Practical Guidance for Employers on Confidentiality Provisions That Survive NLRB Scrutiny

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I. Introduction

From roughly 2004 through 2017, nearly every employer in America needed to revise its employee handbooks to comply with the slew of cases coming out of the National Labor Relations Board on the subject. From rules mandating civility or confidential investigations to those prohibiting false statements, the Board struck down policies left and right under the Lutheran Heritage1 test. Employers struggled to discern the Board’s distinctions between lawful and unlawful policies, except to conclude that most policies violated the Act and that they might be better off with no handbook. The Board smacked down so many rules based on seemingly invisible distinctions under Lutheran Heritage that the test earned clever nicknames: “the handbook Sphinx” that devoured any policy that could not meet its impossible riddle; or, for Monty Python fans, the Bridgekeeper, whose three questions one must answer correctly or be cast into the Gorge of Eternal Peril.2

Attorneys that advise employers can attest to the frustration of trying to explain to their clients why they could not continue to maintain common-sense policies over which no employee expressed confusion. Employers endeavored to walk a fine line to comply with the competing guidance from the Board on what conduct remains protected by the Act.

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1. Lutheran Heritage Village-Livonia, 343 N.L.R.B. 646, 646–47 (2004) (holding that an employer handbook rule violates the NLRA even where the “(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights”).

2. Full credit for the Sphinx metaphor goes to former NLRB Member Harry I. Johnson, III. I can’t take credit for the Monty Python metaphor either, but I can’t remember where I heard it for proper attribution. The Bridgekeeper and his riddle are in MONTY PYTHON AND THE HOLY GRAIL (Python (Monty) Pictures 1975).
and the Equal Employment Opportunity Commission regarding the duty to maintain a workplace free from harassment.\(^3\)

Then in December 2017, the newly formed Republican majority of the Board articulated a revised standard for evaluating work rules in Boeing.\(^4\) The new test promised a more balanced, practical approach to work rules that recognized the complexities of the modern workforce and the legitimate interests of employers in protecting their employees and property. However, in the more than seventeen months since the Board’s decision in Boeing, the Board has yet to issue another decision applying the Boeing balancing test.\(^5\) Thus, employers must wait to understand the full impact of Boeing.

This article explores Boeing’s potential impact on one area of the Board’s work-rule law that has proved particularly difficult for employers to navigate: confidentiality policies. Employers use confidentiality policies in multiple aspects of managing their workforces, from protecting trade secrets to complying with the EEOC’s mandates for confidential harassment investigations, to seeking confidentiality in settlements, severance agreements, and arbitration agreements. This article explores the bounds of permissible language in such provisions by examining Boeing with a combination of existing case law, General Counsel guidance, and practical experience.

Part II provides a brief analysis of Lutheran Heritage and Boeing before discussing other sources of guidance for employers seeking to read the tea leaves on work rules. Part III explores confidentiality provisions in four key areas in an effort to provide employers guidance:

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3. Although this article focuses on confidentiality rules, Board law’s conflict with Title VII bears special mention. D.C. Court of Appeals Circuit Judge Patricia A. Millet wrote a concurrence that explains the issue well in Consolidated Communications, Inc. v. NLRB, 837 F.3d 1, 21–24 (D.C. Cir. 2016). There, the court affirmed the Board’s decision that one employee grabbing his crotch toward another employee was protected activity under the NLRA because the conduct occurred on a picket line. Id. at 11–12. Discussing other decisions where the Board prohibited employers from disciplining employees for racially and sexually harassing behavior, Judge Millet remarked that the Board’s decisions “have repeatedly given refuge to conduct that is not only intolerable by any standard of decency, but also illegal in every other corner of the workplace.” Id. at 20 (Millet, J., concurring). For a detailed discussion of this issue, see Marion Crain & Ken Matheny, Sexual Harassment and Solidarity, 87 GEO. WASH. L. REV. 56, 109–12 (2019); Michael H. LeRoy, Slurred Speech: How the NLRB Tolerates Racism, 8 COLUM. J. RACE & L. 209 (2018).


5. As of the date of this writing on May 27, 2019. In Advancepierre Foods, Inc., 366 N.L.R.B. No. 133, slip op. at 1 n.4 (July 19, 2018), the Board cited Boeing in finding a work rule facially unlawful and unlawful as the employer promulgated it in response to union activity, but those two aspects of Lutheran Heritage remain unchanged in Boeing. See also Pae Applied Techs., LLC, 367 N.L.R.B. No. 105 n.6 (Mar. 8, 2019) (similar result). In UPMC, 366 N.L.R.B. No. 142 (Aug. 6, 2018), the Board found a solicitation and distribution policy unlawful, but under longstanding board law regarding such policies that remain unchanged in Boeing.
(1) workplace investigations, (2) proprietary and other sensitive information, (3) severance and settlement agreements, and (4) arbitration agreements.

