

INSIGHTS

Employer's Routine Requests to Employees to Keep Internal Investigation Matters Confidential Found Unlawful by NLRB

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On July 30, 2012, the National Labor Relations Board (NLRB) ruled that a non-union employer's practice of routinely advising its employees not to discuss ongoing internal investigation matters with their coworkers violated Section 8(a)(1) of the National Labor Relations Act (NLRA).

In *Banner Health System d/b/a Banner Estrella Medical Center*, 358 NLRB No. 93 (2012), a technician employed by a Phoenix hospital complained to the hospital's human resources consultant about instructions he had received from his supervisors that he did not feel comfortable following and which he felt could cause a patient to become ill. The human resources consultant asked the technician not to discuss the matter with his coworkers while the hospital investigated the matter. The same human resources consultant had previously made similar confidentiality requests, on a routine basis, to other employees who had made complaints that were under investigation.

An NLRB Administrative Law Judge (ALJ) found that the hospital's confidentiality request to employees was not unlawful because it was only a "suggestion for the purpose of protecting the integrity of the investigation" and was "analogous to the sequestration rule so that employees give their own version of the facts and not what they heard another state."

The NLRB disagreed. It found, contrary to the ALJ, that the hospital's generalized concern with protecting the integrity of its investigation was insufficient to outweigh employees' Section 7 rights. The NLRB explained that in order to minimize the impact on Section 7 rights, it was the hospital's burden to first determine whether:

- (1) witnesses needed protection;
- (2) evidence was in danger of being destroyed;
- (3) testimony was in danger of being fabricated: or
- (4) there was a need to prevent a cover up.

According to the NLRB, the hospital's "*blanket approach*" clearly failed to meet the above requirements.

Importantly, the NLRB has not prohibited employers from requesting employees to keep internal investigation matters confidential in every situation. Rather, the NLRB has instructed that an employer must simply first be able to show, on a case-by-case basis, that it has a legitimate business justification for doing so based on an analysis of each of the factors noted above in *Banner*.

Most employers should be able to articulate such legitimate business justification, which presumably could include the need to maintain secrecy while an employer conducts an internal investigation in connection with a subpoena or regulatory request for information. As a best practice once a legitimate business justification has been identified, an employer may then wish to consider documenting its articulated reasons for confidentiality in a memo to the investigation file, and also revising any internal investigation policies or guidelines to remove any blanket prohibitions on confidentiality.

The *Banner* decision is yet another example of the current NLRB actively addressing issues involving non-union employers and employee rights under Section 7 of the NLRA. Under Section 7, employees have the right to form, join or assist labor organizations, to engage in “concerted activities for the purposes of collective bargaining or other mutual aid or protection,” as well as to refrain from any or all such activities.

The NLRB has recently launched a new [webpage](#), that is specifically devoted to describing Protected Concerted Activity under Section 7. The site discusses more than a dozen NLRB cases all involving non-union employers and various situations of employee protected concerted activity.

In its news release announcing its new site, the NLRB stated as follows:

“A right only has value when people know it exists,” said NLRB Chairman Mark Gaston Pearce. “We think the right to engage in protected concerted activity is one of the best kept secrets of the National Labor Relations Act, and more important than ever in these difficult economic times. Our hope is that other workers will see themselves in the cases we’ve selected and understand that they do have strength in numbers.” <http://www.nlr.gov/news/nlr-launches-webpage-describing-protected-concerted-activity>

To read the decision, please click [here](#).