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Mum's Not Necessarily the Word: NLRB Complicates Employers' Internal Investigations

By John Skonberg, Earl "Chip" Jones III, and Gregory Brown

In a ruling that affects both union and non-union employers, the National Labor Relations Board held that an employer must establish a specific legitimate business justification for requiring employees to maintain confidentiality during internal investigations of employee complaints. 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. According to the Board, such a rule violates Section 7 of the National Labor Relations Act, which protects employees' rights to engage in "concerted activities" for their mutual aid and protection, regardless of whether the employees belong to a union. The Board's decision continues its recent trend of invalidating common employer practices and policies on the stated grounds of protecting Section 7 rights.

The facts at issue in *Banner Health System* are straightforward. The NLRB's general counsel alleged that the medical center's "Interview of Complainant Form," which included a general instruction that employees making internal complaints not discuss their complaints with coworkers during the ensuing investigation, violated Section 8(a)(1) of the Act. The medical center's human resources consultant did not provide employees with copies of the form during interviews, but instead used it as a guide for conducting those interviews. As such, the human resources consultant routinely – but not always – relayed the instruction to complaining employees.

The Board rejected the employer's argument that the confidentiality instruction was necessary to protect the integrity of its investigations and found the employer's "generalized concern" insufficient to outweigh employees' Section 7 rights. Instead, the Board concluded, in every investigation, an employer must identify a specific need to protect witnesses, avoid spoliation of evidence or fabrication of testimony, or prevent a cover-up, before instructing employees to maintain confidentiality. Consequently, the employer's blanket instruction violated the Act.

The majority also brushed aside the dissent's conclusion that the confidentiality instruction was merely a "suggestion," rather than a rule, and contained no express threat of discipline for its violation. The majority emphasized that the "Interview of Complainant Form" stated that the instruction pertained to "all interviews," and that the employer routinely gave the instruction. The majority further explained that Board precedent does not distinguish between employer requests and instructions, and does not require that a rule carry "a direct or specific threat of discipline" to be impermissible.

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While the Board's holding is significant, it is important not to overreact. *Banner Health* does not signify a total prohibition on requiring employee confidentiality during an internal investigation. Rather, the Board's holding only precludes employers from maintaining a blanket confidentiality rule generally applicable to all internal investigations. Carefully tailored confidentiality instructions remain appropriate for internal investigations in which an employer has and advances a specific legitimate business justification. The Board did not overrule prior decisions in which it recognized the importance of confidentiality during investigations of workplace misconduct, workplace theft, and employee drug use, among other issues. *See, e.g., Northern Indiana Public Service Co.*, 347 N.L.R.B. 210, 212 (2006) (Workplace misconduct); *Caesar's Palace*, 336 N.L.R.B. 271, 272 (2001) (Drug investigation); *Metropolitan Edison Co.*, 330 N.L.R.B. 107, 107-08 (1999) (Workplace theft); *Pennsylvania Power & Light Co.*, 301 N.L.R.B. 1104, 1107 (1991) (Internal drug investigation).

Confidentiality instructions may be appropriate in other contexts as well. The Board has previously recognized an employer's interest in protecting the attorney-client privilege. *See, e.g., BP Exploration (Alaska), Inc.*, 337 N.L.R.B. 887, 889 (2002). Depending on the nature of the employer's investigation, and the laws of the state in which the investigation occurs, an employer may require that employees maintain confidentiality to protect the privilege. Moreover, because the Act does not protect the rights of management or supervisory employees, nothing in the Board's decision precludes employers from maintaining a general rule requiring those employees to maintain confidentiality during an internal investigation.

Additionally, although the Board rejected global confidentiality instructions applicable to all employer investigations, such provisions may, arguably, still be appropriate in the discrimination, harassment, and retaliation contexts. *See Charles Schwab & Co., Inc.*, Case 28-CA-19445, 2004 N.L.R.B. LEXIS 739 (2004) (ALJ found that the employer had legitimate business justifications when it instructed an employee not to discuss her sexual harassment claim during the investigation because confidentiality would prevent the accused harasser from prematurely learning of the claim and creating a hostile environment for the accuser or others; influencing potential witnesses from altering their recollection of the subject events; and ensuring the integrity of the investigation so that others would feel confident when reporting harassment). In deciding *Banner Health System,* the Board did not consider guidance from other federal agencies such as the Equal Employment Opportunity Commission, which has previously counseled employers to inform employees that it will protect the confidentiality of harassment allegations to the extent possible.[1] Indeed, maintaining confidentiality is crucial to creating an environment that encourages employees to report promptly violations of an employer's code of business conduct, such as conflicts of interest, theft, discrimination, and harassment. Prompt reporting is often vital to successful investigation and remediation of these complaints, and can be critical to an employer's defense in the event of litigation.

Unionized employers may also bargain for confidentiality during internal investigations. Many employers have successfully negotiated clauses requiring employees to cooperate in their employers' internal investigations. One element of this cooperation may be maintaining confidentiality. Whenever possible, in negotiating such clauses, employers should ensure that any confidentiality requirements are explicit.

In circumstances in which a confidentiality instruction is not appropriate, proper planning of internal investigations may mitigate confidentiality concerns. Employers with sufficient resources to dedicate to internal investigations may plan "blitz" interviews of employees, interviewing several critical witnesses simultaneously or in rapid succession, so that employees do not have time to discuss the interviews among themselves. Depending on the scope of the investigation, and the number of witnesses, employers may also keep employees sequestered until its investigators are able to interview them.

Banner Health System may require employers to modify existing policies, procedures, and forms used for internal investigations. While the medical center could appeal the decision, in the meantime, employers should review their personnel policies to ensure that the policies are compliant with the Board's decision. They should consider eliminating global prohibitions on employee discussions of internal investigations in favor of language indicating that confidentiality may be necessary under certain circumstances, such as those expressly identified by the Board. In addition, employers should consider training those employees charged with conducting internal investigations as to the circumstances in which a confidentiality instruction is appropriate, how to narrowly tailor the instruction in light of Board law, and how to plan investigations that do not warrant such an instruction.

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1 See Equal Employment Opportunity Commission, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors* (June 18, 1999), *available at* www.eeoc.gov/policy/docs/harassment.html.

John Skonberg, Co-Chair of Littler Mendelson's Traditional Labor Law Practice Group, is a Shareholder in the San Francisco office, Earl "Chip" Jones III is a Shareholder in the Dallas office, and Gregory Brown is an Associate in the Boston office. If you would like further information, please contact your Littler attorney at 1.888.Littler or info@littler.com, Mr. Skonberg at jskonberg@littler.com, Mr. Jones at ejones@littler.com, or Mr. Brown at gbrown@littler.com

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