Daily Journal
November 20, 2012

Demanding confidentiality in the workplace

By Eli Kantor

Can you keep a secret? Do you promise not to tell? Most employers require employee witnesses in investigations into misconduct such as sexual harassment and discrimination to maintain confidentiality. However, because of a recent National Labor Relations Board decision, non-union employers who have a policy that prohibits employees from discussing ongoing internal investigations of workplace misconduct may violate the National Labor Relations Act.

Although this decision is arguably in conflict with the EEOC guidance on the investigation of harassment complaints, which requires employers to assure employees that their complaints will be kept confidential to the extent possible, employers must now deal with this new reality and be prepared to tailor their policies to the facts of each specific case, instead of having a blanket policy of confidentiality in internal investigations

The NLRA gives employees the right to act together to try to improve their pay and working conditions or to fix job related problems, even if they are not in a union. Section 7 of the NLRA gives employees the right to self organization to form a labor organization and to engage in other concerted activities for mutual aid or protection. Recently, the NLRB has been aggressively expanding these rights in the non-union workplace. They have regulated employer's social media policies as well as their employment at-will policies. Now the board is limiting employer's confidentiality policies as well.

In *Banner Health Systems d/b/a Banner Estrella Medical Center and James Navarro*, 358 NLRB No. 93 (July 30, 2012) the NLRB in a 2 to 1 decision ruled that an employer could not have a general policy prohibiting employees from discussing ongoing internal investigations without running afoul of Section 7 of the NLRA, which protects employees who are engaging in *protected concerted activity*. Section 7 protects all employees, both union and *non union*'s, rights to engage in other concerted activity for their mutual aid and protection.

James Navarro was employed as a sterile technician who refused his supervisor's instructions regarding sterilizing equipment and therefore received a disciplinary "coaching." During and before the investigation, human resources routinely asked hospital employees making a complaint not to discuss the matter with their coworkers during the investigation. In addition, each hospital employee hired was required to sign a confidentiality agreement, stating among other things that employees were prohibited from discussing investigations or private employee information such as salary.

> The NLRB has shifted the burden to the employer to show on a case-by-case basis, that it has a genuine business justification for confidentiality which outweighs their employee's Section 7 rights.

In ruling that these general confidentiality polices violated the act, the NLRB stated that to "justify a prohibition on employees' discussion of ongoing investigation, an employer must show that it has a legitimate business justification that outweighs employees' Section 7 rights." Section 7 of the NLRA protects the rights of employees to discuss wages, hours, and other terms of employment with their co-workers. The hospital contended that its practice of instructing its employees not to discuss ongoing internal investigations with coworkers was necessary to protect the integrity of the investigation. However, the NLRB held that this was insufficient to deprive employees of their protected rights to discuss the terms and conditions of employment with their coworkers.

Significantly, the NLRB has not forbidden employers from asking employees to keep information about internal investigations confidential in every case. Rather the NLRB has shifted the burden to the employer to show on a case-by-case basis, that it has a genuine business justification for confidentiality which outweighs their employee's Section 7 rights.

Accordingly, employers should review their current policies in light of the *Banner Health Systems* decision. The following suggestions may assist employers and their counsel in formulating new policies:

Require Confidentiality Where Necessary and Appropriate

Some Employer policies require confidentiality without a time frame or a subject matter restriction. Rather than such a one-size-fits all policy, the policy should be modified so that confidentiality will be required where necessary and appropriate. Then determine the specific confidentiality requirements appropriate to each case. Some investigations may only require confidentiality until the investigation concludes, while others may require permanent confidentiality due to privacy concerns.

Tailor Confidentiality to the Specific Investigation

Consider the specific nature of each investigation to develop a justification for confidentiality. As the NLRB noted, it was the hospitals burden "to first determine whether in any given investigation witnesses needed protection, evidence was in danger of being destroyed, testimony was in danger of being fabricated or there was a need to prevent a cover up."

Thus, an investigation into allegedly sexual harassing statements made during a meeting may require witnesses to keep their statements to investigators confidential, so as to protect the integrity of the investigation and not effect the recollection of other witnesses.

Document the Reasons for Confidentiality

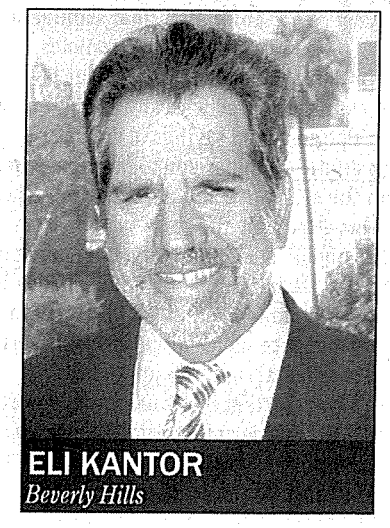
Once the requirements for confidentiality in a specific investigation have been determined, the specific reasons for the confidentiality restrictions should be documented based upon the facts of that particular investigation.

Communicate to Witnesses

At the beginning of each interview, the witnesses should be informed why confidentiality is necessary, the extent of the confidentiality, the length of the confidentiality obligations, and any other restrictions. That discussion should be documented in the interview notes.

Accordingly, if these procedures are followed, employers should still be able to ask their employees to "keep a secret" and conduct confidential internal investigations without violating the NLRA.

Eli M. Kantor *has extensive experience as an attorney in private practice. He represents employers and employees in all aspects of labor, employment and immigration law. He can be reached at (310) 274-8216 or at ekantor@beverlyhillsemploymentlaw.com.*



ELI KANTOR
Beverly Hills