

NLRB: Employers May Not Require Confidentiality in All Internal Investigations

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The National Labor Relations Board (“NLRB”) recently released an Advice Memorandum reiterating that an employer may not instruct employees to keep all workplace investigations confidential. Rather, an employer may issue a confidentiality instruction only if it can show that the particular circumstances justify it.

Background

In its 2012 *Banner Health* decision, the NLRB held that an employer may instruct employees to keep an ongoing investigation confidential only if the employer can demonstrate a legitimate business justification for doing so that outweighs employees’ rights, under Section 7 of the National Labor Relations Act, to discuss the investigation with one another.

In *Banner Heath*, the Board held that an employer may not simply assert that *all* workplace investigations must be kept confidential. Rather, an employer must demonstrate, in each *individual* case, one or more specific circumstances establishing a need for confidentiality – *i.e.*, a need to protect witnesses, avoid fabrication of testimony or destruction of evidence, or prevent a cover-up.

Board’s Advice Memorandum

The Board’s recent Advice Memorandum involved a company known as Verso Paper. Verso Paper’s written Code of Conduct included the following policy:

Verso has a compelling interest in protecting the integrity of its investigations. In every investigation, Verso has a strong desire to protect witnesses from harassment, intimidation and retaliation, to keep evidence from being destroyed, to ensure that testimony is not fabricated, and to prevent a cover-up. To assist Verso in achieving these objectives, we must maintain the investigation and our role in it in strict confidence. If we do not maintain such confidentiality, we may be subject to disciplinary action up to and including immediate termination.

An unfair labor practice charge challenging this policy was referred to the Board’s Division of Advice for guidance as to whether a formal complaint should issue.

In accordance with *Banner Health*, the Division of Advice found the final two sentences of Verso Paper’s investigation policy unlawfully overbroad. The Division of Advice stated that “the Employer cannot maintain a blanket rule regarding the confidentiality of employee investigations, but must demonstrate its need for confidentiality on a case-by-case basis,” based on the factors identified in *Banner Health* – *i.e.*, whether witnesses need to be protected, there is a danger of evidence being destroyed or testimony being fabricated, or there is a need to prevent a cover-up.

Thus, the Division of Advice concluded that the Board should issue a formal complaint against Verso Paper. (The case ultimately settled before a complaint was issued.)

Recommendations

In light of the Board's Advice Memorandum and *Banner Health* decision, employers should:

- Review their policies and practices concerning workplace investigations, and, in consultation with counsel, revise them as necessary to ensure that the need for employee confidentiality in investigations is assessed on a case-by-case basis;
- Confer with counsel before terminating or otherwise disciplining an employee for violating a confidentiality policy. If the policy is overly broad, the proposed discipline could spark an unfair labor practice charge; and
- Monitor further developments in this area. In particular, future Board decisions will likely clarify the circumstances in which the specific factors identified in *Banner Health* (e.g., a need to protect witnesses) will be found to justify confidentiality instructions.



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