

# Electronic Alert

Volume 23, Issue 1

January 2, 2020

## NLRB Issues Flurry of Decisions Impacting Private Sector Employers

By Kyle Abraham & Nicole Elgin

With National Labor Relations Board (NLRB) Member Lauren McFerran's term ending on December 16, 2019, the NLRB issued a flurry of decisions before the end of 2019. These decisions affect private sector employers who have unions or who face union organization. In these decisions, the NLRB returned to long-standing precedent, and reversed decisions issued by the NLRB under the prior administration.

### 1. New Rules Overhaul Election Procedures

The NLRB issued new election rules that overhaul the rules governing union election; the previous rules were commonly referred to as “quickie” or “ambush” election rules. The nicknames are due to the quick deadlines employers faced after receiving notice that a union filed an election petition with the NLRB. The rules also revert back to addressing questions about which positions are within the group subject to organizing before the election. These new election rules become effective April 16, 2020.

### 2. Employers Can Restrict Use of Employer Email Systems

In *Caesars Entertainment*, the NLRB restored employers' rights to restrict employee use of the employer's email system so long as it does so on a nondiscriminatory basis, and returned to the standard announced by the NLRB in the 2007 case, *Register Guard*. Under the *Register Guard* standard, employees do not have a statutory right to use employer email and other IT resources to engage in non-work-related communications, unless, in rare cases, the use of employer-provided email is the only reasonable means for employees to communicate with each other.

### 3. Employers Can Request Confidentiality During Investigations

In *Apogee Retail*, the NLRB ruled that employers may require confidentiality during the course of workplace investigations. The decision is intended to better align with other federal agency guidance on workplace investigations, including from the EEOC's enforcement guidance. However, the NLRB remanded the case for further consideration because the employer's rule on confidentiality did not limit confidentiality to the duration of the investigation. Previously, under the NLRB's *Banner Estrella* standard, employers were required to prove, on a case-by-case basis, that special circumstances justified the need for confidentiality during a workplace investigation.

### 4. Employers May Stop Deducting Dues When Contract Expires

In *Valley Hospital Medical Center*, the NLRB held that an employer's statutory obligation to check off union dues ends upon expiration of the collective bargaining agreement containing the checkoff

provision. The majority explained that there is no independent statutory obligation to check off union dues after contract expiration, even where the contract does not contain a union-security provision. The decision returns to the standard that existed for over 50 years, and was first announced by the NLRB in the 1962 *Bethlehem Steel* case.

#### 5. Long-Standing Arbitrator Deferral Standard Restored

In *United Parcel Service, Inc.*, the NLRB has restored the legal standard it uses to decide whether to defer to an arbitrator's prior resolution of a grievance regarding employee discipline that was an alleged unfair labor practice (ULP). Under the restored standard, the NLRB will defer to the arbitrator's decision where (1) the arbitration proceedings appeared fair and regular, (2) all parties agreed to be bound, (3) the arbitrator considered the ULP issue, and (4) the arbitrator's decision is "not clearly repugnant" to the National Labor Relations Act (NLRA). The decision returns to the standard that existed for nearly 60 years, and was first announced in the 1955 *Spielberg Mfg. Co.* case.

*For questions on how these new rules and decisions affect your company, contact Kyle Abraham at 503-276-2132 or [kabraham@barran.com](mailto:kabraham@barran.com), or Nicole Elgin at 503-276-2109 or [nelgin@barran.com](mailto:nelgin@barran.com).*