
BOND INFORMATION MEMO

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NLRB Advice Memorandum Provides Further Guidance on Confidentiality In Investigations

A recent Advice Memorandum from the National Labor Relations Board's Division of Advice provides employers further guidance on how to address and structure employee confidentiality requirements during investigations. In *Banner Health System* (which was decided on July 30, 2012), the Board held that an employer violated Section 8(a)(1) of the National Labor Relations Act by directing employees not to discuss complaints made to the employer with co-workers while an investigation into the matter is pending. In doing so, the Board put employers on notice that "blanket" confidentiality requirements would violate the right of employees to engage in protected concerted activity.

In the recent Advice Memorandum, the Division of Advice addressed the application of *Banner Health* in reviewing Verso Paper's confidentiality rule. This case raised the question whether Verso's confidentiality requirement "unlawfully interfered with employees' Section 7 rights by precluding employees from disclosing information about ongoing investigations into employee misconduct." Verso's Code of Conduct provided:

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

Citing the Board's decision in *Banner Health*, the Division of Advice agreed with the Regional Director that the rule was unlawfully overbroad, and advised that a complaint should be issued, absent settlement, against Verso for violating Section (8)(a)(1) of the NLRA. The Region reasoned that Verso's provision was in fact a "blanket rule" regarding confidentiality of employee investigations. Instead, Verso's rule needed to demonstrate a case-by-case need for confidentiality. The Division of Advice stressed that the employer has the burden to show in each particular situation that it has a legitimate and substantial business justification for confidentiality, which will outweigh the interference with



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employees' Section 7 rights. The Division of Advice also reiterated that a general concern with the investigation's integrity is not enough, and cited the following factors mentioned in *Banner Health* where an employer may require confidentiality: (1) there are witnesses in need of protection; (2) evidence is in danger of being destroyed; (3) testimony is in danger of being fabricated; or (4) there is a need to prevent a cover-up.

One could argue that the *Verso* Advice Memorandum did not plow any new ground beyond the Board's decision in *Banner Health*. The Advice Memorandum reaffirms the principle set forth in *Banner Health* that a simple "blanket rule" of confidentiality during an investigation into employee misconduct will be found to be unlawful. Rather, the employer must engage in an individualized assessment considering the need for confidentiality in each particular case, analyzing the factors mentioned in *Banner Health*.

Given the Board's current position, employers are well advised to draft confidentiality rules consistent with *Banner Health*'s "specificity" requirements. In this respect, the *Verso* Advice Memorandum provides some helpful guidance. First, the Division of Advice noted that the first two sentences of *Verso*'s rule lawfully set forth the interest in protecting the integrity of *Verso*'s investigations, which were:

Verso has a compelling interest in protecting the integrity of its investigations. In every investigation, Verso 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.

Second, the Division of Advice suggested that, consistent with *Banner Health*, *Verso* could modify the remainder of the rule to lawfully advise its employees that:

Verso 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 Verso 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.

Employers should note that this is only an Advice Memorandum, and the guidance is not binding on the Board. Employers should also note that the *Banner Health* case may not survive the Supreme Court's consideration of the D.C. Circuit's decision in *Noel Canning v. NLRB* and the Third Circuit's decision in *NLRB v. New Vista Nursing and Rehabilitation, LLC*. If the Supreme Court agrees with the D.C. Circuit and the Third Circuit that President Obama's recess appointments to the Board are invalid, the *Banner Health* decision will also be invalid because the NLRB lacked a valid quorum at the time of the decision. If the *Banner Health* decision survives, however, the *Verso* Advice Memorandum at least provides some insight to employers on how to comply with *Banner Health*. Avoid blanket rules and tailor policies to specific facts involved in the employee investigation.

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