"MICROWAVE" UNION ELECTIONS IN "MICRO" UNITS OF EMPLOYEES WHO ARE AT LIBERTY TO USE YOUR EMAIL SYSTEM

THE NEW CHALLENGES TO YOUR ORGANIZATION'S UNION-FREE STATUS

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As we approach the end of the first month of 2015, and with President Obama's State of the Union speech behind us and the final two years of his Administration in front of us, news reports describe the President's desire to "go on the offensive." The President promises to work more aggressively to establish a "legacy" of "accomplishments" that will, as he promised at the beginning of his time in office, "transform America." Given the current Republican majorities in the Senate and House of Representatives, it is clear that the President and members of his administration have concluded that efforts in this regard will necessarily involve Executive Orders and administrative regulations and rulings, rather than the normal deliberative, legislative processes. Certainly, President Obama's appointees on the National Labor Relations Board have heard their marching orders to bring about "transformational change" loud and clear. In keeping with the spirit of a President who has so unabashedly, repeatedly and quite literally declared, "I am a pro-union guy!", the Obama Board's majority members, comprised of former union activists and lawyers, have elevated to even higher levels the pro-union agenda that has already hallmarked the agency for the last six years.

Typical of past year-end "dumps" of precedent - reversing cases and administrative actions for which it has become so well known, the Obama Board ended calendar year 2014 with a "witch's brew" of procedural changes and decisions in which seemingly disparate actions will actually work together in a calculated way. They all are aimed at providing labor unions with advantages in their efforts to organize workers as well as a position of dominance in their dealings with employers whose employees already are or may become unionized. An analysis of two of the major developments and the way in which they "fit" with other actions of the Obama Board follows.

New Union Representation Election Procedures – "Microwave" Elections In "Micro" Units

One of the Obama Board's long-sought transformational changes has been the alteration of procedures used in representation elections the agency conducts in connection with union efforts to organize employees. Efforts to achieve this change began in 2011 with a new regulatory scheme that would have reduced the "pre-election" campaign period and resulted in what has been variously called a "quickie" or "ambush" or, my favorite, a "microwave" election. But before that set of new procedures could be implemented, the Board's administrative action was struck down by a federal court. The court found that the new procedures were adopted by Obama appointees in a meeting at which there was not the necessary quorum of Board members. This past December, however, the Board issued a similar set of procedural changes in a "Final Rule" that will take effect on April 14, 2015, unless that implementation date is delayed through an injunction issued as a result of the

lawsuits various employer associations filed earlier this month challenging their constitutionality.

Below are the key features of the new procedures. As will be observed, the procedures have two objectives: first, speeding up the election process; and, second, providing union organizers with more ways to access employee voters at an earlier stage in the election process:

- NLRB-required communications between its Regional Office and the parties and between the parties themselves will occur electronically;

- Along with the union's election petition, a new Board-produced poster apprising employees of their right to unionize will be sent electronically to the Employer immediately upon the filing of the Petition, with the poster to be posted promptly upon receipt;

- Any pre-election hearing will be scheduled to occur no later than eight (8) days following the date the petition is filed;

- A "Statement of Position" must be filed by the employer no later than the day before the hearing. The employer must identify <u>all</u> issues it wishes to raise regarding the petition (e.g. timeliness of the petition; scope of the identified voting group; supervisory status or other issues that could determine the eligibility of individuals to vote; etc.) or else the issues will be waived from further discussion. Worse, the employer must produce along with its "Statement of Position" a list of the names, job classifications, work shifts, and work locations of all employees it believes are prospective voters. The Board will share this list with the union upon receipt;

- The issues identified in the employer's "Statement of Position" and subsequently articulated at the hearing may be deferred by the Board for consideration until <u>after</u> the election and only then if the issues concern matters that would affect the result the election has produced;

- If the Board finds it appropriate to hold an election, the employer must produce a voter list to be shared with the union that must contain not just employee names and mailing addresses as have been required in the past, but now employee telephone numbers and email addresses as well;

- Under the new procedures, it is expected that an election will be conducted by the Board no later than twenty-four (24) days from the date the petition is filed, but with the possibility that it could be conducted in just over two (2) weeks from the date the petition is filed.

From a practical point of view, the net effect of all this is that the typical election cycle – i.e. from the date the petition is filed to the date ballots are cast – is essentially cut in half. Why the effort to "hurry up" the process? Because while academic studies of the voting dynamics in NLRB elections are few and far between, those which do exist – along with common sense – reveal that the union win rate increases as the time between the filing of the petition and the holding of the election decreases. Simply put, in shorter election cycles, employers have less time to convey their message to employees before they vote, a message that can expose the exaggerations and falsehoods typically utilized by union organizers to "sell" impressionable voters on the union. It is this very limitation on an employer's exercise of its right of free speech, along with the denial of due process resulting from the expedited procedures that are central arguments in the two separate federal court lawsuits that have to date been filed challenging the Board's new procedures, one suit having been filed in Washington D.C., the other in Texas. Both suits seek to block the implementation of the new rules prior to their scheduled April 14 implementation date. Since it will be impossible for either suit to be fully litigated by April 14th, the big question is whether either or both will result in an injunction forestalling the implementation of the procedures. We will keep you posted.

