

NLRB PROVIDES ADDITIONAL GUIDANCE ON EMPLOYER CONFIDENTIALITY RULES

Labor & Employment Alert
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The National Labor Relations Board (NLRB) issued a decision in 2012 that held that an employer must establish a specific legitimate business justification for requiring employees to maintain confidentiality during internal investigations of employee complaints. *Banner Health System d/b/a Banner Estrella Medical Center*, 358 NLRB No. 93 (2012). The NLRB identified the following four justifications for an employer to prohibit employees from disclosing information about ongoing investigations: 1) investigation witnesses need protection from harassment or intimidation, 2) evidence is in danger of being destroyed, 3) testimony is in danger of being fabricated, or 4) there is a need to prevent a cover up.

On April 16, 2013, the general counsel to the NLRB issued an advice memorandum (dated January 29, 2013) that determined that an employer, Verso Paper, had an unlawful confidentiality policy. The policy required that employees maintain strict confidence in every investigation because “Verso has a strong desire to protect witnesses from harassment, intimidation, and retaliation, to keep evidence from being destroyed, to ensure that testimony is not fabricated, and to prevent a cover-up.”

In agreeing with the regional office of the NLRB that the policy was overbroad, the general counsel stated that an employer “cannot maintain a blanket rule regarding the confidentiality of employee investigations, but must demonstrate its need for confidentiality on a case-by-case basis.”

The general counsel went on to assert that the employer could have lawfully advised employees that:

Verso has a compelling interest in protecting the integrity of its investigations. In every investigation, Verso has a strong desire to protect witnesses from harassment, intimidation, and retaliation, to keep evidence from being destroyed, to ensure that testimony is not fabricated, and to prevent a cover-up. Verso may decide in some circumstances that in order to achieve these objectives, we must maintain the investigation and our role in it in strict confidence. If Verso reasonably imposes such a requirement and we do not maintain such confidentiality, we may be subject to disciplinary action up to and including immediate termination.

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Based on this advice memorandum, an employer may recite in its policy the four legitimate reasons for requiring confidentiality in a specific investigation pursuant to *Banner Health*. An employer may also discipline an employee who violates a confidentiality directive. However, it appears that an employer cannot require confidentiality in every case and must demonstrate on a case-by-case basis whether one of the justifications for confidentiality exists. A blanket policy would be violative of employees' Section 7 rights under the act.