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Confidentiality instructions under attack by the NLRB and EEOC

On July 30, 2012, in the *Banner Health System* case, the National Labor Relations Board (NLRB), issued a decision holding that a hospital violated Section 8(a)(1) of the National Labor Relations Act (NLRA) by asking employees who had filed a complaint not to discuss it with co-workers while the investigation was pending.

Shortly after, in a different case, the Buffalo regional office of the EEOC took a similar position: That a confidentiality instruction to an employee making a discrimination complaint would constitute unlawful interference with the employee's efforts to oppose discrimination.

The EEOC view

EEOC guidance states that complaining about discrimination or harassment to anyone—including management, union officials, other employees or even reporters—is protected opposition. An employer that tries to stop an employee from talking with others about alleged discrimination or harassment is violating Title VII, and the violation is "flagrant" not trivial.

Although this position has not been officially adopted by the EEOC as a whole, the fact that two federal authorities are attacking the validity of confidentiality instructions is cause for concern.

At a minimum, employers should take a step back and review their investigatory processes to ensure that they place no undue restraint on employees. Keep these practical pointers in mind when you conduct this review.

Confidential, but …

It's impossible to guarantee that harassment and discrimination complaints will be kept strictly confidential. Official EEOC guidance requires employers to maintain the confidentiality harassment and discrimination complaints *to the extent possible*. The NLRB's *Banner Health System* decision states that a generalized desire to protect the integrity of an investigation does not justify a general policy that matters be kept confidential.

Unionization doesn't matter

It doesn't matter whether employees are unionized or not in determining whether their rights under the NLRA have been violated. Either way, they are protected by the NLRA.

However, supervisors are not considered covered employees under the NLRA. Therefore, they're not entitled to its protections.

Consequently, you can ask supervisors not to discuss matters with co-workers without fear of violating Section 8(a)(1).

Choose words carefully

Consider *asking* employees to keep things confidential or *suggesting* they be *discreet* about the issue. Don't *instruct*, *order* or *direct* an employee to maintain confidentiality. Explain the benefits of confidentiality and that you don't want any information leaked that could potentially hinder your ability to thoroughly investigate the matter and gather accurate, untainted evidence.

You might suggest confidentiality without issuing an express directive by mentioning the *sensitive* nature of the matter and how he or she would not want the allegations to be publicly discussed.

By ultimately leaving some choice with the employee, you should still be able to argue you didn't violate the employee's rights under the NLRA or interfere with employees' Title VII rights to oppose discrimination.

Individual analysis

Analyze each case on an individual basis before asking an employee not to discuss the matter with co-workers. Take into account the factors enumerated by the NLRB in *Banner Health System*:

- Are there witnesses who need protection?
- Is evidence in danger of being destroyed?
- Is testimony in danger of being fabricated?
- Is there a risk of a cover-up?

Although *Banner* involved a "request" (not a directive) that the employee maintain confidentiality, the NLRB did not take issue with the request itself but rather with the employer's blanket practice of requesting confidentiality of all employees without making an individualized assessment as to whether a request was appropriate in any given case.

Blanket requests or instructions to maintain confidentiality in all, or virtually all, investigations will likely not be upheld.

Is request even necessary?

Consider intangible factors, such as whether the employee is likely to keep the matter to him or herself anyway, even without your request to keep it confidential. If the employee is likely to maintain confidentiality regardless, why risk potential liability by issuing a request?

If you ultimately decide to issue a confidentiality instruction or directive (notwithstanding the potential risk of liability) document in writing all the reasons that underlie your decision. That will make it easier to defend if it is ever challenged in the future.

Once you have completed your investigation, consider affirmatively lifting any confidentiality instruction you issued. That could potentially limit the time period for which you could be held liable for the confidentiality instruction if it is ultimately held unlawful.

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