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Management Alert

NLRB Rules That Asking Employee Investigation Witnesses To Keep Quiet Violates Section 7 Of The Act

Last week, the National Labor Relations Board fired another shot across the bow of the employer community, finding unlawful the common (if not universal) practice of instructing -- or even *asking* -- witnesses in an investigation not to discuss the matter with others until after the investigation is completed. In *Banner Health System*, the Board in a two to one decision reversed the well-reasoned decision of the Administrative Law Judge, and held that the employer's standard interview instruction not to discuss the ongoing investigation with coworkers violated employee rights to engage in protected concerted activity under Section 7 of the National Labor Relations Act. The Board held that such an instruction, even if not coupled with an explicit threat of disciplinary consequences, is an unlawful restraint of employees' Section 7 rights. As part of its remedial action, the Board ordered the posting of a notice that would read, in relevant part, that the employer would cease and desist from "[m]aintaining or enforcing the rule that employees may not discuss with each other ongoing investigations of employee misconduct."

The underlying investigation in this case involved an employee's claim that his negative performance evaluation was the result of retaliation by his supervisor over a prior dispute. In the ensuing investigation, the human resources manager investigating the claim utilized an Interview of Complainant form to guide the discussion and to take notes. At the top of the form, in the prefatory remarks, the following instruction appeared:

> This is a confidential interview and I will keep our discussion confidential except as required by law, or Banner policy or as necessary to conduct this investigation. I ask you not to discuss this with your coworkers while the investigation is going on, for this reason, when people are talking it is difficult to do a fair investigation and separate facts from rumors.

During the hearing on the underlying charges, Counsel for the Acting General Counsel moved to amend the complaint to allege that the standard interview instructions violated Section 7 of the Act. The Administrative Law Judge permitted the amendment, but ultimately dismissed the allegations.

In issuing its decision to reverse the ALJ, the Board brushed aside the employers' evidence that the instruction was merely a request, not an instruction or direction. The Board also refused to consider the employer's evidence that the instructions are not shown to or provided to interviewees, and ignored the employer's testimony that the request was read aloud only occasionally, in sensitive investigation situations. Finally, the Board refused to credit the employer's evidence that the request was not even read during the interview at issue.

In its decision, the Board explained that a prohibition on employee discussions of ongoing investigations may be justified by showing a legitimate business justification that outweighs employees' Section 7 rights. However, in the context of this case at least, the Board ruled that the "blanket" instruction not to discuss the investigation "viewed in context, had a reasonable tendency to coerce employees, and so constituted an unlawful restraint of Section 7 rights." The Board rejected the employers' rationale of wishing to maintain the integrity of its investigations, a rationale accepted by the ALJ.

Instead, the Board urged that to justify such an instruction, an employer must weigh and ultimately justify the instruction with considerations such as:

- whether any given investigation witness needs protection;
- whether evidence is in danger of being destroyed;
- whether testimony is in danger of being fabricated; or
- whether there is a need to prevent a cover-up.

So Now What?

The Board's decision, the second in the past year, is disappointing. As the ALJ acknowledged, interview instructions regarding confidentiality are intended to ensure the integrity of the investigation. Employers investigating claims of misconduct, especially misconduct involving alleged harassment, discrimination, retaliation, or other potentially illegal activity, need to be able to conduct professional, untainted investigations to determine whether a violation occurred and to take prompt, corrective action. An employer's ability to conduct such investigations can be hampered if employees can communicate with each other and intentionally or unintentionally interfere with the recollection of witnesses or, worse yet, threaten employees if they cooperate.

While the Board did not foreclose instructions in all cases, its requirement that employers determine whether its business justifications for the instructions outweigh employee Section 7 rights is an invitation for litigation. But the limited factual circumstances of this case may provide employers some hope of being able to meet that burden.

As a threshold matter, employers need make no changes in interview instructions directed to managers or statutory supervisors (as defined by Section 211 of the Act), as they do not fall within the protection of Section 7 of the Act. When a non-supervisory employee is interviewed, however, employers should consider both the nature of the investigation and the identity of the witness, and determine the appropriate amount of emphasis to place upon confidentiality warnings.

The Board unfortunately provides no guidance in its decision about where these lines should be drawn and, as noted above, did not credit the employer's arguments or evidence regarding its reasonable and limited use of requests for confidentiality. Employers determining how to approach a given situation, however, may wish to consider the following:

- Presumably, the more serious the underlying conduct -- especially allegations of workplace violence or sexual or racial harassment -- the more likely that a confidentiality instruction would pass muster. After all, any workplace policy intended to protect employees from violence, discrimination or harassment necessarily depends on providing assurances that an employee may raise complaints in confidence, and have the comfort of knowing that his or her issue will be investigated and resolved with discretion. The Board's decision, as written, pays no heed to this competing consideration.
- If the employee interviewee is merely an eye-witness, and is neither the complainant nor the victim, presumably asking such an employee not to gossip or to approach other eye-witnesses before they can be interviewed would have more weight (and, as a practical matter, presumably such a witness would be less likely to file a charge or a claim, since they are only an eye-witness).
- The risk of perceived retaliation by a reporting victim employee should remain of paramount concern to employers. If, for example, an employee interviewee were free to make a remark or comment to an employee victim who reports harassment, such comments can become part of a mosaic of facts that support a claim of retaliation for reporting misconduct.
- The more particularized the instruction -- for example an instruction not to discuss the substance of the claims, or try to influence, tamper with, or otherwise attempt to shape or influence the testimony of any other witness -- the more likely to survive Board scrutiny.
- In a unionized environment, remember employees have Weingarten rights that must be respected, and even where an employee is the complainant or a mere witness with no such rights, it still might be advisable when giving some type of confidentiality instruction to nevertheless permit such employees to consult with their union representative.

In light of the Board's decision and with the above considerations in mind, employers may wish to modify standard written interview protocols and witness instructions to try to fit the particular instruction to the particular situation and witness. The standard investigation protocols could be amended, for example, to invite the interviewer to consider such matters as the nature of the investigation, the identity of the interviewee, the likelihood of retaliation, the possible spoliation of evidence, the possible fabrication or alignment of testimony and other considerations, before issuing any directions about confidentiality. Employers may wish even to provide some of these justifications to witnesses directly, as well as emphasize why it is in the personal interest of the interviewee not to talk to others (because, for example, such discussions may require a follow-up interview, or may be perceived as retaliatory or intimidating, etc.). Ultimately, employers should reconsider their standard investigation procedures and witness instructions in light of the Board's decision, and keep an eye on the development of this issue in future Board cases.

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