

### **NLRB Clarifies Rules on Confidentiality Instructions During Disciplinary Investigations**

Two recent National Labor Relations Board (NLRB) decisions *Hyundai America Shipping Agency, Inc.*, 357 N.L.R.B. No. 80 (2011) and *Banner Health System*, 358 N.L.R.B. No. 93 (2012) have altered the balance between an employer's understandable interest in confidential internal disciplinary investigations and an employee's right to discuss internal investigations with coworkers as provided by Section 7 of the National Labor Relations Act (NLRA). These cases reflect a shift from previous NLRB decisions that recognized the value of confidentiality pending employer investigations. The earlier decisions allowed employers to instruct employees not to discuss ongoing investigations where there was a business justification to maintain confidentiality of the investigative process. The more recent cases make clear that an employer's "generalized concern with protecting the integrity of its investigations is insufficient to outweigh employees' Section 7 rights." *Banner Health System*, 358 N.L.R.B., at \* 7. Instead, employers who seek to lawfully instruct employees not to speak about an ongoing disciplinary investigation must first determine whether "witnesses need [ ] protection, evidence [is] in danger of being destroyed, testimony [is] in danger of being fabricated, or there [is] a need to prevent a cover up." *Id.* at \*8.

#### **Employee Rights under Section 7**

Section 7 of the NLRA provides employees—whether unionized or not—with the right "to self-organization, to form, join, or assist labor organizations, to bargain collectively" and to engage in other activities. 29 U.S.C. § 157. The NLRB has interpreted this to include a right to "discuss discipline or disciplinary investigations involving fellow employees." *Caesar's Palace*, 336 NLRB 271, 272 (2001). However, where employers have a "legitimate and substantial business justification" for requiring confidentiality, employers can prohibit employees from discussing an ongoing investigation. *Id.* Only where an employee's interest in discussing an investigation outweighs the employer's asserted justification for confidentiality will an instruction to keep the details of an investigation confidential be a violation of Section 7. *Id.* The NLRB has found that a "legitimate and substantial business justification" existed where confidentiality was required to "ensure that witnesses were not put in danger, that evidence was not destroyed, and testimony was not fabricated." *Id.* Under Section 8 of the NLRA, it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." 29 U.S.C. § 158.

#### **Hyundai America Shipping Agency**

In the first of the two recent cases, *Hyundai America Shipping Agency, Inc.*, Human Resources personnel maintained a practice of providing oral warning to employees not to discuss or disclose matters under investigation. The NLRB affirmed the decision of the Administrative Law Judge (ALJ), who found that such warnings, which were "apparently given in every case, without any individual review to determine whether such confidentiality is truly necessary," were evidence of an "overly broad and discriminatory oral rule" in violation of Section 8. 357 N.L.R.B., at \*72-\*74. The ALJ found that "it is the [employer's] responsibility to first determine whether in any give[n] investigation witnesses needed 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." *Id.* at \*73. The NLRB affirmed that the employer violated Section 8 by maintaining and enforcing a rule prohibiting employees from discussing any matters under investigation by its Human Resources department. It did not comment on the ALJ's more specific finding that employers could not provide confidentiality instructions without first making investigation-specific determinations regarding the risks necessitating confidentiality.

## **Banner Health System**

In *Banner Health System*, Human Resources personnel began investigating an employee who was reported for failing to obey instructions. When interviewing the employee, Human Resources asked the employee not to discuss the matter, or the fact that the matter was being investigated, for the period of the investigation. The ALJ found that this instruction was appropriate “for the purpose of protecting the integrity of the investigation,” and because it ensured that “employees [would] give their own version of the facts and not what they heard another [employee] state.” The NLRB disagreed, finding that an employer’s “generalized concern with protecting the integrity of its investigations is insufficient to outweigh employees’ Section 7 rights.” 358 N.L.R.B. No. 93, \*1, \*7. Citing *Hyundai American Shipping Agency*, the NLRB stated that in order to “minimize the impact on Section 7 rights,” employers cannot instruct employees to maintain confidentiality regarding investigations without first determining whether “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.” *Id.* at \*8.

The Board also found that it did not matter that the employer in *Banner Health System* did not threaten the employee with discipline but had instead merely provided an instruction not to disclose the fact of the investigation or its details. Under *Banner Health System*, “[t]he law . . . does not require that a rule contain a direct or specific threat to discipline in order to be found unlawful.” *Id.* at \*9.

In light of *Hyundai America Shipping Agency, Inc.* and *Banner Health System*, employers should consider reviewing their practices, procedures, and policies to ensure that they do not include language directing employees to refrain from discussing investigations into employee misconduct with their coworkers. Given the NLRB’s focus on oral instructions, the review of employer practices and policies should include any forms or policies that guide Human Resources personnel or others who might interview employees during internal investigations. If interviewers instruct employees not to discuss or disclose the details of such an investigation, an employee could use these instructions as the basis for a claim under Section 8 of the NLRA. Employers seeking to conduct confidential internal investigations should advise investigators to create written record explaining the basis for their conclusion that a confidential investigation is appropriate. Interview records should indicate whether employees were advised or instructed not to disclose information about the investigation.

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