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## NLRB UNDERMINES EMPLOYERS' ABILITY TO PROTECT CONFIDENTIALITY OF INTERNAL INVESTIGATION AND WITNESS PRIVACY

By Charles O. Zuver, Jr.

The National Labor Relations Board (NLRB) recently issued two decisions, *Banner Health Systems* and *Piedmont Gardens*, which will hinder employers' ability to conduct internal investigations. As a result, employers can no longer ensure the confidentiality of witness statements and employers are significantly limited in their ability to instruct employees not to discuss internal investigations with co-workers.

In *Banner Health Systems*, the NLRB (2-1) held employees have a right under the National Labor Relations Act (NLRA) to discuss discipline or ongoing disciplinary investigations involving themselves or co-workers. An employer violates the law by restricting, or even asking, employees interviewed during a company investigation not to discuss the investigation with co-workers while the investigation is ongoing, absent the employer demonstrating that it has a legitimate and substantial business justification for the restriction that outweighs the employees' rights. According to the NLRB, an employer must show on a case-by-case basis, based on objectively reasonable grounds, that it believed the investigation would be corrupted without confidentiality either because 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. If

the employer shows such grounds exist, the employer may lawfully restrict employee disclosures.

In *Piedmont Gardens*, the NLRB (3-2) overruled a 37-year precedent holding that witness statements secured during an employer investigation will no longer be treated as confidential and given a blanket exemption from production. The NLRB concluded that witness statements should be treated the same as any other information request; therefore, an employer wishing to avoid disclosure of witness statements in connection with an employer investigation, assuming the statements are relevant, must assert that the witness statements are confidential and offer an accommodation to the union's need for the information. If the accommodation is rejected, the employer will need to demonstrate to the NLRB that it has a "legitimate and substantial" confidentiality interest in the statements – the employer will need show on a case-by-case basis that 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, and that such interest outweighs the union's need for the statements. An employer that fails to disclose or to offer a legitimate and substantial business justification for refusing to furnish the witness statement will violate the NLRA.

Additionally, the employer will need to explicitly assure employees of its intention to protect the confidentiality of the statement. It is not enough for the employees or employer simply to assume it.

The NLRB made clear in both *Banner Health Systems* and *Piedmont Gardens* that a generalized interest in protecting the integrity of employment investigations or a generalized fear of witness intimidation or retaliation will not suffice for confidentiality purposes; rather, an employer must show on a case-by-case basis that the employer has a legitimate and substantial need for confidentiality. Under these standards, employers will infrequently be able to require confidentiality with respect to their ongoing internal investigations or to guarantee witnesses that their statement will be kept confidential. Consequently, employers will almost always need to disclose witness statements and permit employees to discuss internal investigations among themselves even though such activity will potentially compromise the investigation. This will inevitably result in employees being less willing to come forward to report misconduct for fear of harassment and intimidation, particularly in those cases that involve allegations of a co-worker's misconduct. Given that employees are frequently the only witnesses to misconduct, employees may now less frequently report violations, employers may be less aware of the misconduct, and ultimately employer compliance with anti-harassment laws may be negatively affected.

Decisions like these will also likely result in a spike in unfair labor practice litigation over the confidentiality of witness statements because unions will routinely request witness statements and employers may resist disclosure in order to be able to secure workforce cooperation in an investigation and

to remain compliant with other employment statutes, which require an employer to conduct a prompt and thorough investigation. Employers can no longer guarantee confidentiality with respect to witness statements or ask employees to keep information discussed in investigatory interviews confidential absent a showing that witnesses need protection, evidence will possibly be destroyed, testimony is in danger of being fabricated or there is a need to prevent a cover-up. Refusing to produce witness statements or asking employees to maintain confidentiality with respect to the investigation absent such a showing will be found to be unlawful. Second, employers might find it useful to advise employees that they intend to protect the confidentiality of witness statements to the extent possible under the law. This may encourage employees to come forward with the understanding that the employer will try to protect the statement but cannot guarantee it. Third, prior to any investigatory interview and before the employer refuses to turn over a witness statement that the union has requested, employers should consult with labor counsel to evaluate on a case-by-case basis whether the employer has a legitimate and substantial confidentiality interest as defined by the NLRB and also gather any evidence it has that supports the need for confidentiality. If the employer can establish that legitimate and substantial need, the employer is free to ask/require employees keep the investigation confidential and can refuse to furnish the requested witness statements.

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