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Meet Michael Josephson

President and Founder, Josephson Institute of Ethics, Los Angeles

See page 14

by Dawn Lomer

Confidential internal investigations: An exception, rather than the rule

» Ensure company policies do not contain blanket confidentiality requirements for internal investigations.
» Train anyone involved in conducting workplace investigations on the NLRB requirements for confidentiality.
» Document the business case for confidentiality before requesting it of anyone involved in an investigation.
» Consider the consequences for employees when applying confidentiality requirements.
» Ensure confidentiality requests do not contradict other company policies or common sense.

When a company's investigator interviews an employee in an internal fraud investigation, you'd expect that the details of what was discussed in the interview should be confidential.

Not necessarily. A ruling last year by the National Labor Relations Board (NLRB)—that an employer's request, that employees not discuss a workplace investigation while it was ongoing, violated the employees' rights to engage in protected concerted activity—has raised some hackles and some deep discussion.


Lomer

"The NLRB is off its rocker," says Phillip Wilson, author and president of the Labor Relations Institute. "In their zeal to promote unionization, the NLRB is making decisions that fly in the face of both years of NLRB precedent and the realities of the modern workplace. This case is just one more example of that and it is very likely to face a legal challenge," he says.[1]

The Banner case

It all started in July 2012 with the NLRB's decision in *Banner Health System* (d/b/a Banner Estrella Medical Center).[2] In this case, the Board found unlawful the common practice by employers of requesting witnesses in an internal investigation refrain from discussing the investigation details with other employees until after the investigation was completed. The NLRB felt that the confidentiality request restrained employees from exercising their Section 7 rights under the National Labor Relations Act (NLRA).

Although there was no threat of disciplinary action for employees who violated the company's verbal instruction, which the employer had given to all employees involved in the investigation, the NLRB found that the request restricted the right of employees to engage in protected concerted activity—the discussion of wages and working conditions for the purpose of collective bargaining or other mutual aid or protection.

Conflicting obligations

Before the NLRB ruling, an employer's ability to maintain confidentiality depended on the type of investigation and the potential that the case would spark a lawsuit and end up in court. In fact, as long as there was no threat of danger to anyone involved and the case was likely to remain internal, your best bet was to

request confidentiality from all participants in the investigation. Gossip and rumors can sink an investigation very quickly by contaminating evidence and sometimes even witness's testimonies before they are interviewed.

"The NLRB case is frustrating to employers because it conflicts with other legal obligations for companies," says Wilson. "For example, under Title VII, companies must complete thorough investigations and protect witnesses and complainants against retaliation. The NLRB case frustrates those requirements by telling employers that they cannot ask witnesses to keep a pending investigation confidential."

Especially in cases of discrimination or harassment, the new ruling restricts the ability of interviewers and investigators to determine the authenticity of information in a complaint when the details of the case can be discussed freely among employees who are either witnesses or involved in the investigation in some other way.

Reactions to the decision

In an open letter to the NLRB, attorney John Hyman, a partner at Cleveland's Kohrman Jackson & Krantz, and a prolific legal blogger, wrote:

> One sure-fire tool one can use to figure out who's telling the truth and who's lying is to see how everyone's stories jive or contradict. For this reason, one of the key instructions that should be given in any workplace investigatory interview is that the employee should keep everything said confidential. That way, later interviewees will not be influenced, and do not have an opportunity to compare (and prepare) their stories.[3]

Hyman outlined the damage he feels the NLRB's decision might do when put into practice in workplace investigations:

> By prohibiting employers from requiring that workplace investigations remain confidential, your decision in *Banner Estrella* neuters the ability of employers to make key credibility determinations. Limiting confidentiality in this manner will severely constrain the ability of employers to conduct thorough and accurate workplace investigations, which, in turn, limits the ability of employers to stop the workplace evils they are investigating (discrimination, harassment, theft, etc.).

Many employment attorneys, workplace investigators, and employers feel the same way. "Confidentiality requests are really part of what investigators consider standard practices when conducting a good faith investigation," says Allison West, Esq, SPHR, a workplace investigations specialist and consultant with a background in employment law. "As both an attorney, investigator, and someone who trains others on how to conduct investigations, I consider confidentiality one of the most important parts of the investigation."[4]

One of the main reasons for this is to prevent retaliation, or even just to prevent the participants from having to be concerned about retaliation. Unless witnesses and complainants can be assured that the entire company won't find out about their role in the investigation, they may be reluctant to come forward at all.

"Confidentiality helps to maintain the integrity of an investigation," says West. "A confidentiality requirement allows witnesses and complainants an environment that is safe from retaliation, knowing that others involved in the investigation are required to keep the details of the investigation confidential."

Exceptions to the rule

Although the NLRB has condemned the "blanket approach" to requiring confidentiality during internal investigations, the Board has stipulated certain conditions under which a case could be made for confidentiality. These are:

- Protecting witnesses
- Avoiding destruction of evidence
- Preventing the fabrication of testimony
- Preventing a cover-up

But employers must consider each investigation individually to decide whether confidentiality is required and be prepared to make a case for confidentiality in each instance where they feel it is required. Critics argue that this puts a huge burden on the employer to examine each investigation and try to determine whether or not there will be a viable case for confidentiality.

In addition, it's sometimes only after an investigation is under way that it becomes clear that the details should be kept confidential for one of the reasons outlined above. Without a default confidentiality rule, it may be too late to save the witness, evidence, or testimony by the time the issue becomes apparent.

Voice of dissent

But not everyone feels the decision is a bad one, and certainly there can be times when a blanket confidentiality agreement is detrimental to the health of the workplace.

Donna Ballman, an employee-side employment attorney and author of *Stand Up for Yourself Without Getting Fired*, says:

> I've seen these kinds of confidentiality provisions used as a weapon against employees. They complain about, say, sexual harassment and suddenly are banned from discussing with female coworkers that their boss is a harasser. They can be, and frequently are, fired if the employer claims they think the employee violated confidentiality.[5]
>
> The National Labor Relations Act says employees are allowed to discuss working conditions, which would include being able to compare notes on the office letch, dangerous working conditions, and illegal practices. It's about time the practice of putting a gag order on employees was shut down for good.[5]

Clearly, an argument can be made for using common sense in enforcing confidentiality agreements, and it's certainly possible that employers don't always do this. Ballman's example shows how requesting confidentiality could be bad for the complainer and his/her coworkers. But your view is likely to depend on what side of the employment relationship you represent.

The way forward

No matter your view, compliance with the *Banner* decision is, for the moment, mandatory, and employers can take steps to ensure their decisions survive scrutiny of the NLRB.

The first step is to review all internal policies and procedures to ensure they don't contain blanket confidentiality requirements, prohibiting employees from discussing investigation details with one another. Employers should then ensure everyone involved in conducting company investigations, from HR to company counsel to investigators, avoids requesting confidentiality from employees involved in an investigation without first documenting that one or more of the four business justifications exists. And finally, use common sense when a confidentiality request may contradict either a company policy or good judgment. ✳

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1. Quotations are from the author's interview with Phillip Wilson on August 10, 2012.
2. *Banner Health System*, 358 N.L.R.B. No. 93 (July 30, 2012)
3. John Hyman writes Ohio Employer's Law Blog. Available at http://www.ohioemployerlawblog.com/2012/08/a-letter-to-nlrb-on-its-latest-position.html#sthash.5l9gGgEU.dpbs
4. Quotations are from the author's interview with Allison West on December 20, 2012.
5. Quotations are from the author's interview with Donna Ballman on August 10, 2012.