

December 19, 2019

# National Labor Relations Board Reverses Prior Ruling That Limited Employers' Ability to Keep Workplace Investigations Confidential

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## NLRB Holds That Employers May Maintain Confidentiality of Ongoing Workplace Investigations or Interviews.

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### SUMMARY

On December 17, in *Apogee Retail LLC*,<sup>1</sup> the National Labor Relations Board (“NLRB” or the “Board”) overruled its 2015 decision in *Banner Estrella Medical Center* (“*Banner Estrella*”)<sup>2</sup> and held by a 3-1 margin that employer policies restricting or prohibiting employee communications about ongoing investigations are permitted by the National Labor Relations Act (“NLRA”). The ruling provides employers with greater certainty as to steps they may take to protect the confidentiality of ongoing investigations and the privacy of individuals involved. The Board also found that employers may justify such restrictions after the conclusion of an investigation on a case-by-case basis by establishing one or more “legitimate justifications for requiring confidentiality” that outweigh the effects of post-investigation confidentiality.

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### BACKGROUND

Section 7 of the NLRA provides that “[e]mployees shall have the right to . . . engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection.”<sup>3</sup> Section 8(a)(1) makes it an “unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed” by Section 7.<sup>4</sup>

In its 2015 decision in *Banner Estrella*, the Board held that “[e]mployees have a Section 7 right to discuss discipline or ongoing disciplinary investigations involving themselves or coworkers” and that “an employer may restrict those discussions only where the employer shows that it has a legitimate and substantial

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business justification that outweighs employees' Section 7 rights." The legality of these policies was to be decided on a case-by-case basis.<sup>5</sup> The *Banner Estrella* ruling was criticized by many as setting up imprecise standards and thus making it more difficult for employers effectively to investigate workplace misconduct.

Two years later, as discussed in our blog post [here](#), the Board held in *The Boeing Company* ("*Boeing*")<sup>6</sup> that going forward it would employ a balancing test to assess the permissibility under the NLRA of employer rules, policies and handbook provisions governing employee conduct, using three categories:

- Category 1: "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 NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule." One example of a "Category 1" policy is a rule requiring employees "to abide by basic standards of civility."<sup>7</sup>
- Category 2: rules that require case-by-case scrutiny to determine "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."<sup>8</sup>
- 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 justifications associated with the rule." One example of a "Category 3" policy is a rule that "prohibits employees from discussing wages or benefits with one another."<sup>9</sup>

In *Apogee Retail LLC*, the employer operated a chain of retail stores that sold second-hand clothing and other items throughout the United States. Two Apogee Retail policies were at issue in the Board's decision. *First*, the company's "Code of Business Conduct and Ethics" provided: "Team members are expected to cooperate fully in investigations and answer any questions truthfully and to the best of their ability. *Reporting persons and those who are interviewed are expected to maintain confidentiality regarding these investigations.*" *Second*, the company's Loss Prevention Policy provided as an example of "*behaviors that can have an adverse effect on the company and may lead to disciplinary action*" "[r]efusing to courteously cooperat[e] in any company investigation," which "includes . . . *unauthorized discussion of investigation[s] or interview[s] with other team members.*"<sup>10</sup>

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### THE BOARD'S DECISION

The Board began its decision by overruling *Banner Estrella's* "case-by-case approach to investigative confidentiality rules" in favor of the subsequently adopted *Boeing* test. The Board explained that *Banner Estrella* improperly "placed the burden on the employer to determine, on a case-by-case basis, whether its interests in preserving the integrity of an investigation outweighed presumptive employee Section 7 rights," which required an employer to "supply specific evidence that 'in any given investigation witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, and there is a need to prevent a cover up.'"<sup>11</sup>

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The Board found that *Banner Estrella* was erroneous for several reasons. *First*, *Banner Estrella* ignored Supreme Court precedent “recogniz[ing] that it is the Board’s duty to strike the appropriate balance between an employer’s asserted business justifications and the exercise of employee Section 7 rights.” The Board found that the *Banner Estrella* ruling incorrectly “abandoned [the Board’s] obligation to balance employee and employer interests and shifted the burden to the employer to establish, on a case-by-case basis, that its interests in conducting a specific confidential workplace investigation outweighed the employees’ interests in exercising their Section 7 rights.” *Second*, *Banner Estrella* “failed to recognize and weigh the important interests of employers in providing, and of their employees in receiving, assurances that reports of incidents of misconduct or other workplace dangers will be held in the strictest confidence by all concerned.” For example, employers may need confidentiality “to ensure the integrity of the investigation,” “to obtain and preserve evidence while employees’ recollection of relevant events is fresh,” “to encourage prompt reporting of a range of potential workplace issues . . . without employee fear of retaliation,” and “to protect employees from dissemination of their sensitive personal information.” Employees also “possess a substantial interest in having an effective system in place for addressing workplace complaints.” *Third*, the Board found that the *Banner Estrella* test is inconsistent with the Equal Employment Opportunity Commission’s endorsement of “blanket rules requiring confidentiality during employer investigations” of harassment claims.<sup>12</sup>

The Board ruled that the *Boeing* balancing test—which requires the Board to evaluate “the nature and extent of the potential impact of the rule on NLRA rights” and “legitimate justifications associated with the rule” before assigning the rule to one of the three categories discussed above—is the proper standard to evaluate limits on employee communications about workplace investigations.<sup>13</sup>