II. Background: From Lutheran Heritage to Boeing
A. Lutheran Heritage

For more than a decade, the Board analyzed the legality of handbook and other work rules under the test set forth in Lutheran Heritage Village-Livonia,6 Under that test, the Board first asked “whether the rule explicitly restrict[ed] activities protected by Section 7.”7 If yes, the Board deemed the rule unlawful.

If the rule did not explicitly restrict Section 7 activity, then the Board would find that the rule violated the Act if the charging party could show that “(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.”8

In applying that test in Lutheran Heritage, the Board found lawful a rule prohibiting “abusive and profane language.”9 The Board reasoned that “verbal abuse and profane language” were not “an inherent part of Section 7 activity”; thus the rule did not prohibit Section 7 activity on its face.10 The Board noted that, in some cases, Section 7 activity involves such language, but nevertheless found that “a reasonable employee reading these rules would not construe them to prohibit conduct protected by the Act,” even though “the rule could be interpreted that way.”11 The Board further noted that “the rules serve legitimate business purposes: they are designed to maintain order in the workplace and to protect the [employer] from liability by prohibiting conduct that, if permitted, could result in such liability.”12

Despite the Board’s balanced, practical approach to evaluating the work rule in Lutheran Heritage, the Board did not continue to apply the test in such a manner. Specifically, under the first prong—the “reasonably construe” test—the Board tended to find unlawful policies that employees might possibly interpret to prohibit protected concerted activity and to downplay (or ignore) the employer’s legitimate purposes behind the rule.13 Indeed, since Lutheran Heritage, countless Board

7. Id. at 646.
8. Id. at 647.
9. Id. at 646–47.
10. Id. at 647.
11. Id.
12. Id.
panels and Administrative Law Judges have struck down employer’s work rules under the “reasonably construe” test.\(^\text{14}\)

Under the Board’s application of the reasonably construe test, the difference between a lawful and unlawful policy often turned on nearly invisible distinctions. For example, under the “reasonably construe” test, the agency found unlawful rules that required employees to “[b]e respectful of others and the Company”;\(^\text{15}\) prohibited employees from using “loud, abusive, or foul language”;\(^\text{16}\) and “recommend[ed]” that employees not discuss HR investigations with other employees.\(^\text{17}\)

At the same time, the agency found lawful similar rules, such as the following: “Each employee is expected to work in a cooperative manner with management/supervision, coworkers, customers and vendors”;\(^\text{18}\) No “abusive or threatening language to anyone on Company premises”;\(^\text{19}\) “Be thoughtful in all your communications and dealings with others.”\(^\text{20}\)

Numerous legal analysts commented on and attempted to explain the seemingly irreconcilable decisions.\(^\text{21}\) Indeed, the “handbook Sphinx” and “handbook Bridgekeeper” nicknames are humorous only because they aptly describe the impressions with which the Board’s holdings in this area leave employers.

B. Boeing

In December 2017, in an effort to bring clarity and common sense to the area, the Board articulated a new test for facially neutral handbook rules “that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights.”\(^\text{22}\) When evaluating such rules, the Board now balances “(i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated

\(^{14}\) See, e.g., id. slip op. at 1 (“Most of the cases decided under Lutheran Heritage have involved the Lutheran Heritage “reasonably construe” standard.”); Office of the Gen. Counsel, Nat’l Labor Relations Bd., Memorandum GC 15-04, Report of the General Counsel Concerning Employer Rules 2 (2015) [hereinafter GC Mem. 15-04] (rescinded) (“In our experience, the vast majority of violations are found under the first prong of the Lutheran Heritage test.”).

\(^{15}\) GC Mem. 15-04, supra note 14, at 7.


\(^{18}\) GC Mem. 15-04, supra note 14, at 9.

\(^{19}\) Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. NLRB, 253 F.3d 19, 27 (D.C. Cir. 2001).

\(^{20}\) GC Mem. 15-04, supra note 14, at 28.


The Board emphasized that, in the analysis, it would “strike the proper balance between . . . asserted business justifications and the invasion of employee rights.”

The Board in Boeing stated that the balancing would result in three categories of rules:

- **Category 1**: Rules that the Board deems “lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule.”

- **Category 2**: “[R]ules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.”

- **Category 3**: Rules that the Board deems “unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.”

The Board also articulated a few other key points for analyzing work rules under the new standard. First, “the Board may differentiate among different types of NLRA-protected activities (some of which might be deemed central to the Act and others more peripheral),” as well as business justifications with a “direct, immediate relevance to employees or the business” or those “having more peripheral importance.” In doing so, the Board may take into account “different industries” and “work settings” as well as “particular events that may shed light on the purpose” of the rule. That means that employers defending their rules should marshal evidence of the specific context in which they apply the rule to help explain the rule’s significance in their workplace.

