IADC COMMITTEE NEWSLETTER
SUPERIOR ADVOCATES. GLOBAL PERSPECTIVE.
CELEBRATING 100 YEARS 1920-2020

# EMPLOYMENT LAW

*JANUARY 2020*

## IN THIS ISSUE

*In a recent National Labor Relations Board decision, the Board overruled its prior position on the legality of policies requiring confidentiality by participants in workplace investigations. It is critical to note, however, the distinction as between confidentiality provisions related to open and ongoing investigations and closed or completed investigations.*

# NLRB Reverses Course on Lawfulness of Policies Requiring Confidentiality of Open Workplace Investigations

## ABOUT THE AUTHOR

**Tara Martens Miller** is Of Counsel with Holland & Hart, LLP in Boise, Idaho. She is a Member of the International Association of Defense Counsel, including the Employment Law and Business Litigation Committees. Her practice focuses on general and complex business and litigation, including employment, commercial and real estate matters. She can be reached at tmmiller@hollandhart.com.

## ABOUT THE COMMITTEE

The Employment Law Committee serves members who represent employers and their insurers. Committee members publish newsletters and Journal articles and present educational seminars for the IADC membership-at-large and mini-seminars for the committee's membership at the Annual and Midyear Meetings. The Committee presents significant opportunities for networking and business referrals. The goal of the Employment Law Committee is to build an active committee with projects that will attract and energize attorneys who practice employment law on a domestic and international basis. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

**Alfred H. Perkins, Jr.**
**Vice Chair of Publications**
Starnes Davis Florie LLP
aperkins@starneslaw.com

## I. Introduction

On December 16, 2019, the National Labor Relations Board in a 4-1 decision in *Apogee Retail LLC ("Apogee")*[1], reversed its 2015 decision issued in *Banner Estrella Medical Center*[2] that required a case by case determination of whether confidentiality may be required in a workplace investigation. Applying *Boeing Co.* analysis and considering Supreme Court precedent and regulatory guidance, the NLRB determined investigative confidentiality rules are lawful to the extent the policies apply to ***open*** investigations. Employers are urged, however, to carefully craft confidentiality policies in accordance with the NLRB decision.

## II. *Banner Estrella* is Overruled

In 2015, the NLRB in *Banner Estrella* considered whether an employer's policy of confidentiality during the course of workplace investigations violated an employee's Section 7 rights to discuss discipline or ongoing disciplinary investigations involving themselves or coworkers. It found confidentiality instructions unlawful and ruled only after an employer presented a particularized showing that corruption of the investigation was likely to occur could the employer lawfully require employee confidentiality.[3] Here, the Board reconsidered the *Bella Estrella* test and overruled the test finding (1) it failed to consider Supreme Court and Board precedent recognizing the Board's duty to balance an employer's legitimate business justifications and employee's Section 7 rights; (2) *Bella Estrella* failed to consider the importance of confidentiality assurances to both employers and employees during an ongoing investigation; and (3) *Banner Estrella* is inconsistent with other federal guidance. [4]

Citing to *NLRB v. Great Dane Trailers, Inc.,*[5] the Board acknowledged its duty to balance employer's asserted business justifications and the exercise of employee Section 7 rights in light of the National Labor Relations Act ("NLRA") and its policy.[6] Further, the Board addressed the benefits to both employers and employees of confidentiality assurances during the course of workplace investigations. There is no dispute than an employer has a legitimate interest in investigations; however, the NLRB further assessed the interests of the employees in confidentiality:

And, because full, fair, prompt and accurate resolution of such complaints also benefit employees, they too, possess a substantial interest in having effective system in place for addressing workplace complaints. Confidentiality assurances during an ongoing investigation play a key role in serving the interests of both employers and employees.[7] The Board also considered the inconsistency of other Federal regulatory guidance by the

[1] *Id*., 368 NLRB No. 144 (2019).
[2] *Id.,* 362 NLRB 1108 (2015).
[3] *Banner Estrella*, 362 NLRB at 1109.
[4] *Apogee, supra*.
[5] 388 U.S. 26 (1967), citations omitted.
[6] *Apogee, supra.*
[7] *Id*.

