
When Can an Employer Insist on Confidentiality in an HR Investigation? DC Circuit Relaxes Standard Set by NLRB

By Daniel J. Bretz, Thomas P. Brady / Apr 11, 2017

On March 25, 2017, in *Banner Health Systems v NLRB*, the United States Court of Appeals, District of Columbia Circuit, refused to enforce the National Labor Relations Board's (Board) Order that found that the employer violated Section 7 of the National Labor Relations Act (Act) by maintaining "a categorical policy of asking employees not to discuss certain kinds of human resources investigations."

Banner Health received a good deal of notoriety a few years ago (see Clark Hill's e-alert on [Employers Must Justify Instructing Employees Not to Discuss Ongoing Investigations](#)). Many commentators said that it essentially killed confidentiality requirements in HR investigations since it set a nearly impossible standard for employers to meet before asking employees not to discuss an ongoing investigation.

The Board's 2012 decision established a test that the employer had to meet on a case by case basis in order to maintain an investigative non-disclosure policy: the employer must prove in a particular situation that it had "**legitimate and substantial business justification that outweighs the employee's Section 7 rights to prohibit employees from discussing ongoing investigations.**"

The court's decision found that there was no factual basis to support the Board's decision and refused to enforce it. In the opinion, the court cited a more employer-friendly test: "**the employer must show, on a case by case basis, that confidentiality is necessary based on objectively reasonable grounds for believing that the integrity of the investigation will be compromised without confidentiality.**"

In deciding the case, the court did not rely on this easier burden on the employer. Instead, it refused to enforce the decision because there was no evidence to support the Board's conclusion that the employer had a blanket or categorical confidentiality policy.

On a separate issue, the court enforced the Board's decision that the employer's policy which stated that employees were prohibited from discussing their salary and working conditions violates Section 7. This holding is not significant as it is well established law.

The DC Circuit's decision is not necessarily binding on the Board, as the Board believes that only its own decisions are precedential. But this decision does provide some breathing space for HR investigations, and gives HR professionals some latitude to require confidentiality in sensitive situations where there are reasonable grounds to believe that disclosure of information by interviewees could compromise the investigation. The less restrictive test articulated by the DC Circuit may also be adopted in future cases by the newly constituted Board.

If you have any questions about the decision, or how to proceed in this evolving area of the law, please contact Thomas P. Brady at (313) 965-8291 | tbrady@clarkhill.com, Daniel J. Bretz at (313) 965-8366 | dbretz@clarkhill.com, or your Clark Hill Labor and Employment Law attorney.