

NLRB Asks Ninth Circuit To Uphold Purple Communications Decision

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On Dec. 19, the National Labor Relations Board (NLRB) asked the U.S. Court of Appeals for the Ninth Circuit to affirm its ruling in the controversial *Purple Communications* decision. *Purple Communications*, [you might remember](#), was a 2014 decision that overturned the *Register Guard* standard for employee use of company email for nonwork purposes. The standard under the 2007 *Register Guard* decision was that employees had no right under the National Labor Relations Act to use their company email for non-job-related solicitations. Such a rule was critical for employers facing union organizing drives. *Purple Communications* overturned that decision, holding that employee use of email for statutorily protected communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email systems. The presumption could be overcome by employers showing “special circumstances” that require them to limit workers’ nonwork email use. The NLRB’s support of the decision in front of the Ninth Circuit is curious given the recent [memo from new NLRB General Counsel Peter Robb](#), who identified *Purple Communications* as one of the decisions targeted for review during his tenure. In its opening brief in front of the Ninth Circuit, the NLRB said the decision is in line with U.S. Supreme Court precedent allowing workers to use their nonworking time as they please. The board further argued that the rule is needed in the modern workplace where email communication is commonplace, and that the rule is limited to those employers who have made email available to their employees in the first place. Not allowing employees to communicate with their fellow employees through email on nonwork time is an “unreasonable impediment to self-organization,” the NLRB said. The *Purple Communications* decision has had a long and winding road through the NLRB and the courts, and it looks as though it may not end soon. Regardless of the Ninth Circuit’s decision, we will watch for the new board to take up the issue in the future and put its own touch on employee use of company email for union activities.

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