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by Chris Chrisbens

Pursuant to its ongoing and expansive assault on confidentiality provisions, the National Labor Relations Board ("NLRB") recently reiterated, among other findings, that a general witness admonition regarding confidentiality of matters the subject of a workplace investigation contravenes National Labor Relations Act Section 7 rights.

In that case (*Banner Health Systems d/b/a Banner Estrella Medical Center and James A. Navarro*, Case 28-CA-023438), a Banner employee lodged a complaint after receiving "coaching" and a negative performance evaluation on the heels of his allegedly insubordinate behavior. In addition to arguing that the coaching and evaluation violated Section 8(a)(1) because they were motivated by his concerted activity, the employee argued that Banner's confidentiality agreement, and its general practice of advising investigation witnesses not to discuss the subject matter of a workplace investigation during its pendency, violated Section 8(a)(1).

The NLRB reviewed administrative law judge findings on three issues. The judge found that neither the coaching nor the evaluation was motivated by the employee's exercise of Section 7 rights. Nonetheless, the judge found that Banner's employee confidentiality agreement – exposing employees to possible discipline for disclosing "[p]rivate employee information (such as salaries, disciplinary action, etc.) that is not shared by the employee" – could reasonably be construed to violate Section 7 because "it requires an employee to get permission from another employee to discuss the latter's wages or discipline." As to the third issue, Banner acknowledged that during interviews of complaining employees, human resources investigators ask employees not to discuss the matter with their co-workers while the investigation is ongoing. The judge summarily concluded that this "suggestion" served the legitimate business purpose of preserving the integrity of the investigation.

A three-member NLRB panel agreed with all but this last of the judge's findings. Relying on *Hyundai America Shipping Agency*, 357 NLRB No. 80 (2011), a panel majority concluded that Banner's "blanket approach" to investigation confidentiality was insufficient to outweigh employees' Section 7 rights. Rather, the majority reasoned that in order to minimize the burden on Section 7 rights, it was Banner's obligation to make a case-specific determination as to whether a confidentiality restriction was

necessary to preserve the integrity of the particular investigation. In the *Hyundai* case an employee made multiple complaints, including allegations of sexual harassment, hostile work environment and drug use, which Hyundai investigated. Hyundai also acknowledged that during workplace investigations it "routinely cautioned employees orally not to discuss matters that were under investigation." In *Hyundai*, the NLRB summarily affirmed the administrative law judge's determination based on two cases: *Caesar's Palace*, 336 NLRB 271 (2001) and *Phoenix Transit Systems*, 337 NLRB 510 (2002). In *Caesar's*, the NLRB upheld a confidentiality restriction during an investigation of employee drug use, concluding it "outweighed" Section 7 rights because it was designed to "ensure that witnesses were not put in danger, that evidence was not destroyed, and testimony was not fabricated."

In contrast, *Phoenix* sought to enforce confidentiality during investigation of a sexual harassment complaint one and one-half years **after** the conclusion of the investigation, where the reasons for confidentiality were not specifically articulated. Based on these cases, the judge in *Hyundai* concluded that under the NLRB's "balancing test, it is the [employer's] responsibility to first determine whether in any give[n] investigation witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, and there is a need to prevent a cover up."

It is difficult to accept that confidentiality can only be requested or required in such limited circumstances. Workplace investigations are often an extremely valuable and necessary tool for appropriately responding to employee concerns and complaints, resolving workplace conflict, as well as avoiding legal liability. Employers are often obligated to conduct investigations of harassment and discrimination issues in order to uphold the duty to "prevent and correct promptly" such behavior, as required by the U.S. Supreme Court's *Faragher* and *Ellerth* cases.

In those investigations, as well as other investigations of legal issues, confidentiality restrictions are crucial to upholding and supporting anti-retaliation policies, as well as avoiding the chilling effect on employees who may be reluctant to lodge legitimate complaints or participate in investigations due to a lack of reasonable confidentiality restrictions and efforts. As any human resources professional knows, complainants and investigation witnesses are frequently as concerned about confidentiality and retaliation as they are about the underlying issues. A lack of confidentiality only sets the groundwork for retaliatory behavior. Thus, the NLRB's rulings on confidentially restrictions in the context of workplace investigations appear to be counter-intuitive as well as counterproductive to good-faith efforts to address employee concerns.

However, in light of the current NLRB position, employers should proceed with caution and consider:

- limiting investigation confidentiality restrictions to those investigations of complaints and issues which expressly invoke or raise EEO or other legal issues, or which appear likely to implicate

such issues;

- specifically addressing and documenting why confidentiality is necessary in the particular instance;
- expressly tailoring such restrictions to the specific subject matter of the investigation during the pendency of the investigation itself; and
- avoiding explicit disciplinary threats for violation of the restriction.

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