

Client Alert

LABOR, EMPLOYMENT AND BENEFITS PRACTICE GROUP | SEPTEMBER 2012

WIGGIN AND DANA

NLRB Prohibits Broad Rules Requiring Confidentiality

As a result of a recent National Labor Relations Board (“NLRB”) ruling, employers that routinely instruct employees not to discuss internal investigations with other employees could face unfair labor practice charges. The NLRB held in Banner Health System that an employer violated Section 8(a)(1) of the National Labor Relations Act (“Act”) by maintaining a blanket policy requesting that employees registering complaints not discuss the matter with their coworkers while the investigation was ongoing.

In that case, the employer’s human resources consultant used a standard form for interviewing employees who filed complaints. One of the introductory matters read to employees in interviews was a request that the employee not discuss the matter with coworkers while the investigation was ongoing. The NLRB administrative law judge determined that protecting the integrity of ongoing investigations was a legitimate business justification for the request, and the policy was therefore lawful. However, a divided NLRB reversed, and found that the employer’s generalized concern with protecting its investigations was insufficient to outweigh employees’ rights under Section 7 of the Act to discuss the terms and conditions of their employment with their coworkers.

The NLRB held that in the following circumstances, however, an employer could be justified in requiring confidentiality, but it would be the employer’s burden to make that case:

- witnesses need protection;
- evidence is in danger of being destroyed;
- testimony is in danger of being fabricated; or
- there is a need to prevent a cover up.

The NLRB’s decision, therefore, requires an employer to determine if confidentiality is warranted at the outset of each and every investigation. In making such a determination, employers should consider:

- implementing policies that assess confidentiality on a case-by-case basis, particularly where there is a need to protect witnesses or evidence or to prevent a cover up or the fabrication of evidence;
- memorializing the steps taken to determine if the integrity of the investigation is at risk;
- preparing a written record of the precise circumstances that render confidentiality a necessity;
- documenting any instruction given to employees in investigative interviews; and
- when it is necessary to request confidentiality, providing employees who will be interviewed with the justification, preferably in writing.

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Complaints of unlawful harassment present a particular problem under the Banner Health System ruling. Current enforcement guidance from the Equal Employment Opportunity Commission counsels employers to make clear to employees that it will protect the confidentiality of harassment complaints to the extent possible and protect complainants from retaliation. There would appear to be some tension between this guidance and the position taken by the NLRB in the Banner Health System case.

Significantly, the Banner Health System ruling does not apply to supervisors and managers because the NLRA does not cover them. If there is any doubt as to an employee's status as a supervisor or manager under the NLRA, it may be prudent to consult with counsel.

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