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EMPLOYER INVESTIGATIONS

Is requiring confidentiality in workplace investigations passé?

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Can employers require employees who participate in personnel investigations to maintain confidentiality? Two key cases—one federal and one from the California Public Employment Relations Board (PERB)—have held that employers can't have a blanket rule requiring confidentiality in all instances. Because of these cases, many employers have altogether abandoned their prior policies requiring confidentiality. Others have settled on confidentiality admonitions that may not measure up to existing case law. Until the dust settles on this important area of personnel law, we suggest that a tailored, case-by-case approach to confidentiality admonitions is the best alternative.

Two key decisions

In 2012, the National Labor Relations Board (NLRB) decided that employers couldn't have a rule prohibiting employees from discussing ongoing investigations of employee misconduct with each other. After the U.S. Supreme Court put the decision on hold for procedural reasons, the NLRB reaffirmed the decision in 2015. *Banner Health System*, 362 NLRB 137 (2015), reaffirming *Banner Health System*, 358 NLRB 93 (2012).

The NLRB explained that employees have a right to discuss "ongoing disciplinary investigations involving themselves or coworkers" because such "discussions are vital" to addressing terms and conditions of employment, and the employer can restrict those discussions only if its legitimate and substantial business justification outweighs the employees' right to engage in the discussions.

What that means in concrete terms is that an employer can restrict those discussions *only if* it can show *on a case-by-case basis* that it has "objectively reasonable grounds for believing that the integrity of the investigation will be compromised without confidentiality." The NLRB listed the following objective factors that might apply:

- Witnesses need protection;
- Evidence is in danger of being destroyed;
- Testimony is in danger of being fabricated; or
- There is a need to prevent a cover-up.

In 2014, the PERB followed the NLRB's approach. While the case involved interpretation of the Educational Employment Relations Act, which governs public-school employers, the PERB will almost certainly apply it in all facets of the public sector over which it has jurisdiction, including local agencies. *Los Angeles Community College District*, PERB Decision No. 2404-E (2014).

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Incremental legal and policy developments

Since then, some incremental developments have occurred. In a little-noticed decision issued in March 2017, the U.S. Court of Appeals for the District of Columbia Circuit agreed that an employer couldn't have "a policy of categorically requesting nondisclosure regarding any particular kind of investigation," such as those involving claims of sexual harassment, a hostile work environment, retaliation, or abuse. The court, however, declined to