

## NLRB Maintains Focus on Workplace Policies: Board Holds That Request That Employee Not Discuss Employer's Ongoing Investigation Violates the National Labor Relations Act

The National Labor Relations Board (the "NLRB" or the "Board") has ruled, in *Banner Health System d/b/a Banner Estrella Medical Center*, 358 NLRB 93 (July 30, 2012), that an employer may violate the National Labor Relations Act (the "NLRA") when it enforces a general prohibition on employee discussion of ongoing investigations of employee misconduct. Specifically, the Board found that a human resources consultant's practice of asking employees not to discuss matters under internal investigation with their coworkers constitutes an unlawful restraint of the rights employees have under Section 7 of the NLRA to engage in "concerted activities" for mutual aid or protection and therefore violates Section 8(a)(1) of the NLRA.

### The Decision

In *Banner Health System*, the Board addressed an Arizona hospital's practice of routinely asking employees making an internal complaint not to discuss the matter with their coworkers while the hospital's investigation was ongoing. Although an Administrative Law Judge found that the hospital's confidentiality rule was for the purpose of protecting the integrity of the investigation, and therefore held that the maintenance of such a rule did not violate the NLRA, the Board disagreed with this finding. To the contrary, the Board held that a generalized concern with protecting the integrity of an internal investigation is insufficient to outweigh an employee's rights under Section 7 of the NLRA. Adopting a more demanding standard, the Board held that, before enforcing any confidentiality rule, it was the hospital's burden to first evaluate whether application of the rule was warranted in the particular circumstances, applying such factors as whether: (1) witnesses needed protection, (2) evidence was in danger of being destroyed, (3) testimony was in danger of being fabricated or (4) there was a need to prevent a cover-up. The Board found that the hospital's "blanket approach" – which relied on a general rule rather than a case-by-case determination of whether the integrity of the investigation was actually at risk – failed to meet this standard.

In reaching its decision, the majority rejected the dissent's argument that the hospital did not promulgate any "rule" and instead "merely suggested that employees not discuss matters under investigation". The majority disagreed that the record evidence (which established that the prohibition against discussion of ongoing investigations was included on the hospital's standard interview form under the heading "Introduction for all interviews") supported this characterization. Moreover, the majority held that, whether viewed as a command or a suggestion, the practice in question "had a reasonable tendency to coerce employees, and so constituted an unlawful restraint of Section 7 rights".

### Continued Focus on Workplace Policies and Section 7 Rights

The *Banner Health System* decision reflects the NLRB's continued focus on workplace policies and their interaction with employees' Section 7 rights, in both unionized and non-union organizations. As evidenced by this recent decision, overbroad confidentiality policies remain high on the Board's enforcement agenda.

On January 31, 2012, we issued an [alert](#) describing the guidance offered by the NLRB on social media policies in the workplace, including guidance on policies respecting the dissemination of sensitive and confidential company information. In this alert, we noted the Board's view that policies that prohibit the dissemination of unspecified "nonpublic" or "confidential" information may be unlawful, as such broad language could be interpreted, according to the Board, to cover information relating to terms and conditions of employment that, under Section 7 of the NLRA, employees must be permitted to discuss with others.

In May, the NLRB issued additional guidance regarding social media policies. The report from the NLRB's Acting General Counsel (the "General Counsel") outlined six separate cases where the General Counsel found that clauses in social media policies violate the NLRA. In one instance, the clause in question was found to be overbroad – and therefore unlawful – because it purported to restrict the disclosure of "confidential information" on public websites and could therefore be interpreted as prohibiting employees from discussing and disclosing information regarding their own conditions of employment or the conditions of employment of other employees. In another instance, the General Counsel found a prohibition against commenting on any legal matters, including pending litigation or disputes, unlawful because it would restrict employees from discussing the protected subject of potential claims against the employer. In short, the report concluded that a number of seemingly reasonable and common workplace policy formulations would violate the NLRA.

### What Does This Mean For You?

The NLRB's interest in workplace policies, and increased enforcement in relation to the same, will undoubtedly continue. Both the decision in *Banner Health System* and the NLRB's social media guidance make clear that the NLRB will apply a high level of scrutiny in evaluating the extent to which workplace policies might be viewed by employees as suppressing or restricting their rights under Section 7 of the NLRA.

Employers are advised to review their existing policies carefully. Workplace policies that exist almost universally, and that were for many years considered "best practice", are now subject to challenge by the NLRB. Non-unionized employers are reminded that the NLRA protects both union and non-union employees (although the practical consequences of a violation of the NLRA will, of course, vary from employer to employer). For more information about workplace policies, or employer obligations under federal labor laws more generally, please contact any attorney in Ropes & Gray's [labor & employment](#) department.