

## Client Alert **Employment & Labor**

### ***NLRB Makes Holiday Gifts to Labor – Issues Final Ambush Election Rules, Expands Rights of Employees to Use Company E-Mail Systems and Takes Other Steps to Help Unions Organize***

In a series of pro-labor actions, the National Labor Relations Board (“NLRB” or the “Board”) has taken unprecedented steps this month to help unions organize non-union workplaces and to expand worker rights even in the absence of unions.

#### **Expanded E-Mail Rights**

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The Board’s first holiday gift to organized labor, and to employees in general, was its significant expansion of the rights of employees to use company e-mail systems for non-business purposes during non-working time. In *Purple Communications, Inc.*, the NLRB, in a 3-2 decision, adopted a presumption that employees to whom an employer has given access to the employer’s e-mail system have the right to use that system, during non-working time, to discuss terms and conditions of employment. In 2007, the NLRB had held, in its *Register Guard* decision, that employees did not have a right under the National Labor Relations Act (“NLRA” or the “Act”) to utilize an employer’s e-mail system for union organizing. Reversing *Register Guard*, the Board in *Purple Communications* asserted that the *Register Guard* majority had “failed to perceive the importance of e-mail as a means by which employees engage in protected communications.”

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An employer can rebut the presumption that employees may use its e-mail system to discuss terms and conditions of employment only by demonstrating special circumstances (that the Board observed would be rare) that require a ban on non-work use of e-mail in order to maintain productivity or discipline. Further, the right to use the employer's e-mail for protected concerted activity does not extend to employees without e-mail access or to nonemployees.

### **NLRB Targets McDonald's and McDonald's Franchisees as "Joint Employers"**

The Board further demonstrated its pro-labor stance on December 19, 2014, when its General Counsel's office issued 13 NLRB Complaints involving 78 Board Charges in 13 NLRB regional offices around the nation, including Manhattan, Philadelphia, Detroit, and Chicago, against both McDonald's USA LLC and franchisees of McDonald's. The NLRB's Complaints contended that these purported "joint employers" violated worker rights in connection with nationwide labor protests in the fast food industry. The NLRB claimed that McDonald's asserts "sufficient control" over franchisee operations to make it a "joint employer" of franchisee workers and to share liability for violations of the NLRA. By thus endorsing organized labor's efforts to hold franchisors in the fast food industry liable for franchisees' alleged unlawful conduct, the Board is helping unions in their efforts to organize McDonald's and other fast food restaurants around the nation.

### **NLRB's Final Ambush Election Rule**

On December 12, 2014, the Board issued its final rule on union elections (known as the "ambush" or "quickie" election rule). The new regulations, which will take effect on April 14, 2015, (a) dramatically shrink the time between a labor union's filing of a petition with the NLRB and the Board's holding a union election, and accordingly make it much harder for management to oppose the petitioning union's organizing campaign; (b) require employers to give petitioning unions more information about employees; (c) significantly limit the issues at a NLRB hearing and the appeals to the Board that management can take before the election, and will likely thus result in the Board holding elections despite disputes over voter eligibility and the status of supervisors; and (d) create other procedural hurdles for employers.

These "quickie rules" will result in shortening the time from petition to election from the current minimum of 42 to 45 days, to generally 21 or fewer days, and in some



cases, as few as 10 days. This draconian change, which dissenting Board Members Philip Miscimarra and Harry Johnson warned will create a “vote now, understand later” atmosphere, will significantly benefit union organizers.

### Employer Tips

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Because of the new “quickie election rules”, employers who wish to deter union organizing must take action in advance. It will often simply be too late to develop a positive employee relations campaign that will defeat a union in the three weeks or fewer that management will now have to campaign before a union election.

Some of the steps management can take are as follows:

- a. Review employee policies and handbooks to make sure that they are in compliance with NLRB requirements.
- b. Identify supervisory and management employees and make sure that their job titles and descriptions will pass muster under Board’s tests for supervisory and managerial status.
- c. Train supervisors and managers on the do’s and don’ts of combatting union organizing and how to communicate lawfully and productively with workers.
- d. Create a positive employee relations rapid response team that is ready to combat union organizing efforts.
- e. Prepare draft union-free campaign materials and a draft campaign timetable that management and the rapid response team can use when needed.
- f. Evaluate your company’s organizational structure and collect demographic data concerning employees to prepare management’s position on appropriate bargaining units and facilitate the company’s union free campaign.
- g. Foster an ongoing positive employee relations environment that promotes employee communications with management and surfaces issues of concern.
- h. Consult and coordinate with your seasoned labor counsel to make sure that you are taking these steps lawfully and effectively.



Management should also now review, with an experienced labor attorney, any handbooks, policies, or practices concerning e-mails to make sure that they comply with the Board's *Purple Communications* ruling.

Employers should expect more union-friendly decisions and other pro-labor actions by the Board that will significantly impact both union and non-union employers in 2015 and beyond. The Employment and Labor Law team at Sills Cummis & Gross P.C. stands ready to help management maintain positive employee relations in this dynamic and challenging environment. We can also assist employers in drafting language and revising e-mail policies that will pass NLRB examination under *Purple Communications*.

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