

New Ruling Allows Employers to Mandate Confidentiality of Internal Investigations

On December 19, 2019, the National Labor Relations Board (the Board) held that employers can require employees to keep internal investigations confidential during the pendency of the investigations. This decision, *Apogee Retail d/b/a Unique Thrift Store*, overturns a 2015 decision banning employer rules requiring confidentiality in internal investigations, and has significant repercussions for higher education institutions that engage in such investigations.

In *Apogee Retail d/b/a Unique Thrift Store*, the Board majority held that a workplace rule requiring employees to maintain the confidentiality of open workplace investigations is lawful under the National Labor Relations Act (NLRA). This is because the adverse impact on employees' Section 7 rights is relatively slight and outweighed by the employer's justification for having such a rule. The Board majority also held, however, that a rule requiring employees to maintain the confidentiality of workplace investigations that have been completed requires individualized scrutiny in each case to determine "whether any post-investigation adverse impact on NLRA-protected conduct is outweighed by legitimate justifications."

This decision applies to employers covered by the NLRA, which encompasses almost all private sector employers (even if not unionized), including higher education institutions. Colleges and universities, which conduct internal investigations regarding Title IX, sexual harassment, internal policy, and other violations, may now require employees to keep confidential information learned in the scope of those investigations until they have concluded. Employers should be aware, however, that the Equal Employment Opportunity Commission has taken the position that broad confidentiality rules- such as those that may be present in policy manuals- are not allowed under the law because they could discourage employees from exercising their protected rights to alert management or an administrative agency to discrimination. Therefore, to the extent employers seek to issue such policies, they should clearly delineate that the confidentiality provisions do not prevent employees from engaging in said protected activities.

If you have any questions about this information memo, please contact [Theresa E. Rusnak](#), any attorney in the [Higher Education Practice Group](#), or the attorney in the firm with whom you are regularly in contact.

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