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Big Deal? How the NLRB's Recent Decision Limits the Confidentiality of *All* Employer HR Investigations

By Alia Derrick



Employers concerned with maintaining the integrity of their internal HR investigations have traditionally done so by instructing or asking employees to refrain from discussing the investigation. But how does this common practice fare in light of the National Labor Relations Board's ("NLRB") recent decision in *Banner Health Systems d/b/a Banner*

Estrella Medical Center and James A. Navarro (Case 28-CA-023438, July 30, 2012)? In part, the answer depends on whether or not the employer's investigative policies and procedures are sufficiently advanced and up-to-date. If so, for reasons described below, compliance with *Banner Health Systems* may not be as difficult as many management-side pundits are predicting.

In *Banner Health Systems*, the NLRB determined that it was a violation of the National Labor Relations Act ("Act") for an employer to instruct or request participants in an internal investigation not to discuss the investigation with other employees, based solely on its concern for the integrity of the investigation. As a result, according to the NLRB, such instructions or requests by an employer violate the Act if the employer cannot first establish that at least one of four acceptable grounds exists. An employer can only instruct or request an employee not to discuss the investigation with coworkers if it finds that: (1) a witness needs 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. Employers can only comply with *Banner Health Systems*, if, at the outset of every investigation, they identify the crucial fact or reason that, in addition to "preserving integrity," justifies restricting the employee's right to engage in speech with coworkers about the terms or conditions of their employment – which is traditionally considered concerted activity protected by Section 7 of the Act.

Since many investigations involve one or all of the four acceptable bases for conducting a confidential HR investigation, this decision is probably not as problematic for employers as some are predicting. If an employer already conducts a thoughtful pre-investigation evaluation of the complaint and how to best conduct the investigation, it may satisfy *Banner Health Systems'* requirements fairly easily. Employers that are inexperienced at conducting internal investigations and/or lack complete policies and procedures for doing so may have more difficulty. In all situations that call for an internal investigation, employers should document their pre-investigation efforts making sure to, at the very least, describe the issues, the laws and privacy concerns involved, the evidence, if any, at risk and in need of protection, the identity of the investigator

(e.g., HR, in-house or private counsel, outside forensics investigator), and the justification for conducting the investigation in the manner finally chosen.

Ultimately, the *Banner Health Systems* decision limits, but does not foreclose, an employer's ability to protect the confidentiality of internal investigations by instructing the participants not to discuss the investigation with other employees. In response, employers should review their current policies and practices and strongly consider removing any provisions that violate the rule announced in *Banner Health Systems*. That said, as is too often the case with NLRB decisions, especially those that purport to apply to non-union employers, in *Banner Health Systems*, the Board ignores the fact that other laws and considerations may drive the need to require employees to maintain confidentiality during and after internal investigations – e.g., securities or privacy laws. When confronted with the need to conduct an internal investigation, it will be very important for employers to consult with their inside or outside labor/employment counsel to determine the best path forward, given all of the considerations that apply to their particular situation.

If you have any questions about this issue, please contact any member of the **Jackson Walker Labor & Employment** group or:

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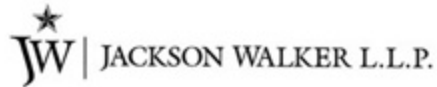
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