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NLRB Issues Guidance on an Employer's Limited Ability to Keep Workplace Investigations Confidential

In July 2012, the National Labor Relations Board issued its decision in **Banner Health System d/b/a Banner Estrella Medical Center**, which involved the legality of an employer's blanket rule requiring employee-witnesses to maintain the confidentiality of pending internal investigations.

The *Banner* Rule

In *Banner Health*, the Board decided that such a blanket policy violated the employees' Section 7 right to discuss workplace concerns under the doctrine that such discussions may constitute "protected concerted activities." While blanket rules are illegal, the NLRB also held that rules of confidentiality may be imposed, but only on a case-by-case basis in which the employer determines that the investigation's confidentiality is necessary for legitimate and substantial business justifications, including whether employee-witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, or there is a need to prevent a cover-up. **The rule applies to both unionized and non-unionized employers.**

The Rule as Elaborated Upon via an Advice Memorandum

Recently, the NLRB's Associate General Counsel released an **Advice Memorandum** regarding a confidentiality policy in a case under investigation, which offered additional guidance on this issue and "approved" specific language consistent with the Board's limits on confidentiality. The Advice Memorandum is dated January 29, 2013, but it was not made public until April 16, 2013.

The policy discussed in the Advice Memorandum provided:

[The Company] has a compelling interest in protecting the integrity of its investigations. In every investigation, [the Company] 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 [the Company] in achieving these objectives, we must maintain the investigation and our role in it in strict confidence. If we do not maintain strict confidentiality, we may be subject to disciplinary action up to and including immediate termination. (Italics added).

According to the Associate General Counsel, the italicized portion of the above policy lawfully described the employer's interest in protecting the integrity of its investigations. The rest of the policy, however, the AGC concluded, violated Section 7 of the NLRA because under the *Banner* doctrine, it did not take into account the employer's burden to show on a case-by-case basis that the employer has a business justification for the requirement of confidentiality that outweighs employees' Section 7 rights.

While concluding that the policy at issue violated the law, the AGC suggested modifications that, in his view, would bring the policy within the *Banner Health* rule. Those modifications would change the last two sentences of the above policy (i.e., the non-italicized sentences), as follows:

The Company] may decide in some circumstances that in order to achieve these objectives, we must maintain the investigation and our role in it in strict confidence. If [the Company] reasonably imposes such a requirement and we do not maintain such confidentiality, we may be subject to disciplinary action up to and including immediate termination.

Lessons for Employers

While the policy edits appear awkward, they do reveal what the NLRB will consider sufficient to warrant the issuance of an unfair labor practice charge. Clearly, according to the Board, employers need not abandon employment policies intended to protect the integrity and effectiveness of workplace investigations. Rather, they should review such policy language and modify it as necessary so that it conforms to the suggested language in the NLRB's Advice Memorandum so that blanket policies requiring confidentiality are replaced with policies reflecting that confidentiality requirement will only be imposed on a case-by-case basis. Further, while making the case-by-case assessment, employers should only impose confidentiality of the workplace investigation when at least one of the aforementioned legitimate and substantial business justifications is found to outweigh the employees' Section 7 rights.

Significantly, it is stressed that the NLRB's current position is that the mere existence of a blanket policy requiring the confidentiality of workplace investigations would be considered a violation of the NLRA, even if no actual investigation were at issue. Thus, the need to review policies, as well as how determinations for when investigations may be kept confidential, should be considered by every employer. This rule would apply to both unionized and non-unionized employers.

If you have any questions regarding the NLRB's Advice Memorandum, how to bring your policies into compliance, or how to implement a confidentiality rule regarding an investigation, please contact your Butzel Long attorney or the authors of this Client Alert.

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