Second, the Board made clear that it will continue to analyze rules from “the employees’ perspective.” However, it seems clear that the current Board majority will use a different employee as a measuring stick than the prior Democratic-controlled Board. Notably, Member Kaplan stated that the Board should view rules from “the perspective of an objectively reasonable employee who is ‘aware of his legal rights

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23. Id.
25. Id.
26. Id.
27. Id.
28. Id. at 15.
29. Id.
30. Id. at 16.
but who also interprets work rules as they apply to the everydayness of his job.”31

Third, the Board will no longer interpret ambiguities in the rule against the drafter.32 The Board emphasized that it will deem rules ambiguous and apply the balancing test only if reasonable employees would read the rule to apply to Section 7 activity, and not merely if employees might possibly read the rule that way.33

The Board applied its new test to a rule at Boeing’s facility that prohibited the use of recording devices on its property without prior approval (the “no-camera rule”). The Board found the rule justified as an “integral component of Boeing’s security protocols,” which were necessary to comply with government rules for performing classified work, conform to export control laws, protect highly sensitive proprietary information, and “limit[] the risk of Boeing becoming a target of a terrorist attack.”34 The Board further found that “the adverse impact of Boeing’s no-camera rule on NLRA-protected activity” to be “comparatively slight.”35 The Board reasoned that most of the blocked images or videos would not implicate NLRA rights and that employees could still engage in protected activity—they simply could not photograph or video themselves or others doing so.36 Thus, the Board found Boeing’s no-camera policy lawful.

The majority went further and expressly overruled cases holding “that it violates the Act to maintain rules requiring employers to foster ‘harmonious interactions and relationships’ or to maintain basic standards of civility in the workplace.”37 In other words, the Board held that most basic workplace civility policies were now lawful under the NLRA.38

C. General Counsel’s Guidance.

Following Boeing, General Counsel Peter Robb issued a memorandum offering the Regions (and practitioners) guidance on application of the new standard.39 Significantly, the memo placed several rules into Boeing’s three categories, providing employers guidance on the GC office’s enforcement priorities. Under “Category 1: Rules that are Generally Lawful to Maintain,” the memo placed the following kinds of rules:

31. Id. at 3 n.14.
32. Id. at 9 n.43.
33. Id.
34. Id. at 17, 18.
35. Id. at 19.
36. Id.
37. Id. at 14 n.15.
38. For a thorough discussion of the Board’s pre-Boeing jurisprudence on civility rules, see Dagen-Sunsdahl, supra note 21.
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- Civility rules;
- No-photography and no-recording rules;
- Rules against insubordination, non-cooperation, or on-the-job conduct that adversely affects operations;
- Disruptive behavior rules;
- Rules protecting confidential, proprietary, and customer information or documents;
- Rules against defamation or misrepresentation;
- Rules against using employer logos or intellectual property;
- Rules requiring authorization to speak for the company;
- Rules banning disloyalty, nepotism, or self-enrichment.\textsuperscript{40}

The memo’s inclusion of all no-recording rules in Category 1 bears noting because in \textit{Boeing}, the employer showed significant, industry-specific justifications for its no-recording rule that included significant national security concerns. Not all employers may have such weighty interests in preventing recording, but the memo tells Regions not to prosecute such cases anyway.

Under Category 2, rules which require a case-by-case determination, the memo placed:

- Broad confidentiality rules that do not violate the Act on their face;
- Rules against criticizing the employer (as opposed to employees);
- Rules against using the employer’s name (as opposed to logo/trademark);
- Rules against speaking to the media or third parties;
- Rules banning off-duty conduct;
- Rules against false or inaccurate statements (that do not qualify as defamatory).\textsuperscript{41}

Employers should thus carefully scrutinize those kinds of rules for compliance.

In Category 3 (automatically unlawful rules), the memo identified rules that will come as no surprise to NLRA-savvy employers, including rules that specifically ban discussing wages and joining outside organizations.\textsuperscript{42}

\begin{itemize}
\item \textsuperscript{40} \textit{Id.} at 2–15.
\item \textsuperscript{41} \textit{Id.} at 16–17.
\item \textsuperscript{42} \textit{Id.} at 17.
\end{itemize}
D. Reading the Tea Leaves

Until the Board applies Boeing’s balancing test in another decision, employers must mine for clues on how the current Board will come out on work rules in the Boeing decision itself, the handful of ALJ decisions applying the case, the General Counsel’s memo, and prior dissents. On that front, Member Miscimarra’s dissent in William Beaumont Hospital\(^\text{43}\) may provide some guidance. There, Member Miscimarra suggested the following legitimate business justifications for a particular rule:

the prevention of discrimination or harassment on the basis of sex, race, age, disability, or other protected factors; the avoidance of workplace violence; efforts to foster occupational safety and health; the protection of trade secrets, intellectual property and customer or client information; and a desire to foster respect, cooperation and courtesy between and among employees (who work in increasingly diverse work forces) or to promote these same qualities in dealings with customers, clients, vendors, and the general public.\(^\text{44}\)

Thus, employers with those justifications for their rules may take some comfort that at least one influential member of the Board found them legitimate.

