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Employer Update

NLRB Rules that Employees Have a Right to Use Employers' Email Systems for Union-Related Communications and Issues Final Rule Expediting Union Representation Elections

By Lawrence J. Baer and Linda Shen

In This Issue

Last month, the National Labor Relations Board (NLRB) ruled in a 3-2 decision that employees have a presumptive right to use their employers' email systems to discuss protected activities such as union organizing, reversing its long-standing precedent to the contrary. On the heels of this decision, an equally divided NLRB announced the issuance of its Final Rule, which significantly expedites the union election process and requires employers to postpone virtually all litigation over voter eligibility until after workers vote on whether to join the union. Business groups have already sued to block the Final Rule, and will likely litigate the email rule later this year. If upheld, these developments will make it substantially more difficult for employers to effectively resist union organizing efforts.

Use of Employer's Email for Protected Activities

On December 11, 2014, the NLRB ruled in *Purple Communications, Inc.* 361 N.L.R.B. No. 126, that employees have a presumptive right to use an employer's email system during non-working time for communications protected by the National Labor Relations Act (NLRA), such as discussion of wages, hours, conditions of employment, and union organizing. This decision overrules precedent in *Register Guard*, 351 N.L.R.B. 1110 (2007), which held that the NLRA did not give employees the right to use employer equipment or networks, including employer email addresses, to discuss union issues or other concerted activities protected by Section 7 of the NLRA.

In *Purple Communications*, a union sued the employer after it lost an election to represent employees of Purple Communications, a company that provides sign language interpretation services. The employer had a policy permitting use of company-owned electronic equipment and systems, including its email system, for "business purposes only," and that prohibited the use of its email system for "activities on behalf of organizations … with no professional or business affiliation with the Company." According to the employer, this restriction was aimed at reducing workplace distraction. However, the union argued that this restriction interfered with employees' Section 7 rights. In upholding the union's position, the NLRB noted that *Register Guard* undervalued employees' Section 7 rights and overemphasized employers' property rights. In addition, it concluded that *Register Guard* incorrectly analogized company email to company-related "equipment" such as

bulletin boards, an analogy that fails to recognize the (increasing) importance of email as a means by which employees engage in protected activities. Instead, the NLRB likened company email to a "gathering place" such as a cafeteria, and applied longstanding Supreme Court precedent guaranteeing the use of natural gathering places for Section 7 communications.

The NLRB ruled in *Purple Communications* that employees have a presumptive right to use an employer's email system during non-working time for communications protected by the National Labor Relations Act.

The NLRB did note certain limitations to this employee right. For instance, employers are not required to provide email access to employees. Instead, the presumptive right to use an employer's email attaches once the employer has granted email access. Moreover, an employer may justify a comprehensive prohibition of non-work-related emails by demonstrating that special circumstances make the ban necessary to maintain production or discipline (though the NLRB did not elaborate on what constitutes special circumstances). Without justification for a complete ban, an employer can still consistently enforce uniform controls over its email system to the extent such controls are necessary for maintaining production and discipline. In addition, the NLRB expressly declined to address email access by non-employees (such as outside union organizers) or other types of electronic communications systems, as they were not at issue in this case.[1]

Expedited Election Rules

On December 12, 2014, only one day after deciding *Purple Communications*, the NLRB voted to issue a Final Rule amending the procedures that govern the formation of collective bargaining relationships between employers and groups of employees. The Final Rule is scheduled to take effect on April 14, 2015.[2]

A typical election process commences when a union files a petition at an NLRB regional office, and concludes with a secret ballot election in which employees vote on whether they favor union representation. The Final Rule shortens the duration between the filing of the petition and the date of the election, in addition to imposing new requirements upon employers. Some key changes include the following:

- Pre-election hearings must be held within eight days after the notice of hearing is served. No deadline existed previously.
- Regional directors will have discretion to limit the scope of pre-election hearings by excluding evidence on voter eligibility and delaying the resolution of those issues until after the election, even if the eligibility of many voters in the bargaining unit is still in question.
- An employer must file its position statement detailing its position on all issues it plans to raise, such as issues regarding the composition of the proposed bargaining unit or the time and place of the election, by noon on the business day before the pre-election hearing. Arguments not raised in the position statement are waived, and the pre-election hearing officer will have discretion to ask the parties for evidence supporting their positions if any arguments in the position statement are disputed.
- As part of its position statement, the employer must now include a list of prospective voters, including their job classifications, work shifts, and work locations. Such a list was previously required only after the regional office had directed an election to be held.
- Within two business days (rather than seven calendar days, as previously required) after approval of an election agreement or the direction of an election, an employer must provide the union with a list of eligible voter names and addresses, in

addition to their telephone numbers and personal email addresses, the latter two of which were previously not required.

