

CLIENT ALERT

NLRB Rules Against Routine Requests for Confidentiality in Ongoing Employer Investigations

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The National Labor Relations Board (NLRB or Board) held in *Banner Health System d/b/a Banner Estrella Med. Ctr. & James A. Navarro*, 358 NLRB No. 93 (July 30, 2012), that an employer violated federal labor law by instructing witnesses not to discuss with others the subject matter of an internal investigation while the investigation was pending. The Board ruled that the employer's "generalized concern with protecting the integrity of its investigation" did not outweigh the employees' protected right to discuss workplace matters with co-employees. Section 7 of the National Labor Relations Act (NLRA) grants employees the right to engage in "protected concerted activity" for their mutual aid and protection, which includes discussing amongst themselves the terms and conditions of their employment. Employers may, according to the Board, lawfully prohibit employees from discussing an ongoing investigation, but only if they can demonstrate a legitimate business need for confidentiality. To meet that burden, employers must show that specific witnesses need protection, that evidence is in danger of being destroyed, and/or that the confidentiality instruction is needed to prevent a cover-up. Without this specific showing, employers will likely be found to have infringed upon employees' Section 7 rights.

Banner Health, an Arizona hospital, instituted an investigation into an employee's alleged insubordination. Its human resources consultant interviewed the employee, as well as certain of his co-employees, regarding the incident that gave rise to the alleged insubordination. During the interviews, the consultant asked each witness not to discuss the matter with co-employees while the investigation was ongoing.

A three member panel of the NLRB, in a 2-1 decision, reversed the Administrative Law Judge's (ALJ) ruling, rejecting his conclusion that the purpose of the confidentiality request, to protect the integrity of the investigation, rendered the confidentiality request lawful. The Board held that Banner Health failed to justify its prohibition on employee discussions regarding the investigation. Previous NLRB decisions, such as *Caesar's Palace*, 336 NLRB 271 (2001), had upheld confidentiality rules when needed to protect witnesses, preserve evidence, and ensure truthful testimony. In *Banner Health*, the NLRB concluded that concerns with respect to these matters will not be considered inherent to every workplace investigation. Rather, an employer must show an actual threat to the integrity of the ongoing investigation, not simply rely on a blanket concern for the integrity of investigations in general. Accordingly, Banner Health was ordered to cease and desist from maintaining or enforcing a rule that employees may not discuss with each other ongoing investigations of employee misconduct.

One panel member dissented, believing, as did the ALJ, that Banner Health's request for confidentiality was not unlawful because it was merely a suggestion, as opposed to a requirement. The majority disagreed, finding that the statement, whether a suggestion or an order, had a "reasonable tendency to coerce employees," and therefore was an unlawful restraint of their Section 7 rights.

It is important to note that the NLRB's ruling applies in union and non-union workplaces. Accordingly, all employers should make a specific assessment of the need for confidentiality relative to each investigation, before instructing – or even asking – that employees refrain from discussing the subject of the investigation with others. An automatic or "routine" request for

confidentiality, without specific facts justifying the need for such a request, will not suffice. Furthermore, employers should review their general employment policies and/or agreements to ensure that they do not contain blanket confidentiality warnings that could reasonably interfere with employees' Section 7 rights. Should you have a question regarding when you may issue confidentiality instructions, please feel free to call your Crowell & Moring contact.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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