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NLRB ALLOWS EMPLOYERS TO IMPOSE GAG RULES IN WORKPLACE INVESTIGATIONS

On December 17, 2019, the National Labor Relations Board ("NLRB" or "Board") issued its decision in *Apogee Retail*, in which the Board reversed yet another Obama Board decision as part of the NLRB's effort to roll back workers' rights and protections. In the 2015 decision of *Banner Estrella*, the Obama Board previously held that employers cannot treat all workplace investigations as confidential by default, and instead required that employers prove, on a case-by-case basis, that the investigation's integrity would be compromised if it were not treated as confidential. That ruling was intended to protect the right of employees to discuss their working conditions, which is protected activity under Section 7 of the National Labor Relations Act.

In reversing *Banner Estrella*, the Trump Board applied the employer-friendly standard for workplace rules that it introduced in its 2017 *Boeing* decision, which makes it much harder for employees or their unions to challenge work rules that could reasonably be interpreted as prohibiting Section 7 activities, as long as the rules appear to be "facially neutral." In *Apogee Retail*, the Board ruled that confidentiality rules for workplace investigations are always lawful, as long as their prohibition on employees discussing the investigation with each other only lasts during the duration of the investigation. Where a confidentiality rule applies after the investigation is completed, however, that type of rule is no longer presumptively lawful, and the Board must determine whether any legitimate justification offered by the employer outweighs the impairment of employees' Section 7 rights. Because the rule in this case was not specifically limited to confidentiality while investigations are ongoing, the Board remanded the case for a balancing of interests.

Even though the broadly-worded confidentiality rule in *Apogee Retail* did not provide that employees still had a right to discuss matters with their union representative or with the NLRB, the Board majority inexplicably suggested that employees will know that they have the right to talk about specific incidents or discipline with those representatives. Member Lauren McFerran, the last remaining Democrat-appointed Board member, wrote a strongly-worded dissent, noting that allowing employers to hold gag rules over their employees has an "obvious and alarming" chilling effect on workers, who will choose to be silent in order to be safe rather than risk speaking with others, including their union representatives. Member McFerran's term on the Board ended on December 16, 2019.

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