



For your information

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NLRB Limits Confidentiality of Workplace Investigations

In recent months, an active NLRB challenged common policies and business practices in nonunion workplaces relating to at-will employment, dispute resolution, and social media. On July 30, 2012, the NLRB added the confidentiality of ongoing internal investigations to its growing list of “unlawful” employer practices. In light of the NLRB’s recent enforcement activity, employers and human resource professionals may want to review their internal procedures and handbook provisions to determine whether modifications are advisable.

Background

Among other things, Section 7 of the [National Labor Relations Act](#) (NLRA) guarantees most private sector employees the right to organize and “to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” Section 7 protects the rights of both union and nonunion employees to discuss their wages, hours, and other terms and conditions of employment. Section 8(a)(1) makes it unlawful for an employer to interfere with, restrain, or coerce employees in the exercise of those rights.

In recent rulings, the National Labor Relations Board (NLRB or Board), which enforces the NLRA, has taken an increasingly expansive view of what constitutes protected concerted activity. (See our [March 8, 2011](#) and [July 13, 2012](#) *For Your Information* publications.) On July 30, 2012, the NLRB held that a company’s routine policy or practice of asking an employee to not discuss with co-workers matters that are under investigation violates the NLRA.

Banner Health Systems, d/b/a Banner Estrella Medical Center

In [Banner Health Systems](#), a hospital technician at a nonunion facility was instructed by his manager to use alternate methods to sterilize surgical instruments when the equipment routinely used became inoperable. The technician said he was uncomfortable using those methods, and did not use them. He shared his concerns with co-workers and with human resources (HR).

The hospital’s “Interview of Complainant” form, which HR used as a guide to conducting employee interviews, included a general instruction that employees not discuss their complaints with co-workers while HR investigated. Although the form was not given to employees, HR routinely asked

employees - as it did in this case - to keep these matters confidential pending investigation. After receiving nondisciplinary “coaching” for failing to follow his manager’s direction, the technician filed an unfair labor practice charge against the hospital, claiming that it violated his Section 7 rights by asking him to not discuss his complaint with co-workers.

The administrative law judge (ALJ) who originally heard the case dismissed the charge, holding that the hospital’s request for confidentiality was justified by its concern to protect the integrity of the ongoing investigation. However, the ALJ found that the hospital violated Section 8(a)(1) by requiring every employee it hired to sign a confidentiality agreement that includes a prohibition against sharing “private employee information” (such as other employees’ salaries or disciplinary actions).

The Board’s Decision

In a troubling decision for employers, the Board held that maintaining and applying a blanket confidentiality rule to protect internal investigations impermissibly infringes on employees’ Section 7 rights. Thus, a company policy that prohibits employees from discussing ongoing investigations of employee misconduct violates the NLRA unless the employer shows that it has “a legitimate business justification that outweighs employees’ Section 7 rights.”

An employer’s generalized concern about protecting the integrity of investigations cannot, in the Board’s view, outweigh those rights. Rather, to justify confidentiality, employers must determine on a case-by-case basis whether: (1) witnesses need 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. Although the Board cited only these factors to sustain restrictions on employees’ Section 7 rights, prior Board decisions recognize that confidentiality is important in a variety of other circumstances. For example, the Board has recognized that confidentiality instructions can be appropriate to protect attorney-client privilege or to investigate theft, discrimination, or harassment claims.

In this case, the Board found that the hospital did not have a legitimate business justification for the prohibition against discussing matters under investigation. Explaining that the hospital’s confidentiality “rule” had “a reasonable tendency to coerce employees” even without a threat of discipline, the Board concluded that the hospital unlawfully restrained Section 7 activity whether employees were “asked” or “ordered” to not discuss matters under investigation.

Although there was no allegation that the hospital enforced the provision in its confidentiality agreement prohibiting the sharing of private employee information, the Board made clear that such a provision also is unlawful, whether or not it has ever been enforced. Because the provision “requires an employee to get permission from another employee to discuss the latter’s wages and discipline,” it could reasonably be construed to prohibit Section 7 activity and thus to violate Section 8(a)(1).

Conclusion

The Board's decision limits, but does not altogether impede, an employer's ability to protect the confidentiality of its investigations. However, employers will have to determine on a case-by-case basis whether confidentiality is required and carefully tailor their internal complaint procedures and other policies addressing confidentiality. The Board's message to employers is clear: Carefully craft your confidentiality policies to avoid unduly restricting employees' Section 7 rights.

This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.
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