

NLRB Wraps up Blockbuster Year with a Bang

Alert

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The National Labor Relations Board (NLRB) issued a whirlwind series of rulings to cap off 2019. The NLRB typically issues many decisions near the end of a Board member's term, so this flurry comes as no surprise (lone-Democrat board member, Lauren McFerran's, term expired on December 16, 2019). Three key labor law changes employers should be aware of as they welcome the new decade are:

Employers may stop dues remittance at CBA expiration

What is old is new again. Under the NLRB's 1963 *Bethlehem Steel* decision, employers could stop checking off and remitting union dues after a collective bargaining agreement (CBA) expired. That rule stood for 52 years, until the Obama-era NLRB's 2015 *Lincoln Lutheran of Racine* decision changed it (*Lincoln Lutheran* held that an employer was obligated to continue remitting dues following CBA expiration). On December 16, 2019 the NLRB reinstated the *Bethlehem Steel* rule in *Valley Hospital Medical Center*. In doing so, the NLRB held that dues remittance is a contract-based duty and lives and dies with the CBA. In short, employers may once again stop remitting union dues following CBA expiration, which may provide bargaining leverage in negotiations.

Employers may once again generally prohibit union organizing through employer-provided email accounts

The Obama-era NLRB's 2014 *Purple Communications* decision held that employees could use employer-provided email accounts to engage in union activity, including union organizing activity, during non-working time. This was a significant departure from established NLRB law, as it rejected the general historical rule that prevented employees from using an employer's property to engage in union organizing. The NLRB overruled *Purple Communications* in its December 16, 2019 *Caesars Entertainment Corp.* decision, holding that *Purple Communications* "impermissibly discounted employers' property rights in their IT

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resources while overstating the importance of those resources to [union] activity.” In other words, *Caesars Entertainment Corp.* returned the NLRB to the historical rule. Employers may once again prohibit employees from using employer-provided IT resources (including email) to engage in union activity unless email is the *only* reasonable means for employees to communicate with each other.

Employers may once again require confidentiality during workplace investigations

In its 2015 *Banner Estrella Medical Center* decision, the Obama-era NLRB held that it was generally unlawful for an employer to require confidentiality during a workplace investigation unless the employer could supply specific evidence demonstrating that corruption of the investigation was likely to occur absent confidentiality. In its December 16, 2019 *Apogee Retail LLC* decision, the NLRB overruled *Banner Estrella*, holding that confidentiality rules for internal workplace investigations are lawful provided their terms apply only for the duration of the inquiry. However, due to their likely impact on protected speech, any confidentiality rules that extend beyond the duration of the investigation require that the employer have a legitimate justification that outweighs the effect such requirements have on employees’ Section 7 rights.

Bottom Line

As these recent developments highlight, NLRB law continues to be an area of significant change and upheaval. While these most recent decisions may be welcomed by employers, changing law brings with it changing compliance obligations and rules. The Trump-era NLRB does not appear to be finished; we expect other significant cases or rules to be issued in the coming year, including on the hot-button issue of joint employer liability.

Stinson’s labor attorneys have been counseling employers on these issues, and offering positive employee relations training for more than 20 years. If you would like more information about these services, please contact [Matt Tews](#), [Dominic Cecere](#), [Joel Abrahamson](#), [Rick Pins](#), [Anne Marie Buethe](#), Johnny Wang, Kyle Malone, Nicole Faulkner, or the Stinson contact with whom you regularly work.

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