

Employment Law Update: Confidentiality Rules During Workplace Investigations

05/12/22

In 2019, the National Labor Relations Board (“NLRB”) issued a decision holding that employer rules which require employee confidentiality during workplace investigations are categorically lawful. However, the current status of this holding is uncertain, according to the NLRB General Counsel’s [August 2021 Advice Memorandum](#), which sets forth areas of law that should be further scrutinized.

Confidentiality Rules During Open Investigations

In [Apogee Retail LLC d/b/a Unique Thrift Store](#), the NLRB overturned its prior approach to confidentiality rules, set forth by [Banner v. Estrella Medical Center](#), which required a case-by-case determination of whether an employer can require confidentiality during a workplace investigation. Instead, the NLRB held that the standard developed in *Boeing Co.* should be applied, wherein employer rules fall in one of three categories:

Category 1 includes rules that the Board designates as lawful to maintain either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of [National Labor Relations Act](#) (“NLRA”) rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule.

Category 2 includes rules that warrant individualized 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.

Category 3 includes 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 justifications associated with the rule. An example would be a rule that prohibits employees from discussing wages or benefits with each other.

The NLRB found that confidentiality rules limited to open investigations were lawful to maintain as a general matter under *Boeing Co.* Category 1(b). However, confidentiality rules that were not limited to open investigations fall into *Boeing Co.* Category 2, “requiring individualized scrutiny in each case as to whether any post-investigation adverse impact on the National Labor Relations Act protected conduct is outweighed by legitimate justifications.”

This decision benefitted employers who wanted to keep open investigations confidential. However, *Apogee* was decided by the NLRB appointed by President Trump. President Biden’s appointed General Counsel to the NLRB signaled in the August 2021 memorandum that recent doctrinal shifts, such as the shift in *Apogee*, will be reexamined to determine if a change is necessary to ensure employees can exercise their rights under the NLRA.

TAKEAWAY: The state of rules regarding confidentiality during workplace investigations is uncertain. Employers should exercise caution in using such rules to avoid running afoul with shifting interpretations of the NLRA. Employers with questions about the National Labor Relations Act can contact Tracy Armstrong or another member of the Wilentz [Employment Law](#) Team.

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