- Regional directors will have discretion over whether employers may file post-hearing briefs addressing issues raised at the pre-election hearing. Previously, employers could file post-hearing briefs as a matter of right.
- Regional directors will no longer be prohibited from scheduling the election less than 25 days after directing an election. Instead, the election should be held at the "earliest date practicable."
- NLRB review of post-election disputes will now be discretionary rather than compulsory.

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While the Final Rule does not specify a time frame in which union elections must occur, it would allow elections to be held in as little as 14 days after the employer is first notified of the election petition, compared to the 2013 median of 38 days, or 59 days in contested cases. On January 5, several business trade groups[3] filed suit against the NLRB, alleging that the Final Rule violates the NLRA by restricting an employer's ability to litigate issues such as voter eligibility, and violates the First Amendment by curtailing an employer's right to communicate with employees through substantially shortening the period between the election petition and the election itself.

Practical Pointers

Pending potential appeal of *Purple Communications*, employers should review their electronic communications policies to ensure compliance with the NLRB's new standards, or to at least understand the risks that current policies might pose. Employers may consider eliminating email system access entirely for jobs that do not require such access. Employers may also modify policies on email usage to include a narrow carve out for communications regarding wages, hours, conditions of employment, and union organizing. Employers can further remind employees that they have no expectation of privacy when using company email systems, even if they engage in activities protected under Section 7. In addition, employers may consider uniform and consistently enforced email restrictions, such as prohibitions on certain types of email attachments, if the employer can demonstrate that this is necessary to maintain production and discipline. For employers inclined to maintain existing email policies while awaiting appeal, it is important to remember that the mere maintenance of a policy that interferes with employee rights under the NRLA, even without enforcement, can be used to invalidate an employer's election victory.

There are also steps that employers can take to guard against the impact of the Final Rule before it takes effect in April. With significantly less time to communicate with employees after the filing of a petition, employers may consider educating employees about the facts of union representation and the collective bargaining process in advance of any organizing activity.[4] Employers additionally may wish to prepare in advance their positions as to appropriate bargaining units, in terms of both location and job classification, and any communications they would issue to employees on unionization. Finally, employers can take a number of preventative measures that reduce the threat of unionization and that heighten their understanding of workplace issues. For instance, employers may train management on the importance of positive employee relations and the potential impact of unionization, and conduct regular audits to keep apprised of workplace issues. Given the ease and speed with which unions may now organize, these precautionary measures have heightened urgency.

1. The NLRB did raise the possibility of extending *Purple Communications* to other types of electronic

communications systems, as it questioned the validity of precedents holding that employers may generally prohibit all non-work use of its equipment.

2. The NLRB had proposed a similar change in 2011, but the D.C. Circuit Court of Appeals struck it down, ruling that the board lacked a quorum to issue the rule. The NLRB re-proposed the rule last February, this time with a full quorum.
3. Plaintiffs include the U.S. Chamber of Commerce, the Coalition for a Democratic Workplace, the National Association of Manufacturers, the National Retail Federation, and the Society for Human Resource Management.
4. Employers should consider the risk that this may also incite organizing activity.

Dramatic Changes Result from the Multiemployer Pension Reform Act of 2014

By Steven M. Margolis and Madeline Lewis

On December 16, 2014, President Barack Obama signed into law the Consolidated and Further Continuing Appropriations Act of 2014, the so-called CRomnibus bill. Included within this bill is the Multiemployer Pension Reform Act of 2014 (MEPRA), a bipartisan bill introduced by Rep. George Miller (D-California) and Rep. John Kline (R-Minnesota). MEPRA includes many provisions regarding multiemployer pension plans – it permanently removes the sunset date that would have otherwise applied to the provisions pertaining to the funding "zone status" of plans and the automatic five-year extension of amortization period enacted in the Pension Protection Act of 2006 (PPA) – but the provision allowing trustees of seriously financially troubled multiemployer plans to reduce accrued benefits to enable such plans to avoid insolvency is the most noteworthy. Below are some of the more significant changes to multiemployer plans as a result of MEPRA.

