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## NLRB Decision Broadens Workplace Investigation

### Confidentiality Rules

By Kirsten Scheurer Branigan, Carole Lynn Nowicki and Teresa Boyle-Vellucci

In recent years, the breadth and scope of workplace investigation confidentiality rules have been scrutinized and debated. Some have argued that imposing confidentiality restrictions upon employees interferes with their Section 7 rights to engage in “concerted activity” for the “mutual aid and protection of employees” under the National Labor Relations Act (NLRA). 29 U.S.C. §157 (emphasis added). Conversely, others have argued that the inability to require confidentiality during an investigation has a significant negative impact. Specifically, without confidentiality, the integrity of the investigation is compromised, and there is an increased risk of interference, retaliation, and dissemination of employees’ sensitive personal information.

In a recent 2019 decision, the National Labor Relations Board (NLRB or the “Board”) revised the parameters for permissible confidentiality rules in workplace investigations. In *Apogee Retail*, the NLRB overruled its prior controversial decision from *Banner Health System* and applied a new analytic framework to determine the legality of workplace investigation confidentiality rules. *Apogee Retail LLC d/b/a Unique Thrift Store and Kathy Johnson*, 368 NLRB No. 144 (2019); *Banner Health System d/b/a Banner Estrella Medical Center and James A. Navarro*, 362 NLRB No. 1108 (2015), enf. denied on other grounds, 851 F.3d 35 (D.C. Cir. 2017). Significantly, the NLRB held that investigative confidentiality rules limited to the duration of open investigations are lawful without the case-by-case balancing of interests (as required under *Banner*).

Confidentiality assurances during an ongoing investigation play a key role in protecting the interests of both employers and employees. As the NLRB cited in the *Apogee* case, employers have a legitimate interest in investigating charges of alleged employee misconduct. While employers have obligations to address complaints fully, fairly, and promptly, employees also possess a substantial interest in obtaining an accurate resolution of such complaints and having an effective system in place for addressing workplace complaints.

### **The Now Overruled *Banner* Confidentiality Standard**

In *Banner*, the NLRB previously ruled that the employer unlawfully maintained a policy of requiring employees during investigatory interviews not to discuss the internal investigation with others. *Banner, supra*, slip op. at 38. Under *Banner*, an employer was required to assess the application of confidentiality on a “case-by-case basis” regarding whether the employer had a “legitimate and substantial business justification” that outweighed Section 7 rights. *Id.* at 41. Such justifications included:

- Witnesses protection;
- Danger of evidence being destroyed;
- Danger of fabrication of testimony; or
- Prevention of a cover-up.

The *Banner* case-by-case framework was often challenging in practice. Deciding whether or not the specific factors could be met in any given matter was not always ascertainable before some degree of preliminary investigation. Also, the inability to require confidentiality could be detrimental in sexual harassment investigations where the complainant desired privacy as to his/her allegations and identity.

### **The *Apogee* Case and New Confidentiality Standard**

In *Apogee*, the employer operated retail stores selling second-hand items in multiple states. The decision did not discuss a specific investigation; the analysis focused only on the employer’s written rules. The employer maintained two written policies that contained confidentiality restrictions. One rule required that employees interviewed during investigations were expected to maintain confidentiality regarding these investigations. A second rule prohibited unauthorized discussion of the investigation or interview with other employees. *Apogee, supra*, slip op. at 1.

The *Apogee* employer was concerned about employee theft and argued that its policies were necessary, providing multiple examples in which investigations had been hindered by its inability to require confidentiality. *Id.* at 1-2. The justifications asserted by the employer included the pervasive issue of employee theft and the need to investigate it, employee concerns

about being labeled a “snitch,” the potential for leaks of information between multiple suspects, witnesses being influenced by other witnesses, safety risks, the need for effective and thorough investigations, and accommodating requests by employees for confidentiality. *Id.*

In *Apogee*, the NLRB noted four compelling reasons for maintaining confidentiality:

- To ensure the integrity of the investigation;
- To obtain and preserve evidence while employees’ recollections of relevant events are fresh;
- To encourage prompt reporting of a range of potential workplace issues—unsafe conditions or practices, bullying, sexual harassment, harassment based on race or religion or national origin, criminal misconduct, and so forth—without employee fear of retaliation; and
- To protect employees from dissemination of their sensitive personal information. *Id.* at 4.

### **Application of *Boeing* Categories in *Apogee***

While employees’ rights are protected under Section 7 of the NLRA, these rights can be restricted when the employer can show legitimate business justifications that outweigh such rights. *Id.* at 6. In *Apogee*, the NLRB overruled *Banner* and, instead, applied a three-category analysis for “facially-neutral” workplace rules established in *The Boeing Company* to assess potential interference with employees’ Section 7 rights. *The Boeing Company and Society of Professional Engineering Employees in Aerospace, IFPTE Local 2001*, 365 NLRB No. 154 (2017); *Apogee, supra*, slip op. at 6-7.

In *Boeing*, the Board evaluated: (1) the nature and extent of the potential impact of the rule on NLRA rights; and (2) legitimate justifications associated with the rule. To that end, the Board identified three categories of rules:

- Category 1 includes those rules the Board designates to be lawful because, (i) when reasonably interpreted, the rule does not prohibit or interfere with the exercise of NLRA rights, or (ii) justifications associated with the rule outweigh the potential adverse impact on protected rights.
- Category 2 includes rules that warrant individualized, case-by-case scrutiny to determine whether the rule would prohibit or interfere with NLRA rights, and if so, whether legitimate justifications outweigh any adverse impact on NLRA-protected conduct.
- Category 3 includes any rule the Board designates as unlawful because they limit or prohibit NLRA-protected conduct and the adverse impact of them on NLRA-protected

conduct is not outweighed by justifications associated with the rule. As examples of Category 3, the Board identified rules that prohibit employees from discussing wages or benefits with each other. *Boeing, supra*, slip op. at 3-4.

