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NLRB Restores Employers' Right to Restrict Employees' Personal Use of Company Email and Other IT Resources

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In Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino, Case 28-CA-060841 (December 16, 2019), the National Labor Relations Board (NLRB) ruled that employees do not have a statutory right under the National Labor Relations Act (NLRA) to use their employer's email system or other information technology (IT) resources for NLRA Section 7 purposes, such as union organizing. In so holding, the NLRB overruled its controversial 2014 decision in Purple Communications, which held that employees who have been given access to their employer's email system have a right to use that system during nonworking time for purposes protected by Section 7 of the NLRA, and therefore, that a policy prohibiting all non-work-related use of company email was unlawfully overbroad.

Background and Holding

Rio All-Suites is a Las Vegas hotel and casino operated by Caesars Entertainment. The company's employee handbook contained a policy on computer resources that prohibited employees from using Rio All-Suites' computer resources, including email, to "[s]end chain letters or other forms of non-business information." After an NLRB unfair labor practice charge was filed alleging that this policy was unlawfully overbroad, an NLRB administrative law judge applied *Purple Communications* and ruled that the prohibition on sending nonbusiness information violated the Act by interfering with employees' right to send emails for Section 7 purposes during nonworking time.

On August 1, 2018, the Board issued a Notice and Invitation to File Briefs, inviting the parties to the case and interested amici to submit briefs on whether the Board should adhere to, modify, or overrule *Purple Communications* and what standard should apply to employee use of computer resources going forward. The parties and over 30 interested amici filed briefs on the issue.

After considering the arguments of the parties, the Board overruled *Purple Communications* and held that there is no statutory right in the typical workplace for employees to use employer-provided email for Section 7 purposes. The Board acknowledged that an employer has a property right to control the use of its communication systems, including its company email. The Board further noted that employees in a typical workplace have adequate avenues of communicating with each other for Section 7 purposes, including face-to-face communication, smartphones, personal email accounts, and social media. The Board thus concluded that "there is no basis for concluding that a prohibition on the use of an employer's email system for nonwork purposes in the typical workplace creates

an '*unreasonable* impediment to the exercise of the right to self-organization.'" Accordingly, the Board held that Rio All-Suites' policy was lawful under the NLRA.

The Board's decision acknowledged that there may be rare cases in which an employer's email system represents the only reasonable means for employees to communicate with each other. In such instances, an employer may be required to permit some personal use of company email to ensure that employees have adequate avenues of communication for Section 7 purposes. Such instances will be handled by the Board on a case-by-case basis in the future.

Key Takeaways for Employers

The key takeaway from *Caesars* is that employers may now publish policies that prohibit employees from engaging in any non-work-related use of company email or other IT resources, except in the rare instance where use of employer-provided IT resources is the only reasonable means for employees to communicate with one another on nonworking time during the workday. Policies that are not "facially neutral"—in other words, policies that expressly restrict Section 7 activity via company IT resources but do not restrict other non-work-related use of IT resources—are still likely to draw Board scrutiny.

Employers that adopt facially neutral restrictions on non-work-related use of IT resources will need to keep in mind that it is unlawful to discriminatorily apply such policies. For example, a company would likely violate the NLRA by disciplining an employee who uses his or her work email to solicit support for a union while permitting the employee's coworkers to use their work email accounts to engage in similar solicitation for other outside organizations. Because there was no allegation that Caesars discriminatorily applied its computer resources policy, the Board did not address what, if any, impact its September 2019 decision in *Kroger Limited Partnership I Mid-Atlantic* would have on future cases alleging discriminatory enforcement of a neutral computer resources policy. That open issue will presumably have to be settled by future litigation before the Board.

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