Remediation for Plans in Critical and Declining Status

MEPRA allows troubled multiemployer plans satisfying certain conditions to apply for permission to suspend participant benefits in order to avoid insolvency. Specifically, to be eligible for this remediation, a multiemployer plan must be in "critical and declining status" – a new "zone" status established for deeply troubled multiemployer plans. Benefits may be suspended only if the trustees determine that all reasonable measures to avoid plan insolvency have and will be taken but the plan will continue to be projected to be insolvent absent the proposed benefit suspensions. A multiemployer plan will be in "critical and declining status" if it is in "critical status" (determined in accordance with PPA) and is projected to become insolvent:

- during the current plan year or any one of the next 14 years or

- during the current plan year or any of the next 19 years and either the plan's inactive to active participant ratio is more than 2 to 1 or the plan's funded percentage is less than 80 percent.

Subject to certain conditions, the plan sponsor of a plan in critical and declining status may, by an amendment to the plan, temporarily or permanently reduce the plan's payment obligations to plan participants and beneficiaries in and out of pay status and incur no liability for this suspension of benefits.

The conditions that allow a sponsor to suspend benefits for a critical and declining plan are:

- Insolvency Determination – The plan trustees determine, in writing, that the plan is projected to become insolvent unless benefits are suspended and despite the taking of all reasonable efforts to avoid insolvency.
- Actuarial Certification – The plan actuary certifies that the plan is projected to avoid insolvency indefinitely if the suspension of benefits occurs.
- Limitation on Suspension of Benefits – The suspension of benefits is also subject to a number of limitations. Benefits in the aggregate may not be reduced below the level necessary to avoid insolvency, no participant's benefits may be reduced below 110 percent of the benefit guaranteed by the Pension Benefit Guaranty Corporation (PBGC), no disability-based benefits or benefits for participants over age 80 may be suspended, and benefits for participants between ages 75 and 80 are limited.
- Retiree Representative – If the multiemployer plan has 10,000 or more participants, the plan's board of trustees must select a participant in pay status as a "retiree representative" to advocate for the retired and deferred vested participants throughout the suspension process (whose reasonable expenses are paid for by the plan).
- Notice Requirements – The plan trustees must apply to the Department of Treasury (Treasury) for approval. If Treasury fails to notify the plan sponsor within 225 days that the application does not fulfill the necessary requirements, the application is considered approved.
- Approval and Ratification – Plan sponsors must also provide notice of the proposed suspension to plan participants and beneficiaries, contributing employers plan, and employee representatives. Within 30 days of Treasury's approval of the suspension, Treasury will put the suspension of benefits to a ratification vote. If a majority of participants and beneficiaries reject the suspension, it generally cannot go into effect. However, the plan sponsor may subsequently submit a new application for suspension of benefits. Moreover, Treasury may permit the suspension notwithstanding a majority vote against suspension if it deems the plan "systematically important." Treasury will deem a plan systematically important if the (PBGC) projects the value of projected financial assistance payments to exceed $1 billion.

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The suspension of benefits will remain in effect until it expires based on its own terms or the plan sponsor provides certain benefit improvements, *i.e.*, resumption of suspended benefits, an increase in benefits, an increase in the rate at which benefits accrue, or an increase in the rate at which benefits become non-forfeitable under the plan. With some limitations, a plan sponsor may choose to provide benefit improvements during a suspension of benefits. Limitations include the requirement that, with exceptions, the benefit improvement may not increase plan liabilities for participants and beneficiaries who are not in pay status at the beginning on the plan year that the benefit improvement takes effect.

Repeal of PPA Sunset Provisions

The PPA provided that funding rules applicable to multiemployer plans considered in endangered or critical status would sunset at the end of 2014. MEPRA repeals this provision and consequently the PPA funding rules due to sunset remain in place indefinitely.

New Rules on Partition of Multiemployer Plans

MEPRA substantially revises the existing rules on the partition of multiemployer plans. Under Section 4233 of the Employee Retirement Income Security Act of 1974 (ERISA), the PBGC may sever the portion of a multiemployer plan benefit liability that is "directly attributable" to service with certain bankrupt employers if it determines that, among other things, doing so would significantly reduce the risk that the plan will become insolvent. These "partitioned" benefit obligations are combined in a new plan and the original multiemployer plan is no longer responsible for them. Prior to MEPRA, partition was only available to vested benefits attributable to a bankrupt employer. Under MEPRA, a multiemployer plan may seek PBGC approval for partition if it is in "critical and declining status" (as described above) and the plan sponsor has taken all reasonable measures to avoid insolvency, including suspending benefits to the maximum extent permissible, such that benefit suspension will allow the remaining portion of the original plan to remain solvent. The PBGC must certify to Congress that its ability to meet existing financial assistance obligations to other plans will not be impaired by such partition and that the cost arising from such partition is paid exclusively from the PBGC's fund for basic benefits guaranteed for multiemployer plans.