If the new procedures do become effective, the "microwave"-like reduction of the time between a union filing an election petition and the holding of the election could be particularly devastating to a targeted employer when the union is aiming its organizing efforts at a "micro-unit." It will be remembered that the Obama Board's 2011 decision in *Specialty Healthcare & Rehabilitation Center* changed decades of precedent regarding the analysis used to determine the makeup of "bargaining units", which at the election stage, means the "voting group" of the employees. The decision essentially makes it much easier for a union to carve out or "cherry pick" for organizing a smaller group - or a so-called "micro-unit" – from what would have historically been a much larger voting group. If an organizing union can show that employees within the targeted "micro-unit" share a "community of interest", the Board will conduct an election involving only that group, unless the employer can show that the employees in the small unit share an "overwhelming" set of interests with employees in a larger group. The practical effect of all of this is that a union can attempt to "cherry pick" out of the overall workforce a particular department or other narrowly defined group of employees in which it believes it has the best chance of garnering support. If successful in an election held in that small unit, the union can use the newly organized group as a stepping stone for expansion within the larger workforce. The possibility of "microwave" elections being held in "micro-units" results in major new challenges for union-free employers who wish to maintain that status. Here, in general terms, are steps an employer must take to attempt to deal with the new reality:

- The employer must be certain that all of the strategies it utilizes in maintaining its union-free workplace culture are functioning effectively;

- The employer's preference for remaining union-free must be widely publicized and known to all;

- Managers and supervisors must be attuned to the issues and circumstances which can give arise to employee unrest, as well as the behaviors which can signal that dissatisfaction is brewing;

- Managers and supervisors must be aware of the early warning signs of union organizational activity and the importance of promptly reporting what is observed so that appropriate action can be taken as soon as possible;

- The employer must keep abreast of union organizing activity in its industry and/or area.

- The employer must review its employee handbook and any other documents published to employees to ensure compliance with the latest Labor Board decisions regarding such matters as employee rules of conduct, employee use of social media, no solicitation/distribution rules, and now the use of employer email systems by employees. (Note: As will be explained below, the Labor Board has been very active in these areas in recent years. Unions can be expected to scrutinize employee handbooks and other publications to determine the existence of "landmines" that can be the unexpected basis of legal action against the employer.)

Employee Use Of Employer Email Systems For Union Organizing Purposes

Historically, employees who wish to engage in union organizational activities have been allowed to do so on an employer's property, but with the employer having the right to establish and uniformly enforce certain restrictions that apply not just to union organizational activity, but to any non-work related activity or purpose. For example, employees can be required to confine their discussions with other employees and their distribution of literature to their own non-working time, that is they can engage in these activities only during their breaks, meal periods, and immediately before and after their shift. Also, those employees who would engage in such activities, even if they are on <u>their</u> non-working time, can be required to conduct themselves in a way that does not interfere with other employees who are on their own working time.

In a 2007 decision known as *Register Guard,* the Labor Board, then dominated by Bush Administration appointees, found that an employer could require that employer-owned computers and other IT devices as well as the company's email and other electronic systems be used exclusively for work purposes. If uniformly enforced to prohibit use for <u>any</u> non-work purposes, such a restriction could be applied to prohibit use for union organizational purposes.

Union's had long argued prior to *Register Guard,* and did so afterward, that an employer's "cyber-space" was no different than the physical space represented by break rooms and other areas of the employer's "brick and mortar" facilities. According to the

theory advanced by labor unions, the same rules that an employer applies to employees who engage in union organizational activities in such physical spaces should also apply to the employer's "cyber-space."

Not surprisingly, in a case known as *Purple Communications, Inc.* issued this past December, the Obama Board overruled *Register Guard* and essentially adopted the union approach described above. The Board has held that if employees have "rightful access to their employer's email system in the course of the work", they have the right to use the system to engage in union organizing (and in other efforts involving "protected concerted activities") on their non-working time. Thus, an employee who is given access to the employer's email system in the course of his/her work is entitled to use the system during his/her non-working time to engage in communications with other employees regarding union organizational efforts and other matters protected by the National Labor Relations Act.*

The only exception to the new entitlement granted by the Board occurs when an employer can show the existence of "special circumstances" which warrant restricting the employees' right to use the email system. However, as to those restrictions, even the Board majority acknowledged that, "... (W)e anticipate it will be the rare case where special circumstances justify a total ban on non-work email use by employees."