In *Apogee*, the Board noted that the great majority of workplace investigative meetings do not even involve NLRA-protected activity. Specifically, the Board opined that employee discussions about investigative interviews only involve “concerted activity” if the objective of the discussions is to initiate, induce, or prepare group action or the discussions have some relation to group action in the interest of the employees. *Apogee, supra*, slip op. at 11.

The Board determined that, had the employer’s investigative confidentiality rules been limited to the duration of open investigations, such would fall into *Boeing* Category 1 and be lawful without engaging in a case-by-case balancing of interests. The Board found that, while such a rule may affect the exercise of Section 7 rights, any adverse impact was comparatively slight. The Board also found that the potential adverse impact on Section 7 rights would be outweighed by the substantial and important justifications associated with the employer’s maintenance of the rules. Lastly, the Board stated that the justifications associated with investigative confidentiality rules applicable to open investigations outweigh the comparatively slight potential of such rules interfering with the exercise of Section 7 rights. *Id.* at 8, 12.

However, investigative confidentiality rules that are not limited to open investigations fall into *Boeing* Category 2 and require individualized scrutiny to determine their lawfulness. *Id.* In *Apogee*, since the employer did not differentiate between open-investigation rules and post-investigation rules, and the rules at issue were silent regarding the duration of the confidentiality requirements, the NLRB believed that most employees would not read them to limit their confidentiality obligations to the duration of the investigation only. As such, the Board remanded the matter for more individualized scrutiny of the company rules under the *Boeing* Category 2 test. *Id.*

While the *Apogee* Board found that silence could be open for interpretation as to duration of the rule, it took a different approach when assessing the rules’ silence in other respects. While the employer’s rules were silent as to any specific exceptions, the NLRB narrowly interpreted the rules and believed that employees would likewise narrowly interpret such rules in the following ways: 1) not restricting employee discussions about discipline or the underlying incidents; 2) not restricting the employees interviewed from discussing the underlying events (unless such was only learned through the investigation); 3) not limiting employees who were not involved in an investigation from discussing such incidents; 4) not restricting employees from generally discussing workplace issues or limiting the employees’ ability to discuss disciplinary policies and procedures; 5) not restricting communications with the Equal Employment Opportunity Commission (EEOC), NLRB, or other Federal or State agencies; and 6) not prohibiting a union-

represented employee from requesting the help of a union representative during an investigation. *Id.* at 10-12.

## **The Significance of *Apogee* and Practice Tips**

While the *Apogee* standard does alleviate the need for a case-by-case analysis for some workplace confidentiality rules, there are limits to the ruling. The following are some key points:

- Reasonably drafted confidentiality rules/instructions can restrict employee discussions about the *investigation of the incidents* or *investigation interviews* for the *duration of an open investigation only*. This would include information that was communicated or acquired by the employee during the investigation.
- Confidentiality rules/instructions must not restrict employees' whistleblowing rights to a government agency (such as the EEOC or the NLRB).
- Confidentiality rules/instructions must not include any restriction on employees' discussions or requests for assistance from a representative (such as a union representative).
- Confidentiality rules/instructions should not restrict employees from discussing discipline, incidents that could result in discipline, workplace issues generally, or disciplinary policies and procedures.
- *Apogee* does not condone all confidentiality rules/instructions simply because they are limited to the duration of open investigations. If the confidentiality rule/instruction is not sufficiently tailored, it may not pass muster even under the broader *Apogee*.
- Unless prepared to justify the confidentiality rule/instruction under more individualized scrutiny, employers should not try to limit discussions about the underlying events themselves (unless such were only acquired during the investigation and, then, only for the duration of the investigation).
- If an employer seeks to impose a broader restriction (including a rule that would go beyond the duration of the investigation or limit discussions about the underlying incidents themselves), an individualized scrutiny would be necessary to ascertain if the impact on NLRA rights are outweighed by legitimate justifications.

Under *Apogee*, a clear standard is now in place as to the type of confidentiality rule that is considered permissible under the NLRA while also permitting broader rules if justifications outweigh the adverse impact on NLRA-protected conduct. Although the ruling in *Apogee* broadens the ability to require confidentiality, such rules and instructions are not without limitation.

It bears noting that neither *Banner* nor *Apogee* involved allegations of sexual harassment. In sexual harassment investigations, the *Banner* test conflicted with the EEOC Guidance on privacy

protections. In announcing the new framework in *Apogee*, the NLRB noted that the framework is now better aligned with the EEOC's existing and proposed Guidance. Before *Apogee*, employers and investigators were caught between two regulatory schemes.

In the wake of *Apogee*, employers, investigators, and professionals in human resources, legal, and compliance roles should be aware of this important change and update their investigative practices, training materials, and policies accordingly.

**Kirsten Scheurer Branigan, Carole Lynn Nowicki and Teresa Boyle-Vellucci** *are partners at KS Branigan Law, a woman-owned law firm in Montclair. The firm concentrates in Workplace Investigations, Alternative Dispute Resolution, and Employment Compliance, Audits, & Training. Branigan is an arbitrator and mediator with the AAA. Nowicki is an arbitrator with the AAA. Boyle-Vellucci is a mediator with the AAA.*