Further, General Counsel Peter Robb listed a number of other work rules in his Mandatory Submissions to Advice, signaling disagreement with existing Board law.\(^\text{45}\) Specifically, the General Counsel listed “common employer handbook rules found unlawful,” including “[r]ules requiring employer to maintain the confidentiality of workplace investigations.”\(^\text{46}\) He also rescinded the prior General Counsel’s memorandum providing guidance on employer work rules.\(^\text{47}\)

However, cautious employers are also mindful that the Board may swing back to its prior interpretations of work rules if President Trump does not win re-election in 2020. Therefore, employers should continue to weigh guidance from pre-Boeing decisions and Democratic Board members, including Member McFerran, who wrote that “[o]ne such factor,” to consider in drafting work rules “is the practice of drafting rules that clearly communicate to employees the legitimate employer interests behind the rules and that are narrowly tailored to serve those interests.”\(^\text{48}\)


\(^{44}\) Id. at 19 n.57 (Apr. 13, 2016) (Miscimarra, Member, concurring in part, dissenting in part).

\(^{45}\) Office of Gen. Counsel, Nat’l Labor Relations Bd., Memorandum GC 18-02, Mandatory Submissions to Advice (2017) [hereinafter GC Mem. 18-02].

\(^{46}\) Id. at 2.

\(^{47}\) Id. at 5 (rescinding GC Mem. 15-04, supra note 14).

\(^{48}\) The Boeing Co., 365 N.L.R.B. No. 154, at 43 (Dec. 14, 2017) (McFerran, Member, dissenting).

Employers frequently rely on confidentiality provisions to protect everything from sensitive intellectual property to employees who raised internal complaints. And employers routinely include such provisions in settlement and other agreements as is common business practice. However, under Lutheran Heritage’s reasonably construe test, the Board often tossed confidentiality provisions into the Gorge of Eternal Peril. This section examines current Board law and the limited guidance on how the Board will interpret such policies under Boeing to provide employers assistance in drafting four key confidentiality provisions: (1) workplace investigations, (2) proprietary and other sensitive information, (3) severance and settlement agreements, and (4) arbitration agreements.

A. Confidential Workplace Investigations

The Board’s law regarding confidential workplace investigations has proven particularly challenging for employers because of the nature of such investigations and Title VII’s conflicting requirements. Workplace investigations inherently involve sensitive issues ranging from simple rudeness to sexual harassment; petty theft to large-scale embezzlement. At stake are individuals’ jobs or their entire careers; lost profits or the future of the entire company. From the perspective of the employee reporting an issue, the employee may want or need confidentiality for a variety of reasons, including embarrassment or shame connected with having to divulge what they experienced and protecting their identity for fear of retaliation or reputational harm. Indeed, a victim or whistleblower may not come forward at all without confidentiality assurances. The employee being investigated has similar confidentiality interests, for fear of being falsely accused or the ramifications of their misconduct outside the workplace. For the employer, the company may want or need to keep the investigation confidential to protect the integrity of the investigation, or to protect itself from liability, government scrutiny, investor backlash, and other concerns.

Further, in the harassment and discrimination context, the EEOC believes that investigations should be as confidential as possible to encourage victims to come forward and protect against retaliation. The EEOC tells employers that their “anti-harassment policy and complaint procedure should contain, at a minimum . . . [a]ssurance that the employer will protect the confidentiality of harassment complaints to the extent possible,” among other items. The EEOC further advises that “information about the allegation of harassment should

be shared only with those who need to know about it.\textsuperscript{50} The EEOC’s guidance is not just good investigatory practice; it finds its roots in the Ellerth-Faragher Supreme Court cases,\textsuperscript{51} which provide employers a defense to a harassment claim if, among other proactive measures, the employer implemented a reporting mechanism, prompt investigation, and adequate remedial measures to prevent future conduct.\textsuperscript{52}

Against this backdrop, Board law places a limit on the extent to which employers can maintain confidentiality over workplace investigations. Simply stated, the Board holds that employers cannot require that employees keep all workplace investigations confidential.\textsuperscript{53} In Banner Estrella Medical Center, the Board held that “an employer may restrict [discussions of discipline or ongoing disciplinary investigations] only where the employer shows that it has a legitimate and substantial business justification that outweighs employees’ Section 7 rights” to discuss such investigations.\textsuperscript{54} Thus, an employer cannot rely on a blanket confidentiality policy to protect its workplace investigations but must conduct a case-by-case analysis in each case to determine whether a specific investigation warrants confidentiality.\textsuperscript{55}

Further, employers must show that their concerns actually applied to the specific investigation at issue. For example, in Phoenix Transit Systems, the Board held that the employer violated the Act “by maintaining a confidentiality rule prohibiting employees from discussing their sexual harassment complaints among themselves.”\textsuperscript{56} The employer first instituted the rule during a two-week investigation into sexual harassment by a supervisor by telling a group of employees not to discuss the investigation after interviewing them in a group setting.\textsuperscript{57} The employer then continued to maintain the rule two years after the investigation.\textsuperscript{58} Thus, the Board held that the employer “failed to establish a legitimate and substantial justification for its rule” given the setting in which the employer promulgated the rule and the length of time after the investigation.\textsuperscript{59}

