

NLRB Challenges Long-established Investigation Best Practice

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Employers routinely conduct investigations of workplace misconduct or other incidents. When doing so, many will direct employee witnesses or complainants not to discuss the investigation with other employees. There are a number of legitimate reasons for this, all aimed at protecting the integrity of the investigation and facilitating the search for the truth, among other things. A recent decision of the National Labor Relations Board, extending prior Board precedent, has criticized this routine and best practice direction by investigators.

In *Banner Health System d/b/a Banner Estrella Medical Center*, 358 NLRB No. 93 (July 30, 2012), the employer's human resources consultant routinely asked employees making a complaint not to discuss the matter with their coworkers while the employer's investigation was ongoing. It was a part of the employer's standard written "introduction for all interviews." The administrative law judge who heard the case upheld this practice, finding that it was justified by the employer's concern for protecting the integrity of its investigations.

On appeal, however, the Board reversed the judge's decision. The Board stated:

"Contrary to the judge, we find that the [employer's] generalized concern with protecting the integrity of its investigations is insufficient to outweigh employees' Section 7 rights [to engage in concerted activity for mutual aid and protection]."

Slip opinion at 2 (emphasis and bracketed material added).

The Board went on to hold that, in order to minimize the impact on Section 7 rights, an employer must first determine whether in any given investigation witnesses needed 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. *Id.*

The Board concluded that the employer's "blanket approach" of "maintaining and applying a rule prohibiting employees from discussing ongoing investigations of employee misconduct" violated Section 8(a)(1) (prohibiting employers from interfering with, restraining or coercing employees in the exercise of their Section 7 rights). *Id.*

The Board's decision leaves at least one very difficult question unanswered, which is: Exactly how does an employer undertake to determine, and then make known to the employee witnesses, prior to their ever being interviewed, whether it should or should not have the concerns necessitating the rule prohibiting discussion with other employees? The Board does not answer this question.

The Board's decision also shows a lack of appreciation for the necessity of effective employer investigations to achieve the prevention or remediation of discrimination, retaliation, theft, violence or other civil or criminal violations in the workplace. The position also threatens to undermine employers' ability to comply with other federal laws. For example, in the discrimination and harassment context, an employer's policy to maintain complaints and investigations as confidential as possible consistent with adequate investigation and remedial action encourages employees who might not otherwise raise concerns of discrimination and harassment to raise them, guards against retaliation, ensures the integrity of the investigation, promotes candor from those interviewed, and is a way to ensure that investigations protected by attorney-client and other privileges remain privileged. Indeed, a failure to advise those interviewed that the matter should be treated as confidential may subject an employer's investigation to attack and jeopardize employer defenses.

In sum, the NLRB has imposed a requirement in the *Banner Health System* case without due regard for either how it can be complied with, or its adverse impact on other legitimate workplace interests and compliance with other laws.

What should employers do now? Employers should continue to follow best practices with regard to internal investigations, including to maintain them in as confidential a manner as possible. To address the NLRB's concerns, an investigator can:

- consider documenting the reasons for confidentiality in a memo to the investigation file;
- continue advising witnesses who are supervisors and executives and not covered by the NLRA that they should treat the investigation and matter being investigated as confidential;
- consider whether, in light of *Banner Health System*, a modified direction to witnesses is warranted or whether an acknowledgement form should be presented to the witnesses that advises the witness about confidentiality and the reasons for

it but that also indicates the witness is not precluded from discussing terms and conditions of employment with others; and

- memorialize points discussed with witnesses including concerning confidentiality, privilege and non-retaliation.

Clients who have questions about the implications of the *Banner Health System* case should contact their Proskauer lawyer for more information.

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