# When "Let's Keep It Quiet" Is An Unfair Labor Practice

Insights
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On July 30, 2012, the National Labor Relations Board (NLRB) issued a bad decision for any employer that expects employees to maintain the confidentiality of internal investigations (such as investigations of employee misconduct, allegations of discrimination, and the like). In *Banner Health System,* the Board held that a blanket rule prohibiting employees from discussing an ongoing investigation violated their legal rights, unless "legitimate and substantial justification exists."

**Background**
Jo Ann Odell, a human resources consultant for Banner Health System, routinely asked employees participating in an internal investigation not to discuss the investigation among themselves while it was ongoing. Consistent with her practice, Odell made this request of Banner employee James Navarro, who was interviewed in connection with a charge of insubordination.

Navarro filed an unfair labor practice charge against Banner claiming, in part, that Odell's request violated his Section 7 rights. Section 7 of the National Labor Relations Act protects discussions between two or more employees concerning the terms and conditions of their employment, as well as communications for other mutual aid or protection.

The Board issued a complaint, which was tried before an Administrative Law Judge. The ALJ rejected Navarro's claim, finding, instead, that Banner's request that employees refrain from discussing internal investigations while they were ongoing was justified by its concern with protecting the integrity of the investigation.

**The Board's Decision**
After a review, the Board reversed the ALJ's decision on this point. An employer must demonstrate the existence of a substantial business justification that outweighs employees' Section 7 rights to justify such a prohibition of employee discussions of ongoing investigations. In the Board's view, a general concern with protecting the integrity of an investigation was simply insufficient to outweigh employees' Section 7 rights. Instead, the Board reasoned that an employer may be able to justify a restriction such as this if it determined:

- a witness needed protection;
- there was reason to believe evidence would be destroyed or fabricated; or
- it was necessary to prevent a "cover-up."

While it is unclear whether the above reasons are merely illustrations, as opposed to exclusive, it appears that a blanket restriction (or even a routine request) is likely to run afoul of the NLRB's expectations.

**What Does This Mean For You?**

This ruling is actually an expansion of an existing Board precedent. As far back as 1989, Board law held that it was unlawful for an employer to instruct an employee who had reported sexual harassment "not to talk to anyone [but their supervisors] about the matter." The reasoning was this would have prevented them not only from discussing the matter with other employees, but also with their union representatives.

*Banner* is significant because it highlights the risk to employers inherent in making blanket "requests" either orally or in writing that employees keep any internal investigation "confidential." It will clearly not be sufficient to claim that such requests are necessary to preserve the integrity of the investigation.

A better approach would be to limit such requests to situations where there is a legitimate and demonstrable safety concern, a concern about witness tampering, or a risk of lost evidence. Even in such instances, the request should ideally be limited to time (*i.e.* the duration of the investigation) and scope (*i.e.* during work time and on company property).

Additionally, you should avoid disciplining, or threatening to discipline, employees for failing to maintain the confidentiality of an internal investigation unless clearly warranted by the circumstances (such as when one or more of the considerations set forth above is present).

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