\textsuperscript{50} Id.
\textsuperscript{52} Ellerth, 524 U.S. at 753; Faragher, 524 U.S. at 807.
\textsuperscript{53} See, e.g., Banner Estrella Medical Center, 362 N.L.R.B. 1108, 1109 (2015).
\textsuperscript{54} Id. (citing Hyundai Am. Shipping Agency, 357 N.L.R.B. 860, 874 (2011)).
\textsuperscript{55} Id. at 1109–10; see also Hyundai Am. Shipping Agency, 357 N.L.R.B. 860, 860, 873–74 (2011) (affirming the ALJ’s finding that the employer failed to meet its burden to show a legitimate justification for its confidential-investigations rule where the employer instructed employees not to discuss the investigation in every investigation, “without any individual review to determine whether such confidentiality is truly necessary”).
\textsuperscript{56} 337 N.L.R.B. 510, 510 (2002).
\textsuperscript{57} Id.
\textsuperscript{58} See id. at 513.
\textsuperscript{59} Id. at 510 (citing Caesar’s Palace, 336 N.L.R.B. 271 (2001)); see also Mobil Oil Exploration & Producing, U.S., Inc., 325 N.L.R.B. 176, 178–79 (1997) (finding that the employer held “exceedingly minimal” confidentiality concerns where the subject of the
Significantly, whether an employer uses mandatory or prefatory language in its confidential investigations policy does not alter the analysis. In a 2015 decision involving Boeing, the Board held unlawful a confidentiality notice issued during all HR investigations “recommend[ing]” that employees “refrain from discussing” the investigation. The Board treated “recommend” as equivalent to “request” and held it violated the Act because the employer made no case-specific determination that the “particular circumstances of an investigation created legitimate concerns of witness intimidation or harassment, the destruction of evidence, or other misconduct tending to compromise the integrity of the inquiry.”

Although the Republican majority of the Board has yet to speak directly on the issue, General Counsel Peter Robb has explicitly stated that he “might want to provide the Board with an alternative analysis” in cases involving “[r]ules requiring employees to maintain the confidentiality of workplace investigations,” citing Banner Estrella. And Member Miscimarra stated that “the prevention of discrimination or harassment” constituted a legitimate business reason.

Nevertheless, cautious employers will continue to follow the existing Board law until the Board provides more specific guidance. To that end, employers should continue to evaluate each investigation to determine whether to implement a confidentiality rule based on the circumstances at issue. It is worth noting that the Board has found confidential-investigation instructions lawful in cases involving “allegations of a management coverup [of drug activity in the workplace] and possible management retaliation, as well as threats of violence.” In those cases, the employers demonstrated that the specific wrongdoing under investigation caused concerns for witness or evidence tampering and employee safety, beyond the generalized concerns present in all investigations.

It is also worth noting that an employer may almost never instruct an employee not to discuss a disciplinary matter, even if the matter is under investigation. For example, in Costco Wholesale Corp., the Board found the employer violated the Act by instructing an employee “not to speak to anyone” about an altercation the employee had with

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61. Id. at 1790.
62. GC Mem. 18-02, supra note 45, at 2.
63. William Beaumont Hosp., 363 NLRB slip op. at 19 n.57 (Apr. 13, 2016) (Miscimarra, Member, concurring in part and dissenting in part).
65. 366 NLRB No. 9, slip op. at 1 n.3 (Feb. 2, 2018).
other employees. The Board adopted the ALJ’s finding that the employer “did not offer any evidence” that it possessed legitimate justifications for its confidentiality rule.66 The Board did not expressly cite Boeing but instead upheld the ALJ’s decision on a narrow ground, stating that “the violation here involves an unlawful instruction to refrain from discussing a disciplinary matter and not the promulgating of a work rule.”67 Nevertheless, Costco teaches that, even post-Boeing, employers should always present evidence of their justifications for requesting confidentiality in an investigation.

Of course, employers seeking to comply with EEOC guidance should also remember that the Board’s law on confidentiality rules for workplace investigations applies only to rules promulgated to employees. Those cases do not prevent an employer from requiring Section 2(11) supervisors to maintain confidentiality over investigations.68

One final point about workplace investigations bears noting. Under existing Board law, in a confidential investigation, it’s not clear if an employer must explain to the employee its justifications for requiring the employee to keep the investigation confidential. But wise employers will do so, absent a specific reason not to, as numerous Board cases suggest that such explanations help to establish an employer’s legitimate justifications.69 At the very least, employers should document the reasons at the time of the investigation as evidence that the employer considered the issue on an individualized basis, should they need to defend their decision.

