KUTAKROCK

February 7, 2020

NLRB Issues Several Employer-Friendly Decisions

The National Labor Relations Board ("NLRB") recently overruled several earlier decisions, indicating employers may expect more management-friendly decisions in 2020.

Restoration of the Right to Restrict Employee Use of Employer Email System

On December 16, 2019, the NLRB issued a 3-1 ruling in *Caesars Entertainment*, 368 NLRB No. 143 (2019), restoring an employer's right to restrict employee use of the employer's email and other information-technology ("IT") resources during nonworking time for non-work-related purposes if it does so in a manner that is not discriminatory. This decision overrules the NLRB's prior decision in *Purple Communications*, 361 NLRB No. 1050 (2014), which held that if an employer provided an employee with access to its email system, it could not prohibit the employee from using it for National Labor Relations Act ("NLRA") Section 7 protected communications (i.e., communications regarding wages, hours, working conditions, and union activities) on nonworking time absent a showing of special circumstances by the employer.

In *Caesars Entertainment*, the NLRB returned to the standard announced in *Register Guard*, 351 NLRB No. 1110 (2007), recognizing an employer has a property right to restrict employee use of its equipment, including its IT resources. *Register Guard* had allowed employers to implement restrictions without exception. *Caesars Entertainment*, however, now recognizes an exception in which an employer's email system is the only available means for employees to communicate with each other; however, in today's typical workplaces where employees have access to various forms of communication devices, such exceptions may be rare.

Confidentiality Rules Are Presumptively Lawful During Workplace Investigations

On December 16, 2019, the NLRB issued its 3-1 decision in *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144 (2019), and held investigative confidentiality rules are presumptively lawful for the duration of an open investigation. After an investigation is closed, however, it will "require individualized scrutiny in each case as to whether any post-investigation adverse impact on NLRA-protected conduct is outweighed by legitimate justifications."

The NLRB determined investigative confidentiality rules are properly analyzed under the test for facially neutral workplace rules previously established in *Boeing Co.*, 365 NLRB No. 154 (2017). Under *Boeing*, Category 1 rules are deemed lawful because either they do not interfere with employee rights or the employer's justification for the rule outweighs any adverse impact; Category 2 rules require an individualized assessment to determine the balance of employer and employee interests; and Category 3 rules are deemed unlawful and include those rules where business justifications cannot outweigh the adverse impact on employees' protected rights. The *Apogee* decision found rules requiring confidentiality during an open investigation belong in Category 1. As such, these rules are deemed lawful. Confidentiality rules that go beyond open investigations, however, belong in Category 2.

The NLRB explained that confidentiality rules during open investigations reflect interests that are shared by both employers and employees, as they protect employee privacy, protect employees from retaliation, and ensure integrity of the investigation.

The Return of Deference to Arbitral Decisions

The NLRB issued its unanimous decision on December 23, 2019 in *United Parcel Service, Inc.*, 369 NLRB No. 1 (2019), in which the NLRB returned to the less stringent *Spielberg/Olin* standard for determining whether to defer to arbitration decisions in unfair labor practice cases alleging discharge or discipline. This decision effectively overruled the 2014 NLRB's decision in *Babcock & Wilcox Construction Co.*, 361 NLRB 1127 (2014), in which the NLRB announced it would no longer grant prearbitral deferral in discriminatory discipline cases unless it could be shown that the bargaining parties incorporated the statutory right at issue into the collective bargaining agreement or explicitly authorized an arbitrator to decide the unfair labor practices. The NLRB also held it would not defer to arbitral decisions unless: "(1) the arbitrator was explicitly authorized to decide the unfair labor practice issue; (2) the arbitrator was presented with and considered the statutory issue or was prevented from doing so by the party opposing deferral; and (3) [NLRB] law reasonably permits the award." The burden of proof under this standard rested with the party urging deferral.

Under *United Parcel*, the NLRB will now defer to an arbitration decision and award if: "(1) the arbitration proceedings were fair and regular, (2) the parties agreed to be bound, (3) the contractual issue was factually parallel to the unfair labor practice issue, (4) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice, and (5) the decision was not clearly repugnant to the purposes and policies of the Act." The burden is once again on the party arguing against deferral.

The NLRB's *United Parcel* decision means it will be more likely to defer to the parties' grievance arbitration process where faced with parallel unfair labor practice claims.

If you have questions related to how these recent NLRB decisions impact your organization's policies or practices, please contact your Kutak Rock attorney or any of the attorneys in the Employment Law Group, and we would be happy to discuss this with you.