

INSIGHTS + NEWS

Client Alert: National Labor Relations Board Issues Two Precedent-Shifting/Pro-Employer Decisions

DECEMBER 19, 2019

EMPLOYERS CAN REQUIRE CONFIDENTIALITY FROM WORKERS DURING WORKPLACE INVESTIGATIONS.

On December 16, 2019, in *Apogee Retail*, N.L.R.B., Case 27-CA-191574, a 3-1 Republican National Labor Relations Board (the “NLRB”) majority overruled an Obama-era decision requiring employers to justify nondisclosure rules that ban employees from discussing ongoing investigations by making a case-by-case determination of whether an investigation would be compromised in the absence of a nondisclosure requirement. Now, the NLRB’s *Apogee Retail* decision allows employers to implement blanket nondisclosure rules mandating confidentiality during the duration of workplace investigations. The NLRB also found that nondisclosure rules that go beyond the life of an investigation continue to require a case-by-case determination of whether nondisclosure is required.

EMPLOYERS CAN BAR WORKERS FROM CONDUCTING UNION BUSINESS OVER COMPANY EMAIL SYSTEMS.

Also on December 16, 2019, in *Caesars Entertainment Inc.*, N.L.R.B., Case 28-CA-060841, the NLRB ruled that employers can block workers from using company email systems to conduct union activity, including organizing. The NLRB found in a 3-1 decision that employees have no statutory right to use employer equipment, including IT resources, for union activity. This decision overturned a 2014 ruling issued under a Democratic-majority board which held that employees do have a right to use employer-owned equipment for nonwork purposes.

The *Caesars Entertainment Inc.* ruling, however, sets forth two limitations on its broad limitation of employee email use. First, while employers have the right to control and restrict the use of their email systems, they cannot “discriminate against union-related communications.” Second, the NLRB created an exception for situations where no other reasonable means exist for employees to communicate with one another.

The Republican NLRB continues to shift the legal landscape back to employer-friendly standards in *Apogee Retail* and *Caesars Entertainment Inc.* Employers should stay tuned, since there will be three Republican members – and therefore a traditionally employer-friendly majority – on the NLRB until at least late August 2020.