1. Proprietary and Other Sensitive Information

A second area of contention between employers and the Board centers around employers’ definitions of confidential information that employees may not disclose. Such provisions make good sense to employers: employees often obtain access to highly confidential proprietary business and customer information, personally identifying information about employees and customers, and other sensitive information that could damage the employer if disclosed. Indeed, to protect

66. Id. at 1 n.3, 5.
67. Id. at 1 n.3.
69. See, e.g., The Boeing Co., 365 N.L.R.B. No. 154, at 43 (Dec. 14, 2017) (McFerran, Member, dissenting) (signaling approval for employers that “draft[] rules that clearly communicate to employees the legitimate employer interests behind the rules and that are narrowly tailored to serve those interests”); Dish Network, LLC, 365 N.L.R.B. No. 47, slip op. at 3 (Apr. 13, 2017) (noting that the employer instructed an employee “not to discuss his suspension with other employees” but that the record did “show that the [employer] offered any justification for its instruction”); Phoenix Trans. Sys., 337 N.L.R.B. 510, 510, 512–13 (2002) (agreeing with the ALJ’s reasoning that the employer “gave no explanation for [the] instruction” to employees not to discuss the investigation and offered no justification for maintaining the rule years after the investigation concluded).
trade secrets and limit liability for data breaches, the law requires employers to keep certain information confidential.

Before *Boeing*, the Board would find unlawful any definition of confidential information that employees *could* read to encompass Section 7 activity. Employees have a right to discuss terms of conditions of employment and in some circumstances to obtain the names and contact information of other employees from their employer’s records. Thus, the Board applied *Lutheran Heritage* to find policies that employees might read to prohibit disclosure of that information violated the Act.70

However, pre-*Boeing*, the Board would find lawful definitions of confidential information that provided specific examples to employees that made clear the policy did not prevent them from discussing terms and conditions of employment.71

Employers should continue to draft definitions of confidential information narrowly and with caution. The General Counsel’s memo on workplace rules under *Boeing* places such rules in all three

70. See, e.g., Verizon Wireless, 365 N.L.R.B. No. 38, slip op. at 1 (Feb. 24, 2017) (finding unlawful a policy that prohibited the disclosure of “personal employee information, including social security numbers, identification numbers, passwords, financial information and residential telephone numbers and addresses”); Cy-Fair Volunteer Fire Dept, 364 N.L.R.B. No. 49, slip op. at 1, 6 (July 15, 2016) (finding unlawful a policy prohibiting the disclosure of confidential and proprietary information defined as “[i]nformation gathered in conversations, e-mails and meetings”); Boch Imports, Inc., 362 N.L.R.B. 706, 706 n.4 (2015) (finding unlawful a policy that banned disclosure of the following information because of the italicized words: “all information that has or could have commercial value or other utility in the Company’s business; the identity of the Company’s customers, suppliers, and/or prospective customers and suppliers; compensation structures and incentive programs; Company policies, procedures, and litigation activity”); Freund Baking Co., 336 N.L.R.B. 847, 847 (2001) (finding unlawful a handbook provision that prohibited employees from disclosing “proprietary information” which meant “all information obtained by the employees during the course of their work”).

71. See, e.g., Macy’s, Inc., 365 N.L.R.B. No. 116, slip op. at 3–4 (Aug. 14, 2017) (finding lawful a policy that prohibited disclosure of “personal data of its . . . customers . . . such as names, home and office contact information, social security numbers, driver’s license numbers, account numbers and other similar data”); Minteq Int’l, Inc., 364 N.L.R.B. No. 63, slip op. at 6 (July 29, 2016) (finding lawful a policy prohibiting disclosure of “any proprietary or confidential information or know-how belonging to the company,” that is “not generally known in the relevant trade or industry,” and which the employee “obtained from the Company . . . in the scope of [his or her] employment” such as “software, technical and business information relating to the Company inventions or products, research and development, production processes, manufacturing and engineering processes, machines and equipment, finances, customers, marketing, and production and future business plans”); Mediaone of Greater Fla., Inc., 340 N.L.R.B. 277, 278 (2003) (finding lawful a policy that prohibited disclosure of “company and third party proprietary information, including *information assets* and *intellectual property*. Information is any form (printed, electronic or inherent knowledge) of company or third party proprietary information. Intellectual property includes, but is not limited to: business plans, technological research and development, . . . trade secrets and non-public information, customer and employee information, including organizational charts and databases, financial information, patents, copyrights, trademarks, service marks, trade names and goodwill”).
categories, depending on their specific content. The General Counsel believes that confidentiality rules fall into Category 1 (generally lawful) if they “make no mention of employee or wage information.” However, the General Counsel placed in Category 2 (intermediate scrutiny) confidentiality rules that “broadly encompass[] ‘employer business’ or ‘employee information.’” And, of course, confidentiality rules should never expressly prohibit discussion of wages, benefits, or other terms and conditions of employment.

2. Confidential Severance and Settlement Agreements

The Board’s approach to confidentiality provisions in settlement or severance agreements does not differ dramatically from its approach to other confidentiality provisions. But it bears noting because (1) employers often include such provisions in those kinds of agreements as a matter of course because they include confidentiality provisions in other kinds of settlement agreements, and (2) the Board appears poised to change course on this issue.

