

NLRB Goes Pro-Employer (Again) in New Ruling

PUBLISHED ON

December 26, 2019

In yet another break from precedent, the NLRB held recently that employers can have policies barring workers from discussing active workplace investigations.

The Republican NLRB majority said in a recent decision that employers don't necessarily violate workers' rights to act collectively by banning these conversations as long as they are limited to the period of active investigation.

In a 2015 decision known as *Banner Health System*, a board majority including board member Lauren McFerran stated that policies barring employees from discussing workplace investigations generally infringe workers' rights. The National Labor Relations Act also specifically allows workers to join together for mutual aid and protection. Tuesday's ruling reverses that decision and remands the dispute to the NLRB's regional office for analysis under the new standard.

Specifically, the decision analyzes confidentiality rules using a test the board laid out in the [2017 Boeing decision](#) that balances business interests in maintaining a given workplace rule with the rule's effects on workers' labor organizing rights. The *Boeing* decision aimed to flesh out case law on rules disputes by directing agency officials weighing policy challenges to place rules into one of three categories along a spectrum of legality:

- **Category 1 rules:** Those that are presumptively legal because they don't affect workers' rights or because employers' reasons for maintaining them outweigh any infringement.
- **Category 2 rules:** More strongly affect workers' rights but may be legal on a case-by-case basis if employers can justify them.
- **Category 3 rules:** Are always illegal because employers can't explain away their adverse effects on workers.

The majority on Tuesday placed rules that block workers from discussing pending investigations into Category 1, saying that they have a "comparably slight" effect on NLRA rights while protecting workers' privacy and aiding probes. McFerran, whose term expired Dec. 16 just before this decision was announced, dissented, saying it will have an "obvious and alarming" effect on workers' rights, particularly sexual harassment victims who want to warn colleagues about a harasser or seek outside help.

If you have any questions on this rule change or any other [recent NLRB activity](#), please [reach out to me](#) or any member of the [Barley Snyder Employment Practice Group](#).