Under the *Boeing* test, the Board found that “as applied to open investigations, the Respondent’s facially neutral investigative confidentiality rules may affect the exercise of Section 7 rights, but that any adverse impact is comparatively slight” and “the potential adverse impact on Section 7 rights is outweighed by the substantial and important justifications associated with the Respondent’s maintenance of the rules,” such that “investigative confidentiality rules” that are “limited to open investigations” are “Category 1” rules that do not violate the NLRA.<sup>14</sup>

As to potential interference with the exercise of Section 7 rights, the Board acknowledged that “[e]mployees have a Section 7 right to discuss their own or their fellow employees’ discipline, or incidents that may lead to discipline, where doing so is not mere griping but rather looks toward group action.” Nevertheless, the Board found the impact of the rules at issue on Section 7 rights to be “comparatively slight” because they “narrowly require that employees not discuss investigations of such incidents or interviews conducted in the course of an investigation” and employees remain “free to discuss such incidents without limitation . . . provided they do not disclose information they either learned or provided during the course of the investigation.” In addition, the rules “do not restrict employees from discussing workplace issues

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generally or limit the employees' ability to discuss disciplinary policies and procedures," nor do the rules "prohibit a union-represented employee from requesting the help of a union representative during such an investigation."<sup>15</sup>

On the other hand, the Board found that Apogee Retail had presented "several substantial and compelling business justifications for the rule" falling into three categories: "(1) to prevent theft and respond quickly to misconduct through prompt investigations; (2) to protect employee privacy and ensure that there will be no retaliation by managers or other employees; and (3) to ensure the integrity of an investigation—including providing reliable and consistent protocols—for the benefit of both employers and employees." Accordingly, the Board found that "it is beneficial to both the employer and employees to have an established policy of confidentiality during ongoing investigations." Thus, the Board held that "investigative confidentiality rules limited to open investigations . . . are lawful to maintain as a general matter under *Boeing* Category 1."<sup>16</sup>

In *Apogee Retail*, the rules at issue were silent as to whether they applied only during the investigation. The Board recognized that there may be "substantial and even compelling reasons" for extending a confidentiality requirement beyond the end of certain investigations, "such as where the circumstances give rise to a reasonable belief that the ability of an investigative target to identify an informant may pose a threat to the safety of the informant and/or his or her family or to the security of his or her property." Thus, the Board held that confidentiality rules that are not limited "on their face to open investigations" fall into *Boeing* "Category 2," "requiring individualized scrutiny in each case as to whether any post-investigation adverse impact on NLRA-protected conduct is outweighed by legitimate justifications." Because the rules at issue were not limited to open investigations, the Board remanded the case for that individualized scrutiny.<sup>17</sup>

In dissent, Board Member Lauren McFerran (appointed by President Obama) argued that the Board's decision is "simply wrong" and "infringe[s] on employees' labor-law rights." She believed that "there is no good reason to discard the Board's existing, well-reasoned framework for carefully balancing the statutory rights of employees and the confidentiality interests of employers on a case-by-case basis" in favor of "[a] categorical determination." She also claimed that the decision would likely have a "chilling effect on workers[,] who will feel compelled to choose safe silence over risky speech" and that "workers who want to support the employer's efforts will be deterred from speaking with each other to gather and share evidence of misconduct that harms them, asking their union for help, or turning to a government agency if they believe that the employer is not doing enough."<sup>18</sup> The Board responded that the dissent "grossly exaggerate[d]" the potential chilling effect of the ruling and argued that the *Banner Estrella* standard was more likely to "cause[] employees to choose 'safe silence over risky speech'" because it was "impossible for employers to give employees assurances of confidentiality from the outset of an investigation." In addition, the Board argued that the dissent "fail[ed] to give appropriate consideration to the compelling interests served by investigative confidentiality rules—interests held not only by employers, but also by their employees." As

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to the dissent's concern about a "categorical" rule, the Board responded that the dissent "has as much to do with the *Boeing* standard . . . as it does with the application of that test" here.<sup>19</sup>

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### IMPLICATIONS

The Board's ruling provides employers with much needed clarity as to steps they may take to protect the confidentiality and integrity of ongoing investigations, and to ensure the privacy of employees involved in those investigations. Employers with existing confidentiality policies that are not limited only to the course of open investigations may consider whether to revise their policies to apply only to open investigations, or whether there are sufficient reasons to maintain such a policy after investigations are closed which would be defensible if challenged. Employers who have not already implemented policies requiring confidentiality of investigations may consider doing so, and whether to limit the policies' scope only to open investigations.

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### ENDNOTES

- 1 368 NLRB No. 144 (2019).
- 2 362 NLRB 1108, 1109–10 (2015), *enf. denied on other grounds*, 851 F.3d 35 (D.C. Cir. 2017).
- 3 29 U.S.C. § 157.
- 4 *Id.* § 158(a)(1).
- 5 *Banner Estrella*, 362 NLRB at 1109.
- 6 365 NLRB No. 154 (2017).
- 7 *Id.* at 3–4.
- 8 *Id.* at 4.
- 9 *Id.*
- 10 *Apogee Retail LLC*, 368 NLRB No. 144, at 1 (emphasis added).
- 11 *Id.* at 2.
- 12 *Id.* at 3–6.
- 13 *Id.* at 6–7.
- 14 *Id.* at 8.
- 15 *Id.*
- 16 *Id.* at 8–9.
- 17 *Id.* at 9–10.
- 18 *Id.* at 12–13, 21.
- 19 *Id.* at 10–12.

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