

NLRB Continues Employer-Friendly Shift; Employers Can Prohibit Discussion of Workplace Investigations

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Authors: [W. Eric Baisden](#), [Adam Primm](#)

Adding to its [recent spate of employer-friendly moves](#), the National Labor Relations Board (the “Board”) issued a precedent-shifting decision on December 17, 2019. *Apogee Retail LLC*, 368 NLRB No. 144 (2019). The 3-1 decision, opposed only by outgoing Democrat Lauren McFerran, holds that employers may set and enforce rules requiring workers to maintain confidentiality and otherwise prohibit discussions regarding ongoing workplace investigations.

The Board applied a revised handbook test first laid out in its 2017 *Boeing Co.* decision, balancing business interests in maintaining workplace rules with the effects such a rule might have on workers’ labor organizing rights (see prior alert [here](#)). The *Boeing Co.* test stated that “when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights”, the Board must “strike the proper balance between” the company’s stated business justifications versus the potential invasion of employee rights protected by the National Labor Relations Act (“NLRA”). This test replaced an earlier 2004 rule under which the Board considered workplace rules illegal if workers would “reasonably construe” them to infringe on their organizing rights under the NLRA.

In its decision on Tuesday, the Board determined that rules prohibiting workers from discussing ongoing investigations have a “comparably slight” effect on organizing rights, which is outweighed by the interest in protecting workers’ privacy, encouraging the reporting of complaints, and enabling the effective investigation of such complaints. The Board noted that such confidentiality rules will encourage employees to come forward without fear of retaliation, while preventing witnesses from coordinating accounts of relevant events or otherwise undermining the integrity of an investigation.

However, *Apogee* does not protect broader rules applying these restrictions beyond active investigations. Those broader rules may still be illegal under the balancing test because the business interests, especially the ability to conduct effective investigations, are no longer present in the absence of an active investigation.

The *Apogee* decision continues to demonstrate an ongoing employer-friendly shift from the Board’s earlier precedent regarding such policies. In its 2015 *Banner Estrella Medical Center* decision, the Board—comprised of a majority including McFerran and fellow President Obama-appointee Kent Hirozawa—had applied the 2004 handbook test, and said that such policies generally infringe on workers’ organizing rights. The *Banner Estrella* decision predated the Board’s *Boeing* test. Thus, *Apogee*, applying the *Boeing* test, overruled *Banner Estrella*.

In light of *Apogee*, employers should consider reviewing their employment policies and handbooks to ensure that any provisions requiring confidentiality during investigations are narrowly tailored and do

not run afoul of the new rule. Employers may also consider adding such a rule regarding confidentiality during an active investigation to take advantage of this new standard.

For more information, contact a member of the firm's Labor & Employment Practice Group.

W. Eric Baisden at 216.363.4676 or ebaisden@beneschlaw.com; or

Adam Primm at 216.363.4451 or aprimm@beneschlaw.com.