The Board was also careful to point out that its decision only addressed an employer's email system. Many observers believe however that it will not be long before other employer-supplied systems are addressed by the Board in a similar fashion. Even the Board added in a footnote what can only be regarded as a warning:

> Other interactive electronic communications, like instant messaging or texting, may ultimately be subject to a similar analysis, although we do not decide that. We also do not address what rights employees may have to communicate via their employer's social media accounts, an issue that was not raised in this case and regarding which no evidence was presented. Thus, (the dissents') prediction that today's decision will inevitably apply to all workplace communication technology is, at a minimum, premature. Today's decision is based on the nature and use of workplace email and on the facts and arguments presented to us. If presented with cases regarding other kinds of communication systems, we would decide those cases based on their own facts.

Apart from the uncertainty that naturally flows from the Board's acknowledgment that the full extent of employee rights in the use of employer information technology systems may not have yet been reached, the *Purple Communications, Inc.* case itself leaves many questions unanswered regarding email use. For one thing, the case does not even make it clear that

employees have to be allowed to use employer-supplied computers and other devices to send and read email relating to union organizing and other now-protected purposes. The prevailing assumption is that these devices are all part of the email "system" and, therefore, employee use of them is implicit. Another of the many questions and issues left unanswered is whether an employer that is concerned about employees "working" before and after shift hours or through their meal periods and thereby accumulating unpaid "off the clock" hours or possibly even overtime, and who, therefore, who does not permit employees to be at their workstations during their "non-working time", can apply this policy in a circumstance where the employee is using his/her "non-working time" to communicate with other employees on the email system. Until the Board addresses the matter, we will not know for sure what position it would take. The betting, however, is that it would be a highly unusual case in which the Board would tolerate such a ban. A final example of the many questions the decision leaves unanswered is whether employees who are opposed to union organizational efforts have the right to use the email system on their "non-working time" to communicate their message. While the current Board majority would probably like to be able to deny an employee that right, the fact is that it would be completely contrary to the statute to do so.

Given the questions left unanswered by the Board's decision, the only thing that is certain at this point is that employers must review their employee handbooks and other publications to determine if policies therein limit employee use of email systems in the unacceptable manner the employer's rule in the *Purple Communications, Inc.* case did. That rule stated as follows:

> Computers, laptops, internet access, voicemail, electronic mail (email), Blackberry, cellular telephones and/or other company equipment is provided and maintained to facilitate company business. All information and messages stored, sent, and received on these systems are the sole and exclusive property of the company, regardless of the author or recipient. <u>All such equipment and access should be used for business purposes only.</u>
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> *Prohibited Activities*
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> Employees are strictly prohibited from using the computer, internet, voicemail and email systems and other company equipment in connection with any of the following activities:
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> - Engaging in activities on behalf of organizations or persons with no professional or business affiliation with the capital Company;
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> - Sending uninvited email of a personal nature.

Do those words or something like them look familiar? Unless such "overly broad" policies are rewritten, they will exist as legal "landmines" which a union can use in one of two ways: first, by filing unfair labor practice charges at the outset of an organizing campaign alleging that the policy in question is illegal on its face and its mere existence - even if it is never enforced against an employee - violates employee rights because it "chills" employees in the exercise of those rights; or, second, by waiting until after the election to "use" the rule as a basis for an unfair labor practice charge or an objection aimed at overturning the election should the union end up losing it.

The Obama Board has been active in finding any number of "typical" rules and policies found in employee handbooks to be violative of employee rights. These include rules and policies addressing topics such as: confidentiality; employment at-will; social media; employee decorum and interactions with customers and fellow employees. While an in depth discussion of Board decisions on these and other topics is beyond the scope of this article, suffice it to say that the Board has created a kind of complex "word game" which employers must master in phrasing their rules and policies. Trying to master the "word game" and complying with the Board's decisions can be a complex and maddening exercise at best, and a virtually impossible one at worst. Indeed, one is compelled to wonder if the Board has not purposefully calculated its decisions to make it impossible to comply with them in their totality. Nevertheless, every employer should use the *Purple Communications, Inc.* decision and the new ruling it contains regarding employee use of company email systems as a reminder that a wholesale examination of its rules and policies set forth in an employee handbook and in other documents is now more important than ever.

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* This article was written with an eye toward the impact of the *Purple Communications, Inc.* decision in a union organizing context. However, the decision does not apply only in such a setting. It applies to any exercise of rights protected by the National Labor Relations Act. As stated in the text, the Board's decision leaves many questions unanswered. But it is virtually certain that the decision can be applied to a unionized employer so as to require it to allow union stewards and employees who are given access to the email system in the course of their job duties to communicate with one another via that system during their non-working time regarding such matters as grievances, union meetings, updates on contract bargaining, etc. An exception to such application might exist if the collective bargaining agreement provides otherwise. However, the limits of email use in the unionized setting, just as the limits of that use in the union-free setting, remain to be fully defined, and the full impact of what the Board has wrought will only be known as future cases are decided.