

Blog Post

Three More Employer Holiday Wishes Granted by National Labor Relations Board

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By Thomas Y. Mandler

The holiday cheer keeps coming from the National Labor Relations Board (NLRB) with the release of three new decisions favoring employers: (1) workplace policies covering confidentiality during workplace investigations are lawful; (2) employers can restrict employees' use of emails for nonbusiness purposes; and (3) employers can stop deducting and remitting union dues after the expiration of a collective bargaining agreement.

Confidentiality Requirements During Investigations Are Presumptively Lawful

In *Apogee Retail*, 368 NLRB No. 144 (2019), the NLRB upheld an employer's rule requiring employee confidentiality during workplace investigations. The NLRB overturned its previous ruling in *Banner Estrella*, which required employers to make a case-by-case assessment on whether their interests in preserving the integrity of an investigation outweighed employees' rights under the National Labor Relations Act (NLRA) to discuss workplace concerns with coworkers.

The investigation confidentiality rules at issue in *Apogee Retail* were contained in the employer's Code of Business Conduct and Ethics and stated:

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Report Illegal or Unethical Behavior

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.*

The employer also maintained confidentiality investigation rules in its Loss Prevention Policy which stated in relevant part:

The following list, neither all-inclusive nor exhaustive, are examples of behaviors that can have an adverse effect on the company and may lead to disciplinary action, up to and including termination:...Refusing to courteously cooperate in any company investigation. *This includes, but is not limited to, unauthorized discussion of investigation or interview with other team members...*

In applying its Boeing 365 NLRB No. 154 analysis, the NLRB stated that any potential adverse impact on employee Section 7 rights – the rights to engage in protected, concerted activity about workplace concerns – was outweighed by the substantial and important justifications associated with the employer's maintenance of the rules. The employer in *Apogee Retail*, a retail store, articulated substantial and compelling business justifications for its investigation confidentiality rules which included: (1) to prevent theft and respond to misconduct through prompt investigation; (2) to protect employee privacy and ensure no retaliation by managers or other employees; and (3) to ensure the integrity of an investigation.

The NLRB explained that the *Apogee Retail* confidentiality rules did not prohibit employees from discussing discipline or incidents that could result in discipline, and that employees not involved in the investigations were free to

discuss the incidents. The NLRB also noted that these rules did not prohibit union-represented employees from requesting help of a union representative during an investigation, nor did the rules restrict discussions of general workplace issues or disciplinary policies or procedures.

Employers May Again Restrict Employees' Use of Emails for Non-work Reasons

In *Caesars Entertainment*, 368 NLRB NO. 143 (2019), the NLRB stated that employees do not have a statutory right to use their employer-provided email for non-work purposes, such as discussing their wages and benefits or forming a union. The NLRB expressly overruled its 2014 ruling in *Purple Communications, Inc.*, 361 NLRB 1050 (2014) by specifically noting that an employer has a property right to control the use of its communication systems, including its email system, and reaffirmed that no Section 7 rights exist in the use of employer-owned televisions, bulletin boards, copy machines, telephones, or public-address systems.

The NLRB noted, however, that an employer's right to restrict employees' use of email is not absolute. The NLRB considered situations where an employer's email system may be the only reasonable means for employees to communicate with one another, or where enforcement of such a policy is discriminatory. The decision does not provide any guidance as to what scenarios qualify as the "only reasonable means" for employees to communicate but NLRB decisions issued prior to *Purple Communications* had taken a very narrow view of this exception, such as in cases where workers telecommuted from remote locations. Development of new technology, including social media and messaging apps, likely limit such situations even further.

Union Dues Check-Off Provisions Do Not Survive the Expiration of a CBA

In *Valley Hospital Medical Center*, 368 NLRB No. 139, the Board returned to longstanding precedent, holding that employers have no obligation to continue deducting union dues from employee paychecks and paying them to the union pursuant to the employee's authorization, following the expiration of the collective bargaining agreement (CBA). As the Board majority stated, "an employer is free upon contract expiration to use dues-checkoff cessation as an economic weapon in bargaining without interference from the Board." After a CBA expires the Board majority noted that unions will have to seek payments directly from employees who choose to continue their financial support to the union. The threat of ceasing dues deduction allows an employer considerable leverage in negotiations for a new CBA.

Contact your Akerman attorney if you need guidance regarding the enforcement or revision of investigation confidentiality rules, employee email restrictions, or changes in dues checkoff procedures as we head into the new year.

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