

NLRB Rulings Impact Confidentiality of Employer Investigations

Article By:

Labor & Employment Group

On June 26, 2015, the ***National Labor Relations (NLRB) Board*** issued two decisions which significantly impact the confidentiality of employer investigations into employee misconduct.

In the first case, *Banner Health Systems*, 362 NLRB No. 137, a 2-1 Board majority reaffirmed an earlier decision which had been vacated by the D.C. Circuit Court of Appeals since the Board lacked a proper quorum based upon the Supreme Court's *Noel Canning* decision.

Upon a *de novo* review of the record, Members Hirozawa and McFerran held that Banner Health

Systems violated employees' Section 7 rights under the National Labor Relations Act (NLRA) when through company forms and oral communications, the company requested employees not to talk with co-workers about matters that were currently under investigation by the company. Member Miscimarra dissented.

The Board majority acknowledged that there may be circumstances in which confidentiality is appropriate, but it placed upon an employer the onus to show that confidentiality was "objectively necessary". The Board majority cautioned that an employer "cannot reflexively impose confidentiality requirements in all cases or in all cases of a particular type". Thus, for a confidentiality rule during internal investigations to be valid, an employer will be required to show, for example, that confidentiality was necessary to prevent such things as threats to or intimidation of witnesses, or the risk of destruction of evidence.

The second case, *American Baptist Homes of the West*, 362 NLRB No. 139, also involved a *de novo* review of an earlier case that had been vacated after the *Noel Canning* decision. By a 3-2 majority, the Board prospectively overruled its 1978 decision in *Anheuser-Busch, Inc.*, 237 NLRB 1174 which had held that an employer was not required to turn over witness statements secured during an internal investigation to the union representing its employees.

The Board majority, comprised of Chairman Pearce and Members Hirozawa and McFerran, held that a union has a right to information relevant to its obligation to represent employees, including its decision whether to take a grievance to arbitration. The majority said that it could see no distinction between information such as witness names—which would have to be provided upon the union's request even under *Anheuser-Busch*—and witness statements. It stated that "we are not persuaded that witness statements are so fundamentally different from other types of information that a blanket exemption from disclosure is warranted."

Acknowledging that there may be times that the confidentiality of witness statements must be accommodated due to harassment or intimidation of witnesses, the majority cautioned that "if the requested information is relevant, the party asserting the confidentiality defense has the burden of proving that it has a legitimate and substantial confidentiality interest in the information, and that it outweighs the requesting party's need for the information."

Members Miscimarra and Johnson issued separate strong dissents. Member Miscimarra argued that when employees come forward to provide information involving the potential misconduct of a co-worker, that employee risks coercion, intimidation, harassment and retaliation. He stated that the majority's ruling would make employees less willing to provide witness statements and hamper an employer's investigation of legitimate matters. Member Johnson similarly expressed his view that the surrender of witness statements to a union severely undermines the employer's ability to investigate claims of serious misconduct.

Taken together, these cases make it clear that a blanket confidentiality rule during internal investigations will be held to violate Section 7 of the NLRA, absent objective proof from the employer that there is a compelling need for such confidentiality.

Source URL: <https://natlawreview.com/article/nlrb-rulings-impact-confidentiality-employer-investigations>