheran Heritage* standard was too generic to be of practical use:

> *Lutheran Heritage* does not permit the Board to differentiate between and among different industries and work settings, nor does it permit the Board to take into consideration specific events that may warrant a conclusion that particular justifications outweigh a potential future impact on some type of NLRA-protected activity.

*Id.* at 9.

For example, in *Hills and Dales General Hospital*, 360 NLRB No. 70 (2014), the Board found a policy adopted by a hospital which required employees to "represent the [hospital] in the community in a positive and professional manner" was unlawfully overbroad and ambiguous. Member Johnson disagreed, and found that in the hospital context, there was no meaningful distinction between the phrase "positive and professional" and a similar phrase - "positive and ethical." The latter had been found lawful by the Board in *Tradesmen International*, 338 NLRB 460,461-462 (2002). Member Johnson wrote that "the term 'professional conduct' refers to conduct appropriate to the standards of a profession. Here, in a hospital setting, the term 'professional conduct' was used appropriately." *Hills and Dales General Hospital*, 360 NLRB at 2, n.6. The *Hills and Dales* majority also rejected the hospital's argument that the rules at issue were not ambiguous because employees covered by the Act had been involved in drafting them as part of an effort to improve employee morale and satisfaction and prevent the loss of patients to other hospitals. Rather, the majority opined that the prior involvement of some employees in

drafting the rules would not determine how other employees would reasonably construe the rules, even if they were "fully informed of the rules origins." A more comprehensive analysis, such as the one set forth in the *Verizon Wireless* dissent, could allow these factual issues to be further explored and appropriately considered.

### E. Conclusion

The new administration and a new Board majority may result in the reversal of several major decisions concerning the use of technology in the workplace. The result in some cases may be return to a familiar standard and in others a new but more precise standard that reflects greater emphasis on an employer's legitimate business justifications for restricting the use of technology when it presents a safety, security, or productivity risk to the business, employees or customers. As it was with *Register Guard* and *Purple Communications*, any change may not be swift, however, more – and perhaps clearer – guidance is on the horizon.