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NLRB Issues Employee Email Use and Workplace Investigation Decisions Friendly to Management

Continuing a year of management-friendly decisions, the National Labor Relations Board (“Board”) issued two more precedent-shifting opinions on December 17, 2019 with broad implications for all employers.

In *Caesars Entertainment Corp.*, the Board ruled that businesses can restrict workers from using company email accounts for non-business or personal reasons, including union and other organizing purposes, without violating the National Labor Relations Act (“Act”). This decision overturns a 2014 Board decision, *Purple Communications*, which held that workplace rules blocking workers from using company email systems for union activity are presumptively invalid.

The second decision the Board issued on December 17, *Apogee Retail LLC*, held that an employer’s confidentiality restrictions for information relating to workplace investigations are generally legal so long as they are limited to the period of active investigation. Applying the Board’s now familiar employee handbook standard from its 2017 *The Boeing Co.* decision, *Apogee Retail* overturns *Banner Health System*, a 2015 Board decision holding that such policies infringe workers’ rights.

In *Caesars*, the Board considered whether *Caesar Entertainment’s* broad policies prohibiting employees from using its email systems for personal use violated the Act. The policies in question did not single out union organizing; rather, the policies prohibited employees from sending “non-business information” via email or using email to solicit “for person gain or advancement of personal views.” In other words, the policies prohibit employees from using their work email accounts to solicit others to join a kickball league as much as it bars union organizing.

In a 3-1 decision, the Board ruled that the casino’s email-restricting policies did not violate federal labor law. In doing so, the Board recognized the right of employers to ban

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employees from using work email for personal purposes, including union organizing, so long as they do not target union-related communications and activity. Notably, the decision includes a carve-out for special circumstances in which use of company email is “the only reasonable means for employees to communicate with one another.”

Specifically as to union organizing, the majority stated: “[e]mployees have no statutory right to use employer equipment, including IT resources, for [NLRA] Section 7 purposes.” The Board went on to state: “employers have the right to control the use of their equipment, including their email and other IT systems, and they may lawfully exercise that right to restrict the uses to which those systems are put, provided that in doing so, they do not discriminate [against union-related communications].”

Hailed by the business community as a common sense protection of an employer’s property rights, *Caesars* effectively revokes the Obama-era board’s *Purple Communications* decision. In *Purple Communications*, the majority found that employees could generally use their employer’s email systems to organize and engage in other Section 7 protected activities.

The impact of *Caesars Entertainment Corp.* is undeniably broad and reaches most employer-employee relationships. Employers are well advised to revisit their employee handbooks to consider their email and IT policies in light of the Board’s decision in *Caesars*.

In *Apogee*, the Board considered a dispute over whether a pair of rules promulgated by thrift store operator Apogee Retail concerning investigative confidentiality violated workers’ rights to act collectively under the Act. The two rules at issue were:

- One rule requiring employees to “cooperate fully in investigations and answer any questions truthfully to the best of their ability,” which also required both reporting persons and interviewees “to maintain confidentiality.”
- A second rule listing behaviors that could result in disciplinary action, which included the “unauthorized discussion” of investigations or interviews “with other team members.”

Apogee Retail had never disciplined an employee for violating either of these rules, but it argued that the rules protected legitimate business reasons and were therefore necessary.

In another 3-1 vote with Member McFerran dissenting, the Board held that an employer’s confidentiality restrictions for information relating to workplace investigations are categorically lawful under the Board’s *Boeing* decision in 2017 where such rules explicitly apply for the duration of an investigation. The Board remanded the case to the NLRB’s Colorado regional office for proceedings consistent with the new standard.

The Board’s landmark 2017 *Boeing* decision overturned precedent from 2004 regarding the standard for weighing the legality of employee handbook policies. *Boeing* directed NLRB officials weighing policy changes to place rules into one of three categories along a spectrum.

Here, the Board reasoned that investigative confidentiality rules that have a “comparably slight” effect on workers’ federal labor rights while protecting workers’ privacy and aiding investigations. Importantly, the majority carefully explained that the new standard does not provide employers with *carte blanche* permission to promulgate investigative confidentiality rules. The majority stated that rules that are not

limited to active investigations, like *Apogee Retail's* two rules, may be illegal because “most justifications” apply to active investigations only.

Apogee Retail comes amidst pressure from the “#MeToo” movement and the related torrent of legislative activity around the country focused on proposing and enacting legislation regarding the enforceability of workplace non-disclosure provisions. The public and legislators are advancing such legislation to ensure victims of sexual harassment and sexual violence are not silenced from coming forward to report misconduct against them. It is key to note that the Board’s decision in *Apogee Retail* setting a new standard for investigative confidentiality is tied to active workplace investigations, and it is not meant to impose or support a regime of permanent non-disclosures.

Apogee Retail is a decision that employers should consider carefully as they revisit their employee handbooks and policies for 2020. The importance of confidentiality in work place investigations is undoubtedly important. Now, employers may rest easy knowing that facially-neutral investigative confidentiality rules during the pendency of active investigations are lawful under the Act.

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