

EMPLOYMENT LAW ALERT
AUGUST 2012

SHHHHHH...
NLRB FINDS BLANKET CONFIDENTIALITY REQUIREMENT FOR
HUMAN RESOURCES INVESTIGATIONS UNLAWFUL

The National Labor Relations Board has found unlawful an employer's general policy instructing employees to keep information about ongoing workplace investigations to themselves.

In the recent case of *Banner Health System*, the Board found that employer-imposed confidentiality of investigations without a specific reason violates employees' rights to concerted activity. The majority decision instructed that confidentiality may be appropriate, however, when the employer can show that: (1) there is a need to protect a witness; (2) there is likelihood that evidence will be destroyed; (3) there is a threat that testimony from witnesses would be fabricated; or (4) there is a need to prevent a "cover-up." Unfortunately, the Board offered no guidance about the kind of proof required for an employer to demonstrate a confidentiality requirement is lawful.

It is a typical practice for workplace investigations to be kept confidential, to the extent possible, and for employee witnesses to be instructed not to discuss the investigation. However, such blanket practices may now subject employers to liability.

Employers are advised to immediately review and update employee handbooks and written policies to be sure that no prohibited confidentiality policy has been established. Also, employers should look at instructions for interviewing witnesses, including checklists used in human resources investigation.

Employers are now required to conduct a threshold analysis before initiating any human resources investigation, to determine if grounds for confidentiality are present. We recommend such determination be in writing and subject to periodic reassessment as facts come to light and circumstances change throughout the investigation.

If you have any questions about this alert or would like to discuss your company's employment policies, please contact one of our employment partners, [Gary M. Feldman](#) or, [Tamsin R. Kaplan](#) in our [Employment Law Practice Area](#).

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