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ADVISORY

JANUARY 2, 2020

# NLRB ROLLS BACK KEY OBAMA-ERA DECISIONS


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In a continuing trend, the National Labor Relations Board (NLRB), in late December, issued two important employer-friendly decisions overturning a pair of controversial rulings by the Obama-era NLRB. In *Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino*, 368 NLRB No. 143 (Dec. 16, 2019), the NLRB restored an employer's right to control employee nonwork use of its information technology and email systems – with important exceptions – without violating the National Labor Relations Act (NLRA). In *Apogee Retail LLC*, 368 NLRB No. 144 (Dec. 16, 2019), the NLRB ruled that a ban on discussing workplace investigations does not violate employees' Section 7 rights.

## CONFIDENTIALITY OF INVESTIGATIONS

In *Banner Health System d/b/a Banner Estrella Medical Center*, 362 NLRB 1108 (2015), the NLRB invalidated an employer's workplace investigations policy that instructed interviewees to keep the subject matter of the investigation confidential. The NLRB held that the employer's blanket policy violated employees' Section 7 right to discuss discipline or ongoing disciplinary investigations involving themselves or co-workers and concluded that an employer could only require confidentiality if the employer first identified a legitimate and substantial business justification necessitating confidentiality, such as the risk of evidence being destroyed or witness tampering. Thus, after *Banner Health*, the burden was clearly on the employer to make a compelling case that the special needs of a particular investigation required confidentiality and that such need outweighed employees' statutory right to discuss workplace issues of mutual concern.

On December 17, 2019, the NLRB revisited employer confidentiality policies and overruled *Banner Health*. In *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144 (Dec. 16, 2019), the NLRB returned to the pre-*Banner Health* standard, which presumed the legality of a work rule requiring confidentiality of investigative interviews. The Board determined that confidentiality rules applicable to open investigations are lawful because, while they may affect the employees' exercise of their Section 7 rights under the NLRA, any adverse impact is comparatively slight. On the other hand, confidentiality rules applied to closed investigations will be individually scrutinized to determine whether any post-investigation adverse impact on NLRA-protected conduct is trumped by legitimate justifications.

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Employers can now revisit their workplace investigation policies, particularly if such policies were revised on the heels of *Banner Health*, and reinstate a requirement of confidentiality as to open investigations. Any instruction as to maintaining the confidentiality of closed investigations continues to be compliant with the NLRA where there is a substantial business justification within the meaning of the initial *Banner Health* ruling. As always, documenting the factors is important to supporting a confidentiality instruction as to a closed investigation.

## EMPLOYEE USE OF COMPANY EMAIL

In ***Purple Communications***, 361 NLRB 1050 (2014), the NLRB found that employees who were given access to an employer email system had the right to use that email system for nonwork-related purposes, including union organizing and other forms of protected concerted activity. The *Purple Communications* ruling was inconsistent with decades of Board precedent finding that the NLRA generally does not restrict an employer's right to control the use of its equipment, including the Board's ruling in *Register Guard*, 351 NLRB 1110 (2007), a case applying that standard to an employer's email system.

Five years later, the NLRB issued a ruling in *Caesars Entertainment*, 368 NLRB No. 143 (December 17, 2019), restoring the rule of *Register Guard*. In *Register Guard*, the NLRB found that an employer's property rights extended to control over its email system (and therefore it was lawful for an employer to maintain a blanket ban on employees' nonwork-related use of employer's email systems).

The NLRB's recent ruling also reaffirmed that "there is no Section 7 right to use employer-owned televisions, bulletin boards, copy machines, telephones, or public-address systems."

The recent ruling in *Caesars Entertainment* recognized two important limitations on an employer's right to control its email system. First, like all other employer rules, those governing IT resources and email systems must not be enforced in a discriminatory manner. This means, for example, that an employer cannot apply a rule prohibiting nonwork use of email to target union activity while tolerating other nonwork uses of emails like charitable solicitations or personal correspondence. Second, the Board created what it called a "rare" exception permitting employees to use employer-owned IT systems for nonwork purposes where there are no other reasonable means for employees to communicate regarding Section 7 activity. While stating that this exception will be rarely applied because employees at most work locations have adequate avenues of communications, the NLRB majority declined to otherwise define the exception, leaving it to be "fleshed out" in subsequent cases.

Employers can thus revisit any prior modifications to their policies regarding nonwork-related use of their IT resources, including email systems; however, in doing so, employers should remember that handbook rules and personnel policies restricting use of IT systems cannot be enforced in a disparate manner that discriminates against or restricts communications related to unions or union organizing.