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# NLRB Takes Exceptional Steps to Encourage & Support Union Organizing

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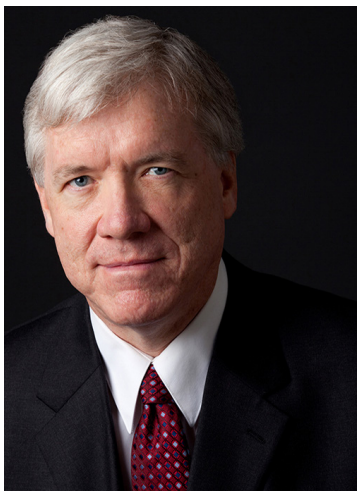

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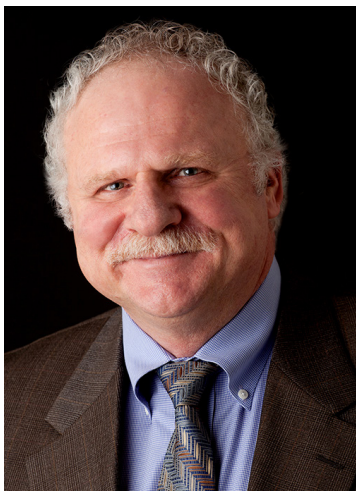

In the waning days of 2014 the National Labor Relations Board took exceptional steps to ensure that 2015 will be a vibrant year for unions and union organizing. In a sweeping NLRB decision related to company email systems and employee union organizing access, *and* newly issued regulations that stand decades of NLRB representation election procedures on their head with new "quickie" union election protocols, the NLRB has opened the door to massive union organizing in 2015 and beyond. These are extraordinary steps by the Board for all employers. These NLRB developments control for private hospitals and health care systems. For public hospitals and systems, the NLRB case regarding employee e-mail use will likely guide the Public Employment Relations Commission when PERC next addresses the permissible scope of public employer e-mail policies and practices.

Labor will undoubtedly be mobilizing in 2015 to move ahead with major union organizing initiatives. Now is the time to prepare with revised policies and training programs to help you reduce risk to your organization.

**Introduction.** Two extraordinary actions were taken by the NLRB last week to undercut employer rights and strengthen union rights for organizing. First, the NLRB overruled prior case law and held that employees have a presumptive right to use employer e-mail systems for protected concerted activity during non-work time, including union organizing. Next, the agency issued final rules—the so-called "quickie election" rules—that will greatly shorten the time frame within which an employer can respond to a union organizing drive after the union files a petition for a representation election. These developments require management to immediately review their e-mail policies and to assess their preventive union avoidance measures. Management training needs to go hand-in-hand with new policies.

**Employees' Right to Use Company E-Mail**

In *Purple Communications*, a divided NLRB overturned its 2007 decision in *Register-Guard* and ruled that employers must allow employees on non-work time to use the employer's e-mail system for protected concerted activity, including union organizing. The

Board rejected claims that the employer's property interest in its e-mail systems outweighed the right of employees to communicate via company e-mail. The modern workplace, according to the Board, relies upon e-mail as the most efficient means of workplace communications, and to deprive employees of the ability to use company e-mail to communicate with co-workers on union matters and matters of common concern (*i.e.*, "concerted" activity") unnecessarily deprives employees of their statutory rights to communicate effectively. The Board stated that employers may still choose not to allow employees access to its e-mail systems, but employers who allow employee access to e-mail for business purposes will need to prove "special circumstances" to justify a ban on employee use of e-mail for union or related purposes. This right of access applies only to employees; unions and other third parties do not have a similar right to use an employer's e-mail system. In two vigorous dissenting opinions, Board members Miscimarra and Johnson argued that employees did not need to use company e-mails for co-worker communications because they could avail themselves of reasonable alternate means of communications, such as social media, private e-mail, websites and in-person communications. The majority rejected these arguments, stating that employees had a presumptive right to use company e-mail without regard to other communication platforms. The majority also dismissed concerns that employers who monitor e-mail usage may be susceptible to charges of unlawful surveillance, and to concerns that its new rule is ambiguous and lacks clarity for employers, employees and unions.

Employers should review their e-mail and electronic communications policies to ensure compliance with this new ruling. This includes access understandings, as well as restriction safeguards where it is appropriate under the new case. Unions will seek to have employees use your systems to disseminate union communications to union and non-union co-workers. They will also use poorly written employer policies and practices to file unfair labor practice charges and overturn any unfavorable union election results. Finally, public employers should be aware that PERC may be guided by Purple Communications when it next addresses the issue in a future unfair labor practice case. Though it may not be necessary for public hospitals to revise their e-mail policies and practices to conform to the NLRB decision right now, they should be prepared for the day that PERC agrees with the NLRB and makes *Purple Communications* the law for public employers as well.

**Quickie Election Rules: Taking Effect in Mid-April**

One day after the NLRB issued its e-mail decision, the agency issued its long-awaited final rules that change dramatically the processing of union election petitions. In particular, the rule: (1) postpones most litigation over union eligibility issues until after a representation election (requiring employers to identify any issues or concerns within a shortened timeframe); (2) shortens the time between the filing of the election petition request and the election itself (cutting short the time an employer has to conduct a campaign); and (3) requires employers to furnish to union organizers all available personal e-mail addresses and phone numbers of employees who are eligible to vote in a union election. The Board will also expressly allow unions to submit electronic signatures of employees in order to sustain a showing of interest for the purpose of moving to an election. These are extremely powerful changes to the NLRB election process and dramatically undermine the rights of employers. They are very similar to the rules that were issued three years ago but which were thrown out by courts because they were issued without a Board quorum. Employers will have very little time after a petition is filed to campaign effectively against unionization; it is expected that these new rules may cut the time to hold an election from roughly 42 days after a petition is filed, to as little as 14 days. This provides almost no time for an employer to provide adequate information about employee rights in a union organizing situation once a NLRB representation petition is filed. Consequently, employers should consider taking preventive measures now, such as employee opinion surveys, supervisory training and union avoidance audits, to reduce the chances that employees will look to unions for assistance with workplace issues in the first place. It may be too late to respond to union organizing after the petition is filed.

The new election rules go into effect April 14, 2015. It is expected that unions may hold off on filing new election petitions until the new, union-friendly, rules go into effect. But expect underground campaigns to ramp up well before

that. Employers should take this opportunity to review their policies and practices, and to consider other preventive measures. Training is essential for your managers and supervisors to protect your employer rights. Public sector employers will not feel the impact of these new rules. There is no indication at present that the Washington legislature or PERC intends to modify state law and rules regarding public sector union elections.

*Matt Lynch is a shareholder with SEBRIS BUSTO JAMES. Matt represents private and public sector employers in all aspects of labor relations, and has negotiated hundreds of collective bargaining agreements, represented management in grievances and labor arbitrations, and handled many cases in front of the National Labor Relations Board. In addition, Matt is a trusted adviser who assists employers in both day-to-day and strategic employee relations issues, including discipline and discharge, employee leaves, employment agreements, policy development, handbooks, wage and hour and discrimination. Before joining the firm, Matt was the Director of Labor Relations Services and General Counsel for the largest employer association in the Pacific Northwest, having been with that association for over 24 years. He also served as a management trustee on a Taft-Hartley insurance trust. Matt has extensive experience in assisting employers in the healthcare, print and broadcast media, education and non-profit sectors. He can be reached at mlynch@sebrisbusto.com.*

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