# CLIENT ALERT: NLRB Concludes that Instructing Employees to Maintain Confidentiality of Investigation Violates Employee Rights

According to a recent National Labor Relations Board ("Board") decision, employers can violate the National Labor Relations Act (the "Act") when they engage in the very common practice of advising employees to maintain confidentiality during the delicate process of internal workplace investigations.

Confidentiality warnings are a common HR practice. Government anti-discrimination agencies may advise or even require that employers should request employees to maintain confidentiality during workplace investigations. Nonetheless, the NLRB has now determined that the employees' protected right to talk to each other about workplace concerns can surpass the sensible approach of advising confidentiality during investigations.

This is another in a recent string of Board cases emphasizing employees' rights in almost any workplace, including non-union settings. The Board has already drawn attention for embarking on a mission to police the content and the enforcement of typical social media policies to prevent interference with employees' "protected, concerted activity." Now the Board has determined that employers might be squelching employees' rights under the National Labor Relations Act in another surprising fashion.

In *Banner Health Systems,* 358 NLRB No. 93, the Board held that an employer violated the Act by routinely asking employees not to discuss their participation in an investigation with their co-workers while the investigation was ongoing. The Board concluded that the employer's generalized concerns for protecting the integrity of investigations were insufficient to outweigh the employees' rights. The rights of an employee to discuss disciplinary matters with other employees, according to the Board, must be balanced against and may outweigh an employer's legitimate and substantial business justification for its confidentiality rule or requirement.

*Banner Health* was not the first recent Board case to deal with this kind of issue, giving employers some insight into the Board's opinion about when it is permissible to instruct an individual not to discuss an on-going investigation. For instance, the Board previously held that an employer was not justified in maintaining a confidentiality rule that prohibited employees from discussing sexual harassment complaints among themselves. However, in another case, the Board found that an employer was justified in instructing employees to maintain the confidentiality of an on-going drug investigation because of allegations of illegal activity, a management cover-up and possible retaliation, as well as threats of violence.

These recent Board decisions require employers to eliminate blanket rules or policies, and to assume the risk of making case-by-case judgments about whether to ask for confidentiality from employees in an ongoing investigation. According to the Board, an employer should consider the need for confidentiality based on among other things, whether the integrity of the investigation is threatened by fabricated testimony, cover-ups, destruction of evidence, or witness intimidation.

The Board's recent approach throws into question the routine and obviously sensible practice by HR professionals who advise employees to be confidential about the process of ongoing investigations. But the Board's decision also collides with common principles of discrimination law. For instance, the Massachusetts Commission Against Discrimination's *Sexual Harassment in the Workplace Guidelines* provide as follows: "The investigator should inform each interviewee, as well as any other individual apprised of the investigation, that the investigation is confidential and should not be discussed with co-workers." According to the Board, adhering to the MCAD's Guidelines would

run afoul of the Act.

Given the potentially conflicting authority, employers should consult with their MBJ attorney with any questions concerning workplace investigations.

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