

“Confidential” Internal Investigations: Beware

By Jessica Summers

In a recent decision, the National Labor Relations Board (NLRB or Board) concluded that the common practice among employers of asking all employees who file a complaint or are interviewed as a witness not to discuss ongoing internal investigations violates the National Labor Relations Act (NLRA). As we have discussed in other blog posts, the NLRB has increasingly been reaching beyond unionized workplaces, issuing decisions with broad implications for employers of all types. The Board’s July 30, 2012 decision in *Banner Health Systems* (available here) continues down this path, presenting an unprecedented conclusion about Section 7 rights that is sure to impact how most employers handle internal investigations.

In *Banner Health Systems*, the NLRB concluded that the employer’s practice of routinely asking those employees making human resource complaints not to discuss the matter with co-workers during an ongoing investigation violated the employees’ rights under Section 7 of the NLRA. This request was one of six points specifically set forth in bullet format in the introductory paragraph of the employer’s standard Interview of Complainant Form. The NLRB found that the statement made by the interviewer in the context of a human resources interview “had a reasonable tendency to coerce employees, and so constituted an unlawful restraint of Section 7 rights.” Its decision gave no credence to the fact that the complainant was not threatened with discipline for violating the rule.

As part of its ruling, the NLRB emphasized that to avoid potentially infringing Section 7 rights, the employer would need to show a legitimate business justification for its rule against discussing matters actively under investigation. The employer in *Banner* asserted that the rule was necessary to protect the integrity of its investigations. The Board rejected that rationale, finding it to be too generalized to meet the employer’s burden. It went on to state that in order to minimize the impact on Section 7 rights, it was the employer’s burden to “first determine whether 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 cover up.”

In light of this case, employers going forward would be well advised to assess the circumstances surrounding each complainant or investigation witness before instructing them not to discuss the investigation with co-workers. Rather than maintaining a broad policy of prohibiting employees from discussing ongoing investigations, employers should try to take a practical and individualized approach to each investigation by assessing the employees, facts and circumstances involved and carefully justifying and recording the need to issue a confidentiality instruction.