

April 3, 2017

What Can You Say? D.C. Circuit Speaks on Employee Confidentiality

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In a ruling that affects both union and non-union employers, the U.S. Court of Appeals for the D.C. Circuit recently held in *Banner Health System v. NLRB* that employers may not prohibit employees from discussing information related to employees' salaries and discipline. While this decision does not break new ground, it does provide employers with some guidance on how the D.C. Circuit will scrutinize efforts to maintain confidentiality surrounding HR investigations.

Background

The facts before the court of appeals were straightforward. The company required all new hires to sign a confidentiality agreement that defined "confidential information" to include "[p]rivate employee information (such as salaries, disciplinary action, etc.) that is not shared by the employee." The agreement also cautioned that employees who failed to maintain the confidentiality of such information could be subject to "corrective action, including termination and possibly legal action."

The company also had created an "Interview of Complainant Form," which was used to record employee complaints to Human Resources. The form included a general instruction that employees making internal complaints not discuss their complaints with coworkers during the ensuing investigation. Although the company's human resources consultant did not provide copies of the form to employees, she relayed the warnings about confidentiality to employees during interviews. She testified that she did so only during investigations in which she needed to speak to more than one person, to "keep the investigation as pure as possible."

The National Labor Relations Board concluded that both the confidentiality agreement's prohibition on discussing private employee information and the investigation form's confidentiality rule violated

Section 7 of the National Labor Relations Act, which protects employees' rights to discuss the terms and conditions of their employment. The company appealed the Board's decision to the court of appeals.

D.C. Circuit Decision

The court of appeals agreed with the Board that employees could reasonably construe the confidentiality agreement to restrict their Section 7 right to discuss the terms and conditions of their employment. The D.C. Circuit explained that although in a prior case it approved a hospital's rule barring discussion of "confidential information concerning patients or employees," it did so because a reasonable employee would not ordinarily assume that "confidential information" included information about the terms and conditions of employment. By contrast, the confidentiality agreement being used by the hospital in this case expressly prohibited discussions of such terms and conditions of employment as salaries and discipline.

Moreover, the confidentiality agreement's safe harbor provision, allowing discussion of such information when "shared by the employee" whom the information concerned, did not render the prohibition lawful. Not only does the Act protect the use of information "innocently obtained," but the safe harbor was too vague to be effective. According to the court, it was unclear from the confidentiality agreement whether employees could discuss covered information if it was leaked inadvertently and, similarly, the confidentiality agreement failed to specify with whom the information needed to be shared to permit employees to discuss it openly.

The company also failed to prove a legitimate and substantial business justification for the overly restrictive confidentiality agreement. According to the court, although the company asserted that the confidentiality agreement was necessary to protect patient privacy, by extending coverage to employee information, the company had not narrowly tailored the agreement to meet that goal. Similarly, the court concluded that the company had not narrowly tailored the agreement to its professed interest in respecting antidiscrimination and privacy laws.

Conversely, the court of appeals found that the Board's conclusion that the interview form's nondisclosure rule violated the Act lacked substantial evidence. The court found the Board's conclusion that the company maintained an unlawful blanket instruction to maintain confidentiality unsupported by evidence. Specifically, the court found no evidence that the company instructed employees to maintain confidentiality in all cases.

What Does This Mean?

The court of appeals' opinion does not represent a sea change. The practical takeaway is that employers may not maintain policies that an employee would reasonably interpret as prohibiting discussions about the terms and conditions of employment, particularly salaries and discipline. *Banner Health System* may require employers to modify existing policies, procedures, and forms used for internal investigations. Similarly, although the court of appeals found insufficient evidence that Banner Health maintained a blanket confidentiality requirement that was applied to all investigations, it did not authorize such blanket rules.

The court of appeals did recognize, however, that confidentiality instructions may be appropriate during certain employee investigations. Carefully tailored confidentiality instructions remain legitimate for internal investigations in which an employer has a specific legitimate business justification for confidentiality. Such investigations may include investigations of workplace misconduct, harassment, workplace theft, and employee drug use, among other issues, or where such an instruction is necessary to maintain the attorney/client privilege. Stated more specifically, employers have legitimate reasons to demand confidentiality from employees involved in some investigations. Many investigations involve credibility, for example, where disclosure of the nature of the investigator's question by one employee to another could impact the investigator's ability to evaluate the later witness's credibility. In other investigations, witness tampering

or potential threats against a witness may justify a demand of confidentiality. To automatically demand confidentiality in every investigation, however, is something that employers should avoid.

Indeed, federal agencies such as the Equal Employment Opportunity Commission have previously counseled employers to inform employees that it will protect the confidentiality of harassment allegations to the extent possible. Maintaining confidentiality is crucial to creating an environment that encourages employees to promptly report violations of an employer's code of business conduct, such as conflicts of interest, theft, discrimination, and harassment. Prompt reporting is often vital to successful investigation and remediation of these complaints, and can be critical to an employer's defense in the event of litigation.

If a confidentiality instruction is not appropriate, proper planning of internal investigations may mitigate confidentiality concerns. Employers with sufficient resources to dedicate to internal investigations may plan "blitz" interviews of employees, interviewing several critical witnesses simultaneously or in rapid succession, so employees do not have time to discuss the interviews among themselves. Depending on the scope of the investigation, and the number of witnesses, employers may also keep employees sequestered until its investigators can interview them, although sequestration can create its own set of problems - ranging from unhappy workers to, in an extreme case, false imprisonment.

Employers should review their personnel policies and confidentiality agreements to ensure that those policies comply with the court of appeals' decision.¹ They should eliminate prohibitions on employee discussions concerning the terms and conditions of employment. Employers should also consider excising confidentiality requirements for internal investigations in favor of language indicating that confidentiality may be appropriate under certain circumstances. In addition, employers should train those employees charged with conducting internal investigations as to the circumstances in which a confidentiality instruction is appropriate, how to narrowly tailor the instruction, and how to plan investigations that do not warrant such an instruction.

¹ Littler filed an amicus brief on behalf of the business community in the *Banner Health System* case regarding the confidentiality issues, and can assist employers with these matters. The firm also provides investigations training to clients on a regular basis.