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## CONFIDENTIAL INVESTIGATIONS - CHALLENGED BY THE NLRB

Does this sound like a good and reasonable thing to say to an employee who has brought a complaint to your attention?

*"Please keep our discussions confidential while our investigation is ongoing."*

Well, it may not be so good or reasonable according to the NLRB. Employers faced with suspected employee misconduct have an obligation - in fairness to all concerned - to do the right thing and investigate the allegations before jumping to conclusions and taking adverse action against the accused. Indeed, making a prompt and thorough investigation into alleged misconduct - sexual harassment, for example - is a necessary step and often will provide a defense for the employer if it acts promptly. Some investigations are particularly sensitive - embezzlement, theft, sabotage, and sexual harassment - and if word were to get out the investigation could be compromised and the informers could be put at risk of retaliation by the accused. In these sensitive cases it makes perfect sense for an employer to require employees to refrain from telling others about the ongoing investigation.

### BLANKET CONFIDENTIALITY REQUIREMENT - UNLAWFUL

The NLRB sees it differently. While recognizing that there may be times when confidentiality can be required, the NLRB will find that a generalized confidentiality requirement unlawfully restricts employees in the exercise of their rights under the NLRA. This position was recently expressed in an opinion issued by the NLRB (Member Hayes dissenting) in the [Banner Health System case](#). In that case a health system's human resources consultant routinely asked employees making a complaint not to discuss the matter with co-workers while the investigation was ongoing. Indeed, the requirement for confidentiality was one of several bullet points on the employer's "Interview of Complainant Form."

This is what the Form said:

*This is a confidential interview and I will keep our discussion confidential except as required by law, or Banner policy or as necessary to conduct this investigation. I ask you not to discuss this with your coworkers while the investigation is going on, for this reason, when people are talking it is difficult to do a fair investigation and separate facts from rumors.*

### THE EMPLOYER'S BURDEN TO JUSTIFY CONFIDENTIALITY

The employer in this case was found to have unlawfully restricted employees in the exercise of their rights by requiring confidentiality in all investigations - without considering the individual circumstances. In other words, the NLRB now holds an employer to the task of justifying *in each instance* that it has a *legitimate business justification* that outweighs employee rights. The NLRB says that in order to protect the rights of employees the employer in any given investigation must bear the burden of showing one of these four justifications:

- That a particular witness needed protection;
- That evidence was in danger of being destroyed;
- That testimony was in danger of being fabricated; or
- There was a need to prevent a cover-up.

A blanket approach of requiring confidentiality in all investigations doesn't meet the burden now imposed on employers by the NLRB. Unless the employer can establish one of these justifications the NLRB will likely find unlawful restraint on employee rights because the blanket confidentiality requirement "*had a reasonable tendency to coerce employees*" in the exercise of those rights. That broad phrase - "*reasonable tendency*" - is turning up in a lot of the NLRB cases recently. For employers who truly want to do the right thing that phrase is very difficult to define. It seems natural and common sense to protect the integrity of an investigation - particularly when it is still ongoing. However, exactly what an employer must now show to fit into one of the four justifications is unclear to say the least. It will always be very dependent on the nature of the conduct being investigated, the personality of the witnesses and the culture of the organization. Even then there are no guarantees that the NLRB won't find an employer's confidentiality requirement had a "*reasonable tendency to coerce*" employees.

## THINGS TO THINK ABOUT

Although it may defy common sense, employers should now try to at least articulate which one or more of the four justifications exist in any particular investigation and be able to back it up with facts. Consider these things:

- Review interview forms and policy statements for any blanket confidentiality requirement;
- List and explain the four justifications in forms and policies dealing with confidentiality during investigations;
- Train supervisors and those involved in investigations about the need to articulate a justification before requiring confidentiality;
- Understand that the more serious the complaint or allegation the more likely there is a need for confidentiality;
- Don't require the employee to "agree" to keep the investigation confidential. Instead, indicate that for the protection of all concerned we "expect you to keep this matter confidential while the investigation is ongoing"; and
- Document the reasons why you need to keep the investigation confidential.

With the current "tendency" of the NLRB to challenge long-standing employer practices and policies, it is a good idea to keep an eye on these developments.

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