

Requiring Confidentiality During HR Investigations May Violate National Labor Relations Act

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In another foray by the National Labor Relations Board (“NLRB” or the “Board”) into new territory affecting non-union workplaces, a divided three-member Board panel found that an employer’s direction that employees not discuss matters under investigation with their co-workers violated Section 8(a)(1) of the National Labor Relations Act (the “Act”) because it “had a reasonable tendency to coerce employees in the exercise of their rights” under the Act. *Banner Health System*, 358 NLRB No. 93 (July 30, 2012).

In concluding that the request for confidentiality “had a reasonable tendency to coerce employees,” the majority gave no weight to the fact that the request was not tied to a threat of discipline. Instead, without offering any explanation, the Board held that “[t]he law... does not require that a rule contain a direct or specific threat of discipline in order to be found unlawful.”

The Board also brushed aside what it called the employer’s “generalized concern with protecting the integrity of the investigation” as insufficient to justify the employer’s call for confidentiality. However, the Board did suggest that an employer may lawfully require that an investigation be treated as confidential if the employer could demonstrate the request is based upon:

- (1) the need to protect witnesses;
- (2) a likelihood that evidence may otherwise be destroyed;
- (3) the threat that subsequent testimony would be fabricated; or
- (4) the need to prevent a cover-up.

Unfortunately, the Board offered no guidance as to what type of proof -- general or specific, subjective or objective -- will be required to satisfy this burden.

Practical Implications of the Board's Ruling

The Board's decision applies to both unionized and non-unionized workplaces. Thus, all employers, not just those with unionized operations or facing organizing drives, may face unfair labor practice charges alleging that their policies calling for confidentiality concerning investigations unlawfully coerce employees. In this vein, the decision is similar to recent cases regarding [social media](#) and [at-will employment](#), in that it seeks to expand the Board's oversight of non-unionized workplaces where employers are perceived by the current Board to be more likely to infringe upon employees' Section 7 rights (*i.e.*, the right to organize, participate in concerted activities and collectively bargain).

The most significant issue the decision raises is its potential impact on workplace safety, privacy, and discrimination laws that generally encourage employers to investigate sensitive allegations or issues that call for at least some degree of confidentiality. As a practical matter, limitations on an employer's ability to ensure confidentiality may dissuade employees from bringing concerns to management's attention, as well as from participating in investigations. Such reluctance may unreasonably expose employers to liability because of the increased difficulty with recognizing and remedying improper or unlawful actions.

Despite its broad impact on investigations involving employees, the import of the decision does not extend to supervisors and managerial employees. Thus, an employer is free to require that supervisors and managers maintain confidentiality in connection with any investigation, regardless of whether the employer can articulate an explanation for its actions that would satisfy one of the exceptions referred to in *Banner Health*. Of course, the determination of who is a supervisor and who is an employee under the Act is a question that may require independent consideration.

What Employers Should Do Now

Employers should proceed cautiously given the absence of substantive guidance from the Board concerning the exceptions. Reasonable first steps for remedying potentially unlawful overbroad confidentiality requirements may include:

- Eliminating blanket non-disclosure requirements from investigatory procedures;
- Re-evaluating those policies that expressly connect the violation of a non-disclosure requirements with disciplinary action;
- Developing and implementing revised policies concerning investigations that emphasize promotion of confidentiality on a case-by-case basis, particularly where there is evidence of the need to:
 - Protect witnesses and/or evidence; or
 - Prevent the fabrication of testimony or a cover up.

- Encouraging management representatives to discuss concerns with their supervisors prior to requesting an employee maintain confidentiality; and
- Training human resources employees who conduct investigations on:
 - Determining which investigations require confidentiality; and
 - Proper documentation of justifications for confidentiality so that unfair labor practice charges are more easily defended.

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