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NLRB Takes Aim at Policies Designed to Ensure Confidentiality of Internal Investigations

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By **Michael S. Arnold**

The National Labor Relations Board continues to expand the scope of the National Labor Relations Act in union *and* non-union workplaces – this time taking issue with an employer's policy prohibiting employees from discussing ongoing internal investigations.

As sensible employers everywhere realize, it is important to maintain confidentiality during the course of an internal investigation. The Board apparently disagrees, taking the position that a blanket policy of requesting participants in an internal investigation to refrain from discussing the investigation violates the NLRA. Specifically, in *Banner Health System*, the Board found that an employer's desire to protect the integrity of its investigations was not a legitimate business justification sufficient to overcome the employees' NLRA section 7 rights to engage in concerted activity – that is, generally, to discuss issues related to their compensation, benefits or working conditions.

The Board stated that an employer cannot require employees to keep an ongoing investigation confidential unless the employer "first determine[s] whether . . . witnesses need protection, evidence [was] in danger of being destroyed, testimony [was] in danger of being fabricated, or there [was] a need to prevent a cover up." Essentially, the Board is requiring employers to make a preliminary determination regarding confidentiality before it conducts any investigation.

Besides adding yet another layer of administrative complexity to employer's internal operations, the Board's ruling may actually discourage employees from complaining if they fear the absence of confidentiality, which in turn would adversely affect the employers' ability to resolve workplace issues like discrimination, harassment, retaliation and other types of serious wrongdoing – issues, that if left unresolved, may prove costly to employers. Further, the Board's ruling also appears to conflict with the EEOC's **Enforcement Guidance** regarding supervisor harassment, which states in part that "[a]n employer should make clear to employees that it will protect the confidentiality of harassment allegations to the extent possible." It is unclear at this time whether the Board's rule will apply to these types of investigations.

Regardless of the merits of the Board's decision, employers should review their existing investigation policies and procedures to determine whether its confidentiality provisions are "overbroad" under the Board's analysis. Employers should also strongly consider documenting their efforts to analyze the confidentiality issue before commencing any investigation (and to revisit the issue as necessary during the investigation). We suspect that, in many cases, the employer can sufficiently document a need to protect the complainant (or other witness) and a separate need to promote witness candor and/or prevent witness dissembling in order to require confidentiality.

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