

# What We Know

## ARTICLES & INSIGHTS

### ABOUT THE AUTHOR



[Connie Elder Carrigan](#) is a partner in the firm, with a practice concentration in Business Law. Her focus is assisting clients with issues regarding employment law, business advice and litigation, construction law, equipment leasing and creditor bankruptcy. Connie has lectured on topics ranging from employment law, bankruptcy, and equipment leasing to construction law.

## NLRB's 2020 Vision is More Employer-Friendly

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With the beginning of a new decade comes further evidence of the National Labor Relations Board's resolve to roll back prohibitive rulings issued during the Obama era. On December 16, 2019, the NLRB issued two rulings which confirm that (a) policies prohibiting employees' use of company equipment, including work emails and IT resources, and (b) certain policies requiring employee confidentiality in workplace investigations constitute lawful exercise of an employer's workplace standards and do not unduly restrict activities protected under Section 7 of the National Labor Relations Act, which prohibits employer practices and policies which unduly infringe upon employees' statutory right to discuss terms and conditions of their employment.

### **Restrictions on Use of Company Equipment Permitted**

The NLRB's decision in the case of *Caesar's Entertainment, Inc.* reversed a significant Obama-era ruling in *Purple Communications, Inc.* in ruling that employees' statutory right to engage in protected Section 7 activities must yield to the property rights of employers to control the use of their equipment, so long as the policy or practice does not target union-related communications and activity and provided that employees have reasonable alternative means of communication available to them.

The *Purple Communications* decision issued in 2014 held that if an employer provides employees access to an email system, the employer cannot prevent employees from utilizing that email system for activities prohibited by the National Labor Relations Act during non-worktime unless "special circumstances" exist. Business advocates have sharply criticized that ruling on the basis that it places too little weight on an employer's property rights and overstates the importance of IT resources to Section 7 activity.

Caesar's Entertainment maintains a central facility to which all employees report and work. The facility provides several common areas where employees are permitted to solicit and distribute non-work-related communications. The company handbook, which all employees are required to sign, contains a "Computer Usage" policy prohibiting the use of Caesar Entertainment's IT systems for various purposes, including the sharing of confidential information, sending chain letters, soliciting for personal gain or advancing

personal views, visiting inappropriate websites, and excessive use of personal email.

Relying upon *Purple Communications*, a lower court judge ruled that Caesar's Entertainment violated the National Labor Relations Act by prohibiting the dissemination of non-business communications. The NLRB reversed this ruling, noting the prevalence of smartphones, personal email, and social media in its holding that "an employer does not violate the Act by restricting the nonbusiness use of its IT resources absent proof that employees would otherwise be deprived of any reasonable means of communicating with each other, or proof of discrimination."

In light of this ruling, it is recommended that employers evaluate their current policies in order to ensure that any limits on the use of company equipment, including IT systems and emails, are justified and are sufficiently and clearly documented. These new standards will be applied retroactively to all pending cases which challenge workplace rules restricting the use of IT resources for nonwork purposes.

### **Confidentiality Restrictions Permitted**

The NLRB's decision in *Apogee Retail LLC* serves to resolve long-standing conflicting mandates from the NLRB and the Equal Employment Opportunity Commission regarding the scope and enforceability of confidentiality requirements during workplace investigations. In the 2015 decision of *Banner Estrella Medical Center*, the NLRB required employers to determine, on a case-by-case basis, whether imposing confidentiality restrictions during a workplace investigation improperly infringed upon employees' Section 7 right to discuss the terms and conditions of their employment. However, the EEOC endorsed blanket confidentiality rules during workplace investigations.

Without the ability to require confidentiality and faced with conflicting agency rules, employers were challenged in their efforts to ensure the integrity of workplace investigations and to protect the reporting employee and other participants from retaliation.

In *Apogee Retail*, the NLRB permits employers to implement blanket nondisclosure rules mandating confidentiality for the duration of workplace investigations. In so ruling, the NLRB determined that its prior precedent improperly strayed from the Board's duty to balance employers' business justifications for workplace confidentiality rules with the adverse effect of such rules on employees' rights. The NLRB ruled that as investigative confidentiality rules are limited to the duration of the investigation, such rules do not require engaging in a case-by-case balancing of employer and employee interests as the justification for the rules significantly outweighs the impact on employee rights to discuss their own or their fellow employees' discipline. The Board found that such rules do not broadly prohibit employees from discussing incidents that could result in disciplinary measures. Rather, they narrowly require that participating employees refrain from discussing investigations of incidents or interviews conducted during the course of investigations.

It is to be noted that the NLRB's decision is somewhat limited in that employer policies

regarding confidentiality will be presumptively lawful only during the course of an open investigation. Nondisclosure rules that go beyond the time frame of an investigation continue to require a case-by-case determination of whether confidentiality is required. What this means for employers is that handbooks should be reviewed to ensure that policies require confidentiality only from participants in the investigation and do not prohibit any employee from discussing the incidents upon which the investigation is based.

If you have questions regarding these agency rulings or other legal issues pertaining to the employment relationship, please feel free to contact Connie Carrigan at [ccarrigan@smithdebnamlaw.com](mailto:ccarrigan@smithdebnamlaw.com).

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