Under existing Board law, the Board closely reviews such provisions in agreements with employees to ensure that they don’t unduly infringe on Section 7 rights. For example, in S. Freedman & Sons, Inc., the Board held that the employer lawfully included a confidentiality clause in a settlement agreement because the confidentiality clause was “narrowly tailored to the facts giving rise to the settlement and the employee receive[d] some benefit in return for the waiver”—reinstatement for a terminable offense. The waiver in that case prohibited the employee from discussing only the terms of the settlement leading to his reinstatement, not any future discipline. The Board noted that it will find unlawful “settlements that prevent a signatory employee from exercising rights that are unrelated to the facts giving rise to the settlement.”

In contrast, in Baylor University Medical Center, an ALJ applied the Boeing balancing test to find unlawful the following confidentiality provision in a separation agreement:

[Employee] agrees . . . she must . . . keep secret and confidential and not . . . utilize in any manner all . . . confidential information of . . . [Baylor] or any of the Released Parties made available to her during her . . . employment . . . , including . . . information concerning

72. See GC Mem. 18-04, supra note 39, at 9–11.
73. Id. at 9.
74. Id. at 17.
75. Id. 17–18.
76. 364 N.L.R.B. No. 82 (Aug. 25, 2016).
77. Id. at 2.
78. Id.
79. Id. (citing cases that held unlawful a clause that prohibited assisting other employees from prosecuting claims against the employer).
The ALJ reasoned that employees would construe the provision to ban discussion of wages and conditions of employment. The ALJ further rejected the employer’s argument that the rule “protect[ed] against former employees divulging private health-care related information” because the provision expanded far beyond such information.

Notably, in an earlier procedural decision in the same Baylor University case, Members Emanuel and Kaplan stated their “belie[f] that . . . the legality of confidential severance agreements for former employees should be reconsidered.” Until then, however, employers must continue to evaluate the breadth and necessity of such provisions and narrowly tailor them to the extent possible.

3. Confidential Arbitration Agreements

Finally, confidentiality provisions in arbitration agreements merit discussion given the recent developments in this area. Following the Supreme Court’s decision in Epic Systems Corp. v. Lewis, many employers undertook to reexamine their existing arbitration agreements or implement such agreements for the first time. A number of pre-Boeing decisions reflect the Board’s view that confidentiality provisions in arbitration agreements violate the Act, at least when they broadly prohibit any discussion of the subject matter of the arbitration or the decision of the arbitrator.

For example, in California Commerce Club, Inc., the Board found unlawful a provision in an arbitration agreement that provided that “the arbitration shall be conducted on a confidential basis and there shall be no disclosure of evidence or award/decision beyond the arbitration proceeding.” The majority agreed with the ALJ’s rationale that the provision “explicitly limit[ed] employees’ right to discuss terms and conditions of employment such as wages” because it was not limited to the arbitration proceeding itself, but expanded to include the “very events or circumstances that g[a]ve rise to the arbitration proceedings.” Notably, former Member Miscimarra concurred in the Board’s decision but found the confidentiality provision unlawful on a narrower basis. In his view, the provision appeared to preclude “discussions and coordination between or among two or more employees.

81. Id. slip op. at 2.
82. Id. at 4.
83. Id.
84. Case No. 16-CA-195335, 2017 WL 6728887, slip op. at 1 n.2 (NLRB Dec. 27, 2017).
85. 138 S. Ct. 1612, 1619 (2018) (holding that class action waivers in employment arbitration agreements did not violate the National Labor Relations Act).
86. 364 N.L.R.B. No. 31, slip op. at 1, 5 (June 16, 2016).
87. Id. at 9.
regarding employment-related disputes, including those that may be resolved by arbitration.\textsuperscript{88}

Similarly, in \textit{Jack in the Box, Inc.}, the Board affirmed the ALJ’s finding that the following confidentiality clause in an arbitration agreement violated the Act: “The Arbitrator’s decision is confidential. Neither Employee nor the Company may publicly disclose the terms of the award” except in certain narrow circumstances.\textsuperscript{89} The Board affirmed without comment the ALJ’s rationale that the clause “reasonably implies that employees cannot discuss with each other the facts of the case, the respective merits of the parties’ positions, their motivation in seeking relief, or the award rendered regarding any arbitration proceeding.”\textsuperscript{90} Miscimarra concurred with that ruling because the clause “would preclude all public discussion . . . of employment-related matters addressed in arbitral decisions, including discussions that constitute [protected] concerted activity . . . and the record reveals no countervailing interest that justifies the impact on NLRA-protected rights.”\textsuperscript{91}

The Fifth Circuit denied enforcement, reasoning that “in finding [the employer’s] confidentiality rule in this case to be unlawful, the NLRB failed to follow its own precedent and to consider the actual verbiage of the rule at issue.”\textsuperscript{92} The Fifth Circuit did not fully explain its rationale, but appeared to hinge its decision on the fact that the ruling ran counter to the Fifth Circuit’s decisions in \textit{Murphy Oil}, and \textit{D.R. Horton},\textsuperscript{93} and the fact that the arbitration agreement at issue expressly permitted employees to file unfair labor practice charges with the Board.\textsuperscript{94}