Once a multiemployer plan sponsor notifies the PBGC of its requests for a partition, the plan sponsor must notify the plan's participants and beneficiaries within 30 days of submitting the application. The PBGC must make a determination regarding the plan's application within 270 days of the application's submission and, within 14 days after the PBGC's partition order, the PBGC must provide notice to Congress.

If the PBGC approves the plan sponsor's partition request, the order must provide that the "old" partitioned plan transfer just enough of its liabilities to the "new" successor plan created by the partition to keep the "old" partitioned plan solvent. The plan sponsor will continue in effect for both the "old" partitioned and "new" successor plans. The "new" successor plan is responsible for paying only the level of PBGC-guaranteed benefits, but the "old" partitioned plan must pay a monthly benefit to its participants and beneficiaries for each month that the benefit is in pay status in the amount by which the benefit that would be paid under the plan terms exceeds the PBGC's guaranteed benefit amount for that person.

If an employer withdraws from the "old" partitioned plan within 10 years of the partition, withdrawal liability will be assessed with respect to both the "old" partitioned plan and the "new" successor plan. However, if a withdrawal takes place after the passage of 10 years, withdrawal liability is only assessed with respect to the "old" partitioned plan.

In addition, the "old" partitioned plan must pay PBGC premiums with respect to the participants whose benefits were transferred to the "new" successor plan for a period of 10 years after the partition.

Rules to Facilitate Multiemployer Plan Mergers

MEPRA has given the PBGC the authority to promote and facilitate the merger of multiemployer plans in the event that the plan sponsors request this assistance and the PBGC determines the merger is in the interest of the participants and beneficiaries of at least one of the affected plans and is not adverse to the overall interests of the participants and beneficiaries of the other plan. PBGC assistance may take the form of training, technical guidance, mediation, communication with stakeholders, and support with requests made to other government agencies. Assistance may also be financial if 1) it is necessary to allow at least one of the plans to forestall or avoid insolvency, 2) at least one of the plans is in "critical or declining status" as previously described,

3) the PBGC reasonably expects this action will reduce its long-term loss with respect to the plans and assistance is necessary for the merged plan to be solvent, 4) the PBGC certifies the assistance will not impair financial obligations to other plans, and 5) the assistance is paid exclusively from the PBGC's multiemployer benefit fund.

Early Election to Enter Critical Status

Under the PPA, an actuary must now certify to Treasury and the multiemployer plan sponsor whether or not the plan will be in "endangered status" for the plan year or "critical status" for that year and the succeeding five years. Under MEPRA, the plan sponsor of a multiemployer plan that is not presently in "critical status", but is projected to be in "critical status" during any one of the next five years, may elect for the plan to be considered in "critical status" for the current year (thus bypassing "endangered status" and allowing the plan sponsor to more quickly develop a rehabilitation plan).

Stricter Rules on Emergence from Critical Status

MEPRA revises the rules for determining whether a multiemployer plan can emerge from "critical status", making it more difficult for a plan to emerge from "critical status" (including a plan that elects to be in "critical status" as described above) so that such plan is not continually going in and out of "critical status" on a yearly basis. Prior to MEPRA, the actuary need only certify that the multiemployer plan was not projected to have an accumulated funding deficiency for the current plan year and the subsequent nine plan years. Now, the actuary must also certify that the multiemployer plan is not projected to become insolvent for any of the next 30 years and such plan is not in "critical status" as of the beginning of the plan year. Certification that the multiemployer plan is not in "critical status" at the beginning of the plan year is subject to an exception for some plans that have an automatic extension of amortization period. However, MEPRA also protects multiemployer plans that emerge from "critical status" from overly easy reentry into critical status. These plans now only reenter critical status if the plan is projected to have an accumulated funding deficiency for the plan year or any one of the succeeding nine plan years or the plan is projected to become insolvent for any of the subsequent 30 years.

Specifying Applicable Contribution Schedule When Collective Bargaining Agreement Expires

Upon the expiration of a collective bargaining agreement (CBA), which had been agreed to under a funding improvement or rehabilitation plan, if the parties to the expired CBA cannot agree on a new remedial contribution schedule, the contribution schedule under the previously expired CBA will be automatically implemented after 180 days from that CBA's expiration date.

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