

NLRB Chairman Signals Willingness To Reverse Register Guard Decision

March 24, 2014 | [National Labor Relations Board, Unions And Union Membership, Labor Relations](#)



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There has been much speculation that the NLRB's decision in [Register Guard, 351 NLRB 1110 \(2007\)](#), which involves employee use of employer email for union purposes, may be in jeopardy under the Obama Board. As we [previously covered](#), employee use of an employer's email system was highlighted by NLRB General Counsel Richard Griffin as an issue of "particular concern" to the NLRB. The concerns about the viability of *Register Guard* obviously are well-founded, as illustrated by the NLRB decision in [California Institute of Technology Jet Propulsion Laboratory, 360 NLRB No. 63 \(March 12, 2014\)](#), issued last week. The *Register Guard* decision generally held that employees do not have a Section 7 right to use their employers' computers and, in particular, email systems to engage in protected concerted or union activity, and if they do so without permission, they may be lawfully disciplined for doing so. The decision also went on to hold that it was permissible for employers to draw lines concerning email use on a non-Section 7 basis. In other words, employers could allow certain kinds of email communications and not union communications without being subject to a discrimination theory as it relates to the enforcement of a policy under the National Labor Relations Act. In *Jet Propulsion Laboratory*, the ALJ applied *Register Guard* but found employees' use of an employer's email system was protected, despite the employer's arguments that it violated the employer's non-discriminatory policies regarding email use, because there was substantial evidence that the employer had allowed employees to use its email system for numerous other purposes that also would have violated its policies. The NLRB affirmed the ALJ's finding under *Register Guard*. But in doing so, NLRB Chairman Mark Gaston Pearce expressed his disagreement with the standard applied in *Register Guard*. Nonetheless, he agreed with the ultimate outcome based upon the facts of the particular case in front of the Board. However, Chairman Pearce's position clearly demonstrates his willingness to reverse *Register Guard*. And given the right set of facts, he may be able to convince another NLRB panel that a change in the law is warranted. Additionally, the *Jet Propulsion Laboratory* case demonstrates that employers must be mindful to consistently enforce their policies, especially related to email usage, in order to be able to take advantage of the current rule allowing "line drawing" on non-Section 7 basis established in *Register Guard*. The *Jet Propulsion Laboratory* case can be found on the Board's website [here](#).

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