Finally, in \textit{Dish Network, LLC},\textsuperscript{95} the Board found unlawful a provision in an arbitration agreement that deemed confidential “all arbitration proceedings, including but not limited to hearings, discovery, settlements, and awards.” The Board found such a rule “prohibit[ed]
the discussion of terms and conditions of employment." Miscimarra, at this time, acting chairman, concurred in the finding on the grounds that the arbitration agreement "encompassed unfair labor practice claims" and that employees had a right to discuss such claims. However, Miscimarra also opined that "[t]here may be circumstances where an arbitration agreement’s confidentiality provision may be lawful based on justifications unrelated to the NLRA, particularly when the matter being arbitrated does not implicate NLRA-protected activity." Miscimarra cited to Professional Janitorial Service of Houston, where he emphasized (pre-Boeing) the importance of striking the proper balance between business justifications and NLRA rights. Thus, perhaps Miscimarra would find sufficient justification for a confidentiality provision in an arbitration agreement, where the arbitration concerned trade secrets or classified information. Significantly, on enforcement, the Fifth Circuit remanded the case for further reconsideration in light of Boeing.

Although the Board has yet to take up the issue, one ALJ recently found a confidentiality clause in an arbitration agreement unlawful under Boeing. In Pfizer, Inc., the confidentiality clause at issue provided:

The parties shall maintain the confidential nature of the arbitration proceeding and the award, including all disclosures in discovery, submissions to the arbitrator, the hearing, and the contents of the arbitrator’s award, except as may be necessary in connection with a court application for a temporary or preliminary injunction in aid of arbitration or for the maintenance of the status quo pending arbitration, a judicial action to review the award on the grounds set forth in the FAA, or unless otherwise required or protected by law or allowed by prior written consent of both parties. This provision shall not prevent either party from communicating with witnesses or seeking evidence to assist in arbitrating the proceeding. [Nothing in this Confidentiality provision shall prohibit employees from engaging in protected discussion or activity relating to the workplace, such as discussions of wages, hours, or other terms and conditions of employment.] In all proceedings to confirm or vacate an award, the parties will cooperate in preserving the confidentiality of the arbitration proceeding and the award to the greatest extent allowed by applicable law.

96. Id.
97. Id. at 5 (Miscimarra, Acting Chair, concurring).
98. Id. at 5.
99. 363 N.L.R.B. No. 35, slip op. at 5 n.7 (Nov. 24, 2015) (Miscimarra, Member, concurring in part and dissenting in part).
101. 731 F. App’x 368, 369 (5th Cir. 2018) (per curiam).
ALJ Locke concluded that the provision violated the Act.\(^{103}\) In so holding, he distinguished *Epic Systems* on the grounds that an employee’s right to discuss conditions of employment is a substantive right, not a procedural one (like the right to bring a class action), and because he rejected the argument that confidentiality is a “fundamental attribute” of arbitration.\(^{104}\) The ALJ then found that the clause restricted employees’ ability to discuss working conditions, even with the limiting clause in brackets, because the limiting clause made no exception that allowed employees to discuss “the arbitration proceeding itself.”\(^{105}\) The ALJ then rejected the employer’s justification that the rule was necessary to promote “trust and confidence in the arbitration process.”\(^{106}\) The ALJ ultimately concluded that the rule fell into *Boeing* Category 3 because it prohibited employees from discussing a condition of employment and was not outweighed by the employer’s claimed justification.\(^{107}\) As of this writing, the parties are in the middle of briefing on the employer’s and General Counsel’s exceptions to the ALJ’s decision.\(^{108}\) It remains to be seen how the Board will settle on the issue of confidential arbitrations following *Epic* and *Boeing*, but it may decide that narrowly tailored confidentiality provisions pass muster when supported by legitimate business justifications. Until then, cautious employers should omit confidentiality policies from their arbitration agreements or at least narrowly define what employees must keep confidential.

IV. Conclusion

*Boeing* promises to bring predictability and common sense to Board law over workplace rules, once the Board issues additional decisions applying the framework. Until then, cautious employers will continue to carefully draft work rules based on prior Board decisions. And, given the Board’s tendency to swing ideologically when the opposite party takes control of the White House, the most efficient course for employers may be not to revise any work rules drafted to comply with the old *Lutheran Heritage* framework. That said, employers seeking to increase protection for workplace investigations and proprietary information, or to implement confidential arbitration procedures, should hew closely to the available Board guidance for confidentiality provisions. That includes articulating case-specific justifications for requiring employees to keep workplace investigations confidential and documenting the justifications for confidentiality provisions.

\(^{103}\) *Id.* slip op. at 51.

\(^{104}\) *Id.* at 8, 10–12, 27–31.

\(^{105}\) *Id.* at 38–39, 42.

\(^{106}\) *Id.* at 44–45.

\(^{107}\) *Id.* at 50.