

We Knew This Was Coming: NLRB General Counsel Recommends Abandoning Workplace Rule and Confidentiality Rule Frameworks

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As foreshadowed by the NLRB General Counsel's [August 2021 Advice Memorandum](#) (which we discussed [here](#)), the vacillating standard for the legality of employer handbooks and policies and confidentiality requirements during open employer-investigations have been ripe for reversal by the NLRB.

On March 7, 2022, in response to the NLRB's January 6, 2022 notice and invitation to file briefs, the NLRB General Counsel filed a [post-hearing brief](#) in the case *Stericycle, Inc.*, asking the Board to abandon its existing frameworks for evaluating facially-neutral workplace rules (*Boeing*) and confidentiality rules during open investigations (*Apogee*).

The Long Fight Over Common Workplace Rules

As we have [previously discussed](#), the Board in *Boeing* overruled the *Lutheran Heritage* standard, which required the Board to determine whether an employer's workplace rule would be "reasonably construed" to prohibit the exercise of employees' NLRA rights under Section 7 of the Act. *Boeing Company*, 365 NLRB No. 154 (2017); *Lutheran Heritage* 343 NLRB 646 (2004). The application of *Lutheran Heritage* resulted in a mad dash to parse common workplace policies in the hunt for potential violations of the National Labor Relations Act.

Instead, the Board, in *Boeing*, established three categories for evaluating the lawfulness of workplace rules: (1) lawful rules, (2) rules that required individualized scrutiny, and (3) unlawful rules.

The GC's post-hearing brief recommended that the Board revert to the *Lutheran Heritage* standard, describing the *Boeing* framework as "more complicated, less predictable, and much less protective of employee rights."

The brief also provided several recommendations as to how the Board may strengthen the *Lutheran Heritage* standard:

- The Board should not presume that employees are aware of their rights under the NLRA.
- The Board should presume that employees will likely interpret a rule to be restrictive of their NLRA rights.
- The Board should substitute the word “could” for “would” in the standard, and add the word “unlawfully” so the test states as follows: a rule is unlawful if “employees [c]ould reasonably construe the language to [unlawfully] prohibit Section 7 activity.”
 - The first change (could to would) makes the test more consistent with the Board’s application of *Lutheran Heritage* in subsequent cases and the Board’s general standard for employer statements, according to the NLRB GC.
 - The second change (adding unlawfully) would remove any doubt as to facially-neutral policies that represent lawful restrictions of Section 7 activity, such as neutral rules limiting solicitation to non-working time.
- The Board should permit rules that would ordinarily be considered restrictive in some situations as lawful, if the rule is (1) narrowly tailored to a special circumstance and (2) the employer’s interest in the rule outweighs its employees’ Section 7 rights.
- The Board should provide a statement of employees’ statutory rights that employers could include in handbooks to create a presumption that other rules within the handbook do not prohibit those rights.

Evaluation of Confidentiality Rules During Open Investigations

In addition, the NLRB GC encouraged the Board to abandon its *Apogee* framework when evaluating confidentiality rules during an open investigation. *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144 (2019).

As we have [previously discussed](#), the Board in *Apogee* overruled the *Banner Estrella Medical Center* standard, which required an employer to determine, on a case-by-case basis, whether its interests in preserving the integrity of an investigation outweighed employees’ Section 7 rights. *Banner Estrella Medical Center*, 362 NLRB 1108 (2015), *enf. denied on other grounds* 851 F.3d 35 (D.C. Cir. 2017).

In *Apogee*, the Board held that an employer's confidentiality restrictions for information relating to workplace investigations are categorically lawful under *Boeing*, where such rules explicitly apply for the duration of an investigation only.

The GC's brief recommended returning to the *Banner Estrella Medical Center* standard, arguing that *Apogee* chills Section 7 rights during open investigations asserting—without citation to any proof—“employees...reasonably fear discipline based on a violation of said [confidentiality] rule.”

Two amicus briefs from the U.S. Chamber of Commerce and the HR Policy Association and Retail Litigation Center have been filed.

Takeaways

It is hardly surprising that the Board is taking aim at these policies. It has become regular practice to overrule precedent from the last administration. The General Counsel's recommendations in her post-hearing brief outline potential paths that the NLRB could take in reshaping the standard for lawful handbook policies and reverting to the prior standard regarding restrictions on confidentiality during employer investigations. In particular, the fickle standard for handbook policies has made it difficult for an employer to issue policies that it can reasonably expect will be long-lasting. The practical effect of overturning the current case law will be that employers will once again be forced to defend policies in the absence of any other unlawful behavior. We expect the Board to address the standards regarding these issues in this case—potentially adopting the GC's view in at least some measure. We will follow up with future developments regarding the Board's action in response to the GC's recommendations.

Stay tuned, we will keep you posted as developments occur.

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