Overruled: the NLRB Restores Employers' Rights

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In a whirlwind of activity at the end of 2019, the National Labor Relations Board followed through on its promise to reverse course on a number of precedents that either were established or significantly modified during the Obama administration. In the last weeks of 2019, the Board issued several employer-friendly decisions and Advice Memoranda aimed at addressing a broad spectrum of employment issues for both unionized and non-union workforces. The most immediately significant of these decisions include restoring employers' control over their email and IT systems and permitting employers to once again require confidentiality during the course of employment investigations. These two, as well as a few others, outlined in this article, will significantly impact employer practices and policies.

Employers May Require Confidentiality During Workplace Investigations

One of the more controversial and problematic precedents from the Obama-era Board was the 2015 decision in Banner Health, which required employers to determine on a case by case basis whether its interests in preserving the integrity of an investigation outweighed presumptive employee-rights under Section 7 of the National Labor Relations Act ("NLRA"), to discuss the terms and conditions of their employment. At its core, this decision prohibited employers from having a blanket rule of insisting on confidentiality during workplace investigations. Without such confidentiality, employers experienced an unintended chilling effect on employee-candor and participation in workplace investigations. Employers also expressed concerns with regard to maintaining the integrity of investigations, as they were not permitted to require confidentiality of witnesses and other participants.

In *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144 (December 17, 2019), the Board rejected the holding in *Banner Health*, which put employers in the untenable position of either complying with the NLRA, or protecting employees (i.e., the accuser, accused and witnesses), and safeguarding the integrity of open internal investigations. Instead, the Board used the analysis standard established in *The Boeing Company*, 365 NLRB No. 154 (2017), which weighs the nature and extent of the effect on employees' Section 7 rights, and the employer's legitimate justifications for the rule. Under this framework, the Board held that, while an employer's facially-neutral confidentiality rules impact employees' Section 7 rights, such impact is "comparatively slight" and were "outweighed by the substantial and important justifications associated with the [employer's] maintenance of the rules."

This change in policy moving forward is consistent with how internal investigations were being handled by several federal agencies, including the NLRB, Equal Employment Opportunity Commission, and the Occupational Safety and Health Administration. All of these agencies had blanket rules requiring confidentiality during their own active internal investigations to protect employee-privacy and maintain the integrity of those investigations. The Board noted, however, that an employer's investigative rules that do not expressly limit confidentiality to ongoing and open investigations could be subject to higher scrutiny and may require the employer to proffer additional legitimate business justifications. Therefore, while employers now may implement blanket confidentiality rules during investigations of alleged wrongdoing, such requirements should apply to ongoing investigations only. Once the investigation is over, non-supervisory employees

should be permitted to speak about their role in the investigation unless there remain significant reasons to continue to require confidentiality.

Employers May Restrict Use of Email and Other Information Tech Systems

In a 3-1 decision, the Board overturned a prior 2014 ruling in *Purple Communications*, which held that employer policies prohibiting employees from using the employers' email systems for non-work related purposes were presumptively invalid as they impinged upon employees' Section 7 rights.

In *Caesars Entertainment Corp d/b/a Rio All-Suites Hotel and Casino*, 368 NLRB No. 143 (December 16, 2019), the Board held that employees' Section 7 activities must yield to an employer's property rights in controlling the use of their equipment and that employees "do not have a statutory right to use employers' email and other information-technology (IT) resources to engage in non-work-related communications." Accordingly, employers may lawfully exercise their right to restrict the uses to which those email and other IT systems are intended. The Board noted the prevalence of smart phones, personal email and social media, and found restrictions on employer platforms is lawful providing the restrictions are not discriminatory, *i.e.,* apply only to concerted union activity.

The *Caesars* decision recognizes that, while the majority of workplaces will allow employees adequate access to communicate without using their employer's equipment, there will be rare circumstances where an employer's IT resources are the only reasonable means for employees to do so. When determining whether to implement policies restricting use of email and other systems, it is important to be mindful of the nature of the work environment, particularly where a substantial portion of the workforce is comprised of remote or virtual employees.

Employers May Limit Union Buttons and Other Insignia in the Workplace

Employees' protected right to wear union insignia *e.g*., buttons, pins, *etc*., stems from a 1945 decision in *Republic Aviation*, which recognized workers' right to wear union insignia, and presumed that an employer's restrictions were unlawful unless they could demonstrate "special circumstances" justifying the restriction. Special circumstances that would justify an employer's limitations on union and other insignia have been exceptionally narrow and are generally only permitted to stand where such items would (1) jeopardize employee safety; (2) damage machinery or products; (3) exacerbate employee dissension; or (4) unreasonably interfere with a public image that the employer has established, as part of its business plan, through appearance rules for its employees. *In-N-Out Burger, Inc.,* 365 NLRB No. 39 (2017).

In *Wal-Mart Stores, Inc.*, 368 NLRB No. 146 (Dec. 16, 2019), at issue was Wal-Mart's dress code policy that only permitted employees to wear "small, non-distracting logos or graphics" no larger than the size of the employee name badges. There, the Board returned to the balancing analysis established in its 2017 *Boeing* decision, and found Wal-Mart's facially-neutral policy was lawful for some employee groups, but not others. Specifically, the Board held that Wal-Mart's policy was lawful as it applied to employees who dealt directly with customers on the sales floor because the employer's interest in providing its customers a satisfying shopping experience, on balance, outweighed the employees' interest in having no restrictions on the size of the insignia they were permitted to wear. The policy was held unlawful, however, in "employee-only" areas because "the whole point" of wearing a large or distracting union button was precisely to "catch the attention of coworkers" for communications protected by Section 7 of the NLRA.

The takeaway from this decision is that employment policies should be narrowly tailored to limit insignia worn by frontline employees while they are working in the employer's sales areas or in view of customers or clients.

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Now that the NLRB has given employers back some of the rights they had previously, it is incumbent upon each employer to review carefully its policies and procedures to ensure they provide the level of control and flexibility desired by the

company's management. Now is a good time to review investigation procedures, to consider thoughtfully how your company wishes to handle investigations. This should include, but is not necessarily limited to, the level of confidentiality the company will expect from participants during internal investigations. As it is the start of a new year, now also is a good time to review “acceptable use” policies related to employees' use of company communication systems and property, including email or other IT systems. Employers also should review and update their dress code policies, which may include limitations on buttons or other insignia. Careful attention should be paid to whether any personal wearable paraphernalia can be seen by customers or clients. Some of these policies may have just recently been changed to reflect the restrictions imposed upon employers under the prior NLRB decisions, but a second review now would be wise.