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nlrb to employees: "you have a right not to remain silent."

MSK Client Alert

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Revealing that it is increasingly out of touch with the practical realities of the workplace, the National Labor Relations Board has made it more difficult for employers to keep their workplace investigations confidential. In its recent decision of *Banner Health System*, the Board found that an employer's practice of asking employees not to discuss workplace investigations with their coworkers violates the employees' Section 7 rights under the National Labor Relations Act. 358 NRLB No. 93 (2012). Section 7, which applies to ALL employees, whether or not represented by a union, protects the right of employees to engage in "concerted activity" activities for their mutual aid and protection.

Banner Health System, like many employers, routinely asked employees being interviewed during a workplace investigation not to discuss the matter with their coworkers while the investigation was ongoing. The request for confidentiality was listed as one of six bullet points under the heading "Introduction for all interviews" on a standard form used by the company. The Board found that this instruction (which it characterized as a prohibition) had "a reasonable tendency to coerce employees, and so constituted an unlawful restraint of Section 7 rights." The Board did not provide any further reasoning as to how or why such an instruction constituted "coercion."[1] (However, the Board has long held that prohibiting employees from discussing workplace complaints or concerns with coworkers coerces and restrains their exercise of Section 7 rights.) In light of the Board's decision, employers who want to keep their workplace investigations confidential must now establish, ***at the outset of the investigation***, that there is a legitimate business reason for doing so. A generalized concern with protecting the integrity of the investigation is insufficient. Rather, the Board stated , before an employer may lawfully request that an investigation remain confidential, it must determine whether: (a) witnesses need protection; (b) there is a danger of evidence being destroyed; (c) there is a danger of testimony being fabricated; or (d) there is a need to prevent a "cover-up." The employer must make such determination(s) at the outset of an investigation. Given that only limited facts

are usually available at the beginning of an investigation (hence the need for the investigation), an employer may be hard-pressed to meet this newly imposed burden. Fully and effectively conducting investigations of potential wrongdoing (especially in response to complaints of discrimination, harassment, or retaliation) should remain the paramount goal of employers. In order to ensure that ***investigations*** are both appropriate and compliant with the Board's decision in *Banner Health*, Employers should review any existing policies and procedures (including all written materials) used for workplace investigations. Employees who conduct such investigations should be trained on when it is appropriate to require that investigations be kept confidential, including those circumstances expressly identified by the Board.

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[1] The dissent in *Banner Health* characterized the prohibition as "not an actual rule, but rather a mere suggestion to employees" that they not discuss the matter with others. The Board found that, regardless of how the rule was characterized, it was coercive.

ASK MSK

Q. In the absence of a blanket confidentiality policy, what steps may an employer take to ensure that an investigation is conducted appropriately? A. Even though a blanket confidentiality policy no longer may be appropriate, employers still have options available when it comes to deciding how to conduct workplace investigations. The Board's decision highlights the importance of careful planning at the outset of an investigation —especially if a need for confidentiality is not immediately apparent. If requesting confidentiality is not appropriate, employers should determine when they first learn of a complaint whether any alternative action is appropriate to preserve the integrity of an investigation in the interim. For example, in some situations, it may be necessary to place an employee on a leave of absence if there is a concern that his or her conduct during the pendency of the investigation may be harmful to the company. Similarly, if there are concerns about one or more witnesses sharing information, employers may need to carefully consider the order in which witnesses are interviewed or interview witnesses simultaneously. Finally, investigations should be completed as quickly as possible to mitigate concerns about integrity. Q. How should I respond if an employee asks that an investigation be kept confidential? A. While investigators should be trained on how to identify and handle sensitive and personal information, employers should never promise complete confidentiality during the course of an investigation. There are a myriad of reasons why an investigator may need to disclose information learned during the course of an investigation and promising complete confidentiality in such circumstances is unrealistic and counter to the purpose of the investigation. This was true before and has only been reinforced by the Board's decision in Banner Health. Q. I am a nonunion employer. Does the Board's decision apply to me? A. Yes, and Banner Health is only the latest in a series of aggressive decisions by the Board that affect employment policies and procedures in virtually ALL American workplaces. Section 7 of the National Labor Relations Act protects the rights of both union-represented and nonunion-represented employees. ***However, because the Act does not protect supervisory employees, employers still may require that those employees not discuss workplace investigations.***