

NLRB holds employers may not prohibit employees from discussing ongoing investigations

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SUMMARY

The NLRB has announced yet another extension of its approach to protection of employees' rights under the National Labor Relations Act to share information and to restrict employers' common practice of maintaining confidentiality during internal investigations. Increasingly, as in this case, the Board is focusing on employees who are not represented by unions.

What Happened?

In *Banner Health System d/b/a Banner Estrella Medical Center*, 358 N.L.R.B. No. 93 (2012), the Board, by a 2 to 1 majority, held that an employer may not maintain a blanket rule prohibiting employees from discussing ongoing investigations of employee misconduct because such rules impede employees' right to engage in "concerted activities" for their mutual aid and protection, regardless of whether the employees belong to a union.

In a ruling that affects both union and non-union employers, the National Labor Relations Board held that employers must show a specific and legitimate business reason for requiring employees to maintain confidentiality during internal investigations of employee complaints.

The decision did not address a particular investigation, but rather the general practice and policy adopted by the employer. Banner Health System utilized an employee complaint system in which employees were routinely advised to keep the matter confidential and not discuss their complaints with coworkers during the course of the investigation.

The employer reasoned that the confidentiality is necessary to protect the integrity of all of its internal investigations. The Board majority ruled that a general concern is not valid and an employer must identify a specific need to protect witnesses, avoid spoliation of evidence or fabrication of testimony, or prevent a cover-up, in each individual case rather than maintaining a blanket rule in all cases.

In other cases the Board has recognized the legitimate need to maintain confidentiality including instances where the employer was investigating claims of discrimination, harassment and retaliation under EEO type statutes. These decisions were not expressly overruled by *Banner Health System*. Nor does the decision in *Banner Health System* apply to what is told to managers and supervisors not covered by the NLRA.

What Does It Mean ?

This case seems to ignore the guidance and urging of other agencies, which typically advise that confidentiality is an essential element of safeguarding employees who register complaints and the integrity of investigations to prevent cover-up, destruction of evidence and influencing witnesses. We are aware of at least one report that an EEOC office has admonished employers that they cannot require confidentiality in EEO investigations because that might interfere with employee rights under discrimination laws, or prevent cooperation in the charges by others, but that has not been the usual guidance. As such, a wholesale elimination of such instructions to employees would seem to be an overreaction. The consequences of maintaining such a policy if challenged at the Board carry only a sanction of eliminating the policy except perhaps where an employee is disciplined or discharged and the need for application of the rule was not specifically identified and justified in the particular case.

Employers who have blanket rules may want to avoid the risk of the policies being challenged by adding modifying language to comply with *Banner Health System*.

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