

NLRB: EMPLOYERS MAY REQUIRE CONFIDENTIALITY IN WORKPLACE INVESTIGATIONS

Insights
Dec 18, 2019

The National Labor Relations Board just ruled that employers may now require confidentiality from employees involved in open workplace investigations. Importantly, yesterday's decision in *Apogee Retail LLC* resolves conflicting commands from the Board and the Equal Employment Opportunity Commission regarding investigation confidentiality that has plagued employers for years.

CONFIDENTIALITY REVIVED

In 2015, the Obama-era NLRB in *Banner Estrella Medical Center* reversed well-settled precedent regarding confidentiality in workplace investigations. In that decision, the National Labor Relations Board (NLRB) required employers to determine, on a case-by-case basis, whether imposing confidentiality during any particular workplace investigation improperly infringed upon employees' statutory rights under the National Labor Relations Act (NLRA) to discuss terms and conditions of their employment.

Without the ability to require confidentiality, however, employers found they were unable to ensure the integrity of the investigation or protect the reporting employee and other participants from retaliation. In addition, employers were faced with a serious dilemma as the NLRB's guidance was incompatible with current recommendation from the EEOC that endorses blanket confidentiality rules requiring during workplace investigations. Therefore, employers were

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forced to decide which regulatory regime it would follow and face potential legal consequences of non-compliance.

But in yesterday's *Apogee Retail* decision, a majority of the NLRB found the previous Board had improperly strayed from its duty to balance employers' business justifications with the adverse effect of employee rights. The NLRB found employer rules regarding confidentiality in investigations must be analyzed under [the balancing test in its recent Boeing Co. decision](#) where workplace rules fall into one of three categories:

- Category 1 – rules that the Board will designate as lawful to maintain because, when reasonably interpreted, they do not prohibit or interfere with the exercise of employee rights or the potential adverse impact on protected rights is outweighed by associated justifications;
- Category 2 – rules that warrant specialized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights and, if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications; and
- Category 3 – rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by the justifications associated with the rule.

Using that framework, the Board found that investigative confidentiality rules, [which are limited to the duration of the investigation](#), fall into Category 1 lawful rules that do not require engaging in a case-by-case balancing of employer and employee interests. The Board noted the employer justifications for the rules significantly outweigh the slight effect on employee rights to discuss their own or their fellow employees' discipline.

The Board found the rules do not broadly prohibit employees from discussing discipline or incidents that could result in discipline. Instead, they rather narrowly require that participating employees not discuss *investigations* of incidents or *interviews* conducted during the course of investigations.

However, the rule in *Apogee Retail* is not limited on its face to open investigations. The NLRB noted most employer

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justifications requiring confidentiality during investigations apply while the investigation is ongoing. Therefore, the NLRB held that rules regarding investigation confidentiality not specifically limited to the duration of the investigation fall into Category 2, which requires a case-by-case balancing of employer and employee interests. The NLRB remanded the case for further proceedings for specialized scrutiny of the rule under the facts of the case.

WHAT THIS MEANS FOR EMPLOYERS

Employers should immediately review their handbooks and other employment policies regarding workplace investigations. The NLRB has made clear that employer policies regarding confidentiality during investigations will only be presumptively lawful during an open investigation. Moreover, employer policies may only require confidentiality from participants in the investigation and may not prohibit any employees from discussing the incidents upon which the investigation is based.

We will continue to monitor any developments on this decision and provide updates, so be sure you are subscribed to [Fisher Phillips' alert system](#) to gather the most up-to-date information. If you have questions or desire a review of your policies, please contact your Fisher Phillips attorney or any attorney in our [Labor Relations Practice Group](#).

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