NLRB Loosens Two Restrictions on Work Rules

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With its sole Democratic member's term expiring as of December 16, 2019, the National Labor Relations Board issued a flurry of decisions this week in advance of her departure, including two decisions rolling back Obama-era restrictions on workplace rules. Those decisions, which permit employers to require employees to maintain the confidentiality of internal investigations and to prohibit employees from using company email for non-work purposes, give employers more freedom to implement neutral, uniform work rules.

Rules Requiring Confidentiality During Investigations Are Valid

The first decision, *Apogee Retail LLC d/b/a Unique Thrift Store and Kathy Johnson*, 27-CA-191574, considered whether two employer policies requiring employees to keep internal investigations confidential were lawful under the National Labor Relations Act (NLRA). In a 2015 decision, the Board had held that a similar work rule violated the NLRA because it unduly restricted employees from speaking about their terms and conditions of work and from engaging in related protected and concerted activity under the NLRA. The Board held that employers could not require confidentiality in every investigation, but had to demonstrate that special circumstances justified confidentiality in the particular investigation at issue. This 2015 ruling conflicted with longstanding EEOC guidance on investigations of discrimination, harassment, and retaliation complaints, which recommends blanket confidentiality rules during such investigations.

In *Apogee Retail*, the Board reexamined its earlier holding in light of the test for facially neutral workplace rules set forth in its recent decision *Boeing Co.*, 365 NLRB No. 154 (2017) (discussed in a previous alert). Applying the *Boeing Co.* framework, the Board determined that confidentiality rules that apply only for the duration of the investigation do not interfere with employees' Section 7 rights and are presumptively valid. The Board also noted the conflict between the prior rule and the EEOC's guidance on investigations and indicated that their decision would "eliminate the dilemma faced by employers" in navigating the two different requirements. The specific policies in *Apogee*, however, did not fall within the EEOC's guidelines as they required confidentiality even after the investigation had ended. Accordingly, the Board held that they required further scrutiny and remanded the case for additional factual finding to determine whether confidentiality after an investigation was over was necessary in the particular case at hand.

Employers Can Restrict Employee Non-Work Use of Email

The second decision, Caesars Entertainment Inc., Case 28-CA-060841, considered whether a casino's policy barring non-work use of its email system violated the NLRA. Previously, in Purple Communications, the Obama-era Board had held that such rules are presumptively invalid because they block workers from using email systems for union activity. Similar to the Board's rule on confidential investigation rules discussed above, prohibitions on using work email for non-business purposes needed to be justified by "special circumstances."

In Caesars Entertainment, the Board reversed course, holding that blanket policies prohibiting use of company electronic resources, such as email, for non-work purposes, were generally permissible, with two limited exceptions. First, if the policy specifically discriminated against union-related communications, it would likely be invalid under the Act. For instance, an employer could not allow employees to use their work email to coordinate off-duty social gatherings but prohibit them from coordinating off-duty union meetings. Second, if an employer's email system is the only reasonable means for employees to communicate, then the employer could not prohibit use of the system for non-work, including union and organizing-related, purposes. Accordingly, Caesars Entertainment allows the vast majority of employers to implement rules prohibiting non-work use of their electronic systems without running afoul of the NLRA.

These decisions are the natural extension of the Board's decision in Boeing and the General Counsel's new guidance on handbook

policies. Nonetheless, employers can rest a little easier knowing that they can craft facially neutral policies in these areas without violating the NLRA.

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