Equal Employment Opportunity Commission ("EEOC") which suggested an employer should protect the confidentiality of harassment allegations to the extent possible.[8] As such, the Board reasoned, overruling *Banner Estrella* eliminated the "dilemma faced by employers who have been caught between two regulatory schemes."[9]

### III. Application of *Boeing* Test

The Board next applied the *Boeing* test to the confidentiality policy at issue. Per the Board, in *Boeing*, it adopted a new standard for determining whether the "mere maintenance of a facially neutral work rules violates the [NLRA]."[10] In balancing asserted business justifications and potential for the invasion of employee rights, the Board designates the confidentiality policy into one of three categories:

**Category 1** includes rules that the Board designates as lawful to maintain either because (1) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule[;]

**Category 2** will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications; and

**Category 3** will include rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is out-weighed by justifications associated with the rule. An example would be a rule that prohibits employees from discussing wages or benefits with each other.[11]

The Board found that as applied to open investigations, the confidentiality rules may affect the exercise of Section 7 rights, but that any adverse impact is comparatively slight. Therefore, Category 1 of the *Boeing* test is applicable, and the rule deemed lawful to maintain.[12] It is important to note that Category 1 treatment was limited by the Board to the rule as applied to **open** investigations.

### IV. Conclusion

Per the Board's analysis, most justifications for requiring investigative confidentiality apply while the investigation is ongoing.[13] Therefore, it found those provisions lawful under Category 1 of the *Boeing* test. However, the Board specifically left the facial validity of the confidentiality rule at issue in *Apogee* as an open question requiring remand because the rule was not, on its face, limited to ongoing or open investigations. Further the Board determined those rules that are not limited

[8] *See* "*Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*" (June 18, 1999), Section V(C)(1) "Confidentiality."
[9] *Apogee*, *supra,* citations omitted.
[10] *Boeing Co.,* 365 NLRB No. 154 (2017).
[11] *Apogee, supra*.
[12] *Id*.
[13] *Id*.

to open investigations fall into Category 2 of the B*oeing* test and thus subject to heightened individualized scrutiny.[14] As such, employers should carefully craft confidentiality policies in line with the NLRB's recent decision and underlying analysis.

[14] *Id*.

**Past Committee Newsletters**

Visit the Committee's newsletter archive online at www.iadclaw.org to read other articles published by the Committee. Prior articles include:

DECEMBER 2019
Spoliation and Sanctions in Employment Litigation: An Update
Peter J. Pizzi and Eric Padilla

AUGUST 2019
Do Applicants Have a Disparate Impact Claim Under the ADEA?
Larry D. Smith

MAY 2019
Employing Foreigners in Turkey
Dr. Döne Yalçın and Sinan Abra

MARCH 2019
Gratuities in the Restaurant Industry-What's Going On?
Glenn Duhl

JANUARY 2019
Inadvertently Perpetuating Wage Discrimination: The Ninth Circuit finds Employers' Reliance on Salary History Violates the Equal Pay Act
Tara Martens Miller and Christina Fout

DECEMBER 2018
The Risk of a Hefty Social Security Price Tag on Shares Awarded to Employees of EU (Belgium) Based Affiliated Companies
Cecilia Lahaye

NOVEMBER 2018
The Rising Number of Platform Workers as a Problem for Employment Law
Dr. Gerlind Wisskirchen and Jan Schwindling

OCTOBER 2018
Enhanced Workhour Flexibility Under Taiwan's LSA
Christine Chen

2018 Immigration Roundup For Employers
Michael H. Gladstone

JUNE 2018
Don't Ask, Don't Tell (Me About Your Salary History): An Update on the Status of State Salary History Inquiry Bans
Mark Fahleson

MAY 2018
Responding to 30(b)(6) Deposition Notices in Employment Cases
Larry D. Smith

MARCH 2018
How to Conduct an Effective Harassment Investigation
Glenn Duhl