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Asking Employees to Keep Mum During Internal Investigations Could Constitute an Unfair Labor Practice, NLRB Rules

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The National Labor Relations Board took another step into territory most employers previously assumed was safe when it decided on July 31 that a general rule requiring confidentiality during an internal investigation into an employee complaint constitutes an unfair labor practice.

In *Banner Health System d/b/a Banner Estrella Medical Center*, a divided Board held that "to justify a prohibition on employee discussion of ongoing investigations, an employer must show that it has a legitimate business justification that outweighs employees' Section 7 rights." The 2-member majority rejected Banner's argument that the prohibition was justified by its interest in protecting the integrity of internal investigations, and ordered Banner to post a notice that the policy had been found to violate federal law.

A "blanket approach" to requiring confidentiality during internal investigations will not suffice, the Board held. Rather, an employer must consider each investigation individually, and decide whether confidentiality is required 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.

Lesson for Employers

Employers should jettison any general policy against employees discussing with each other ongoing investigations into employee misconduct. This holds true even if the policy carries no threat of discipline for violators. However, employers should continue to insist upon confidentiality in connection with investigations into particularly sensitive complaints, such as those of sexual harassment, discrimination, or fraud. Moving forward, employers should work with counsel in analyzing each investigation individually to determine the level of confidentiality required.

To discuss any questions you may have regarding the issues discussed in this alert, or how they may apply to your particular circumstances, please contact Emily S. Miller at 215.665.2142 or esmiller@cozen.com.

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