

CONFIDENTIAL WORKPLACE INVESTIGATIONS UNDER ATTACK BY THE NLRB AND EEOC

Labor & Employment Alert
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The National Labor Relations Board (NLRB) and U.S. Equal Employment Opportunity Commission (EEOC) have condemned employer policies that ask employees not to discuss ongoing internal investigations of workplace misconduct and alleged harassment. These positions have significant implications for employers going forward with internal investigations.

The NLRB's decision in *Banner Estrella Medical Center*, issued on July 30, 2012, found that part of an employer's confidential internal investigation procedure violated the National Labor Relations Act (NLRA). Specifically, the employer's investigator routinely asked employees making a complaint not to discuss the matter with their co-workers while the investigation was ongoing. The NLRB found that the employer violated employees' rights to engage in protected concerted activity under Section 7 of the NLRA when it requested that employees refrain from discussing an ongoing investigation regarding allegations of workplace misconduct. The NLRB held that there was no legitimate business reason to justify this prohibition on employee discussion. The NLRB went on to find that the employer's "generalized concern with protecting the integrity of its investigations is insufficient to outweigh employees' Section 7 rights."

Within the same week, the EEOC addressed confidential workplace investigations and their impact on employees' rights to protected opposition. On August 3, 2012, the EEOC's Buffalo, New York office issued a pre-determination letter to an employer, indicating that it would be expanding its investigation of the employer to include the company's policy of warning employees not to discuss harassment investigations.

According to the EEOC, the employer had "a written policy that warns all employees who participate in one of [the employer's] internal investigations of harassment that they could be subject to discipline or discharge for discussing 'the matter,' apparently with anyone."

The EEOC went on to state that:

EEOC guidance states that complaining to anyone, including high management, union officials, other employees, newspapers, etc. about discrimination is protected opposition. It also states that the most flagrant infringement of the rights that are

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conferred on an individual by Title VII's retaliation provisions is the denial of the right to oppose discrimination. So, discussing one's complaints of sexual harassment with others is protected opposition. An employer who tries to stop an employee from talking with others about alleged discrimination is violating Title VII rights, and the violation is "flagrant" not trivial. In this case, telling the ___ women who complained of harassment that they were not to tell others about the alleged harassment is enough to constitute a harm under Title VII. There does not have to be a separate adverse action. In addition, your written policy is so broad that a reasonable employee could conclude from reading it that she could face discipline or charge for making inquiries to the EEOC about harassment if that harassment is being or has been investigated internally by your organization.

The EEOC's position, as expressed in the pre-determination letter, essentially condemns confidential workplace investigations, finding that an employer's request that the employee(s) keep the internal investigation confidential to be a "flagrant" violation of an employee's right of protected opposition under Title VII.

Although the EEOC's position is not law and may be limited to the circumstances of the specific charges, the EEOC's position, along with the NLRB's, could make employer investigations meaningless if employees do not keep their participation in such investigations confidential. If an employer determines that confidentiality is necessary, it should develop the specific reasons in advance and explain them to participants. Nevertheless, employers should review their policies in accordance with these recent agency positions to ensure that they are not overbroad. Employers may also want to focus on streamlining their internal investigation procedures to ensure each investigation is well planned and completed timely. In particular, employers may want to require immediate or prompt interviews with all employees to reduce the possible effect of employees coordinating stories and/or spoliation of evidence.

We will continue to monitor the NLRB's and EEOC's positions and notify you of any developments relating to employer internal investigations. If you have any questions regarding your internal investigation procedure, please contact any one of the attorneys in our Labor & Employment Practice Group.