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A New Year's resolution for in-house, employer counsel

As we ring in the New Year, many of us will clean out our offices and our homes, attempting to begin 2015 with a fresh start and a blank slate. Out with the old and in with the new, as the saying goes.

The same is true for in-house and employer counsel and others charged with monitoring rules and regulations and updating employee handbooks and policies. A new policy for a New Year should be the motto! Specifically, employers should take a close look at their existing employee handbooks and consider a few changes to their Internet, email, privacy and confidentiality policies to comply with new and recent National Labor Relations Board precedent.

By MARY E. "MOLLY" SHEPARD
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Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, provides that employees have the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." Communication between employees at work about the terms and conditions of the workplace has been regarded as the most important "concerted activity" protected by Section 7, see e.g. *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978) ("We have long accepted the Board's view that the right of employees to self-organize and bargain collectively established [by Section 7] necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite.").

The proliferation of online communication in various platforms has given new meaning to the types of employee communications that are protected by Section 7. And, just as modern technology has given employees a new platform for communications protected by Section 7; it has placed a new burden on employers to protect their businesses in the "viral" age.

In recent years, the NLRB has issued various decisions and other guidance broadly interpreting Section 7 to cover employees' discussions of the terms and conditions of their employment over the Internet, through social media and other electronic or online platforms, see Office of the General Counsel, NLRB, OM 12-59, Report of the Acting Gen. Counsel Concerning Soc. Media Cases, 2012 WL 10739277, at *3 (May 30, 2012). This trend has forced employers to review their internal policies and handbooks to ensure that any limitations on employees' communications comply with the NLRB's broad interpretation of Section 7.

For example, a blanket prohibition on employees posting "confidential employer information" on an Internet or social media platform is overbroad and would be a violation of Section 7, *Id*. at *2. Employers must now be cautious to carefully tailor any language in an employee manual or policy handbook to ensure that it does not encroach on their employees' right to freely discuss any issues related to the terms and conditions of their employment, *Id*.

Confidential information should be defined so that it excludes information related to the terms and conditions of employment (for example, salary or working hours), and so that it could not be interpreted by an employee to include such topics. The best approach, according to the NLRB, is to specifically identify what information should be kept confidential – for example, trade secrets or confidential client information – and to provide specific examples so that employees understand what confidential information is and that it does not include information that is presumptively protected by Section 7, *Id.* at *15.

The NLRB's recent decision in *Purple Commc'ns, Inc. & Commc'ns Workers of Am., AFL-CIO*, 361 NLRB No. 126, 2014 WL 6989135 (Dec. 11, 2014), gives employers yet another reason to review their employee manuals and policies relating to communications over the Internet, particularly company email usage. *Purple Communications* reversed the 2007 split decision of the NLRB in *Register Guard*, which had held that an employer could prohibit use of company email for Section 7 purposes.

In *Register Guard*, a divided board found that, absent discrimination, the maintenance of a blanket prohibition of the use of an employer's email system for any non-business purpose, includ-

Continued ...

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Continued ...

ing Section 7 communications, was permissible under the National Labor Relations Act, In Re the Guard Publ'g Co., 351 NLRB 1110 (2007).

In *Register Guard*, a newspaper maintained an email system to which some, but not all, employees had access. The company's policies regarding the system prohibited "solicit[ing] or proselytiz[ing] for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations," *Id*. at 1111. However, the company overlooked employees' use of the email system for non-work, personal purposes, such as sending party invitations.

With respect to the written policy, the NLRB held that employees did not have a statutory right to use their employer's email communication system for Section 7 purposes. Relying on precedent, which held that employees did not have a right to use an employer's property for Section 7 purposes, the NLRB determined that an email system was an employer's property which could be regulated by the employer in any way, as long as it did not amount to discrimination under Section 7.

The board determined that because the "use of email has not changed the pattern of industrial life" there was "no basis … to refrain from applying the settled principle that, absent discrimination, employees have no statutory right to use an employer's equipment or media for Section 7 communications," *Id*. at 1116.

Accordingly, following the NLRB's issuance of *Register Guard*, employers could lawfully limit their employees' use of their email communications systems to business communications. Moreover, an employer could specifically prohibit the use of its email system for Section 7 communications.

Last month, the NLRB, again in a 3-2 decision, found that the holding in *Register Guard* was "clearly incorrect" and that "[b]y focusing too much on employers' property rights and too little on the importance of email as a means of workplace communication, the board failed to adequately protect employees' rights under the act and abdicated its responsibility 'to adapt the act to the changing patterns of industrial life,'" *Purple Communications* 2014 WL 6989135, *1.

The *Purple Communications* Board specifically determined that an employee handbook policy which prohibited employees from using the company's email for any non-business purpose, and which specifically prohibited employees from using its email system to "[e]ngag[e] in activities on behalf of organizations or persons with no professional or business affiliation with the company … [or] [s]end … uninvited email of a personal nature" violated Section 7.

The NLRB focused on the ubiquitous nature of email communications that, in its opinion, has effectively made it the "water cooler" of the modern workplace – a "pervasively used [modem] of employee-to-employee communications," *Id*. at *8. It distinguished its prior precedent relating to the use of an employer's property, and criticized the *Register Guard* majority's reliance on the property rights analogy to determine whether restrictions on email use were permissible under Section 7.

For example, where an employer may have a legitimate interest in prohibiting an employee from using its copy machine or its telephone system to solicit employees, because the particular device may then be blocked for other users who are performing work, email systems allow multiple users to send and receive email at the same time and do not, generally, involve significant costs, *Id*. at *8-9.

The board also pointed to the modern, remote workplace where employees may not be able to readily have employee-to-employee discussions without the use of an employer's email system, to support its determination that an employer's policies must not impede its employees' Section 7 protected communications over email.

The NLRB limited its decision to those employees who already have access to their employer's email system, without requiring that an employer provide access to email. Further, should an employer show "special circumstances" for a total ban on email access for non-work-related purposes, the ban may be permissible under the NLRA.

However, it remains to be seen what "special circumstances" would warrant a reprieve from the rule. The majority stated that "it is the 'nature of the employer's business that determines whether 'special circumstances' justify a ban on such communication," *Id*. at *13. Nevertheless, it qualified this limitation by reminding employers that "[b]ecause limitations on employee communication should be no more restrictive than necessary to protect the employer's interests, we anticipate that it will be the rare case where special circumstances justify a total ban on non-work email use by employees," *Id*. at *14.

In sum, should you have the occasion as the year begins to wade through your clients' employee policies, it is prudent to review any policy that relates to employee communications, whether a confidentiality policy, social media policy or policies related to employee use of computers or email communications systems. The NLRB is clearly taking a closer look at what constitutes a permissible restriction on employee communications, and therefore, employers should be aware of what their policies are and update them as necessary.

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