NLRB Rules Blanket Requests for Confidentiality in Workplace Investigations Unlawful

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Mark Twain reportedly said that "a lie can run around the world six times while the truth is still trying to put on its pants." If Twain had ever conducted a workplace investigation, he might have more accurately remarked that the truth is actually still in bed wearing pajamas.

By their very nature, workplace investigations concern matters that get people talking. Their subjects include all of the great plot lines of classic literature: romance, betrayal, deceit, misuse of company technology. It's no mystery, therefore, that tales of the office's underbelly spread quickly. Because of this, sensible employers commonly ask those involved in a workplace investigation to not discuss the matter with others. The reasoning is simple: the principle purpose of conducting an investigation is to deduce what *probably* happened by collecting various employee recollections. Discussions amongst employees can alter recollections, affecting the integrity of the investigation. Such discussions may also intimidate or discourage employees from cooperating with the investigation. In other words, without confidentiality, the truth may never get out of bed.

Banner Health System **Limits Employers' Ability to Request Confidentiality in Investigations**

In *Banner Health System d/b/a Banner Estrella Medical Center*, 358 NLRB No. 93 (July 30, 2012), the National Labor Relations Board ("Board") expressed its disagreement with employers' long-standing practice of requesting confidentiality during investigations. There, an employee accused of insubordination met with Banner Health System's ("Banner") human resources representative to tell his side of the story. Banner provided its representative with a standard interview form containing an "Introduction for All Interviews," which noted that the investigator should tell employees to not discuss ongoing investigations. The form was never provided to employees. However, as a matter of course, the human resources representative asked the employee to not discuss the investigation with others until she concluded the investigation. She did not threaten disciplinary action if the employee chose to do otherwise.

In a 2-1 decision, the Board found that the representative's confidentiality request "had a reasonable tendency to coerce employees, and so constituted an unlawful restraint of Section 7 rights" under the National Labor Relations Act ("NLRA"). Section 7 grants employees—in both union and non-union workplaces—the right to engage in "concerted activity," including discussing issues related to their wages, hours, and working conditions. The Board reasoned that the general concern of protecting the integrity of an internal investigation is not a sufficient legitimate business justification that outweighs an employee's Section 7 rights. The Board went on to hold that an employer can only request that an employee not discuss the investigation with coworkers if: (1) a witness needs protection; (2) evidence is in danger of being destroyed; (3) testimony is in danger of being fabricated; or (4) there is a need to prevent a cover-up.

Board Member Hays dissented from the majority holding, finding that the instruction not to discuss the investigation was merely a "suggestion." Board Member Hays reasoned that there was no actual "rule" mandating investigation confidentiality, nor were employees threatened with discipline for discussing the investigation. The majority specifically rejected this conclusion, holding that Banner's "blanket" approach to requesting confidentiality based on its "generalized concern with protecting the integrity of its investigation" was too broad to satisfy a legitimate business interest that would outweigh employees' Section 7 rights. Accordingly, the NLRB ultimately concluded that Banner's confidentiality directive violated the NLRA.

Recommendations for Requesting Confidentiality after *Banner Health System*

While the *Banner Health System* decision limits an employer's ability to protect the confidentiality of investigations, it is not a total prohibition against requesting confidentiality. If you are concerned about maintaining confidentiality for your investigations, remember these three key points:

1. Preserving the integrity of an investigation, by itself, no longer justifies restraining employee speech. Under *Banner Health System*, employers and their investigators must do away with routine requests for confidentiality in investigations. Employers should also review existing investigation policies and procedures to determine whether confidentiality provisions could be considered overbroad boilerplate language. Any such language should be replaced with a case-by-case assessment of whether restrictions on employee speech are necessary.

2. Case-specific "legitimate business justifications" will validate employer restraints on employee speech. At the outset of an investigation, employers and investigators should assess whether there is a "legitimate business justification" to ask employees to not discuss the investigation. Do circumstances suggest that evidence will be destroyed if word gets out? Is there reason to believe that the complainant or one of the witnesses is vulnerable to retribution for their cooperation? Is there danger that testimony may be fabricated or a cover-up may be attempted? At least one of these concerns may arise in most cases. However, if none of these concerns reasonably exist, an employer may not request that employees refrain from discussing an investigation. If one or more of these do apply, carefully document the reason(s) for requesting confidentiality.

3. The Board continues unprecedented expansion of the scope of the NLRA in union and non-union workplaces alike. *Banner Health System* evidences a recent paradigm shift in the way the Board views its powers of enforcement. Historically, the Board has focused on unionized workplaces, taking the reactive role of deciding disputes after a petition or charge is filed. In the past few years, the Board is increasingly focused on directing both union and non-union workplaces and proactively filing its own unfair labor practice complaints. The infamous example of this trend is the April 2011 Board-initiated complaint against Boeing seeking to prevent Boeing from moving a production line from Washington to South Carolina. The Board also recently attempted to enact a rule requiring most U.S. employers to post a notice of employees' labor rights. Two federal courts blocked the rule, one specifically scolding the Board that the rule "proactively dictates employer conduct prior to the filing of any petition or charge, and such a rule is inconsistent with the board's reactive role under the [NLRA]." The Board displays a similarly aggressive stance on social media policies. In recent months, the Board issued decisions in multiple social media cases and its Acting General Counsel drafted a series of "guidance memoranda" intended to direct all employers' social media practices. In short, the Board is taking an increasingly proactive stance on labor law enforcement, and non-union workplaces are subject to the same scrutiny historically aimed at union workplaces. As a result, both union and non-union employers may expect to see a rise in Board oversight and unfair labor practice charges, so proceed cautiously before issuing a confidentiality instruction.

Reminder to Employers with Employees in Seattle. The Seattle sick and safe leave ordinance went into effect on September 1st. Employees who work 240 or more hours per year in Seattle are granted leave rights by the new law. Please contact Jeff James at (425) 450-3384 or Jennifer Parda at (425) 450-0495 if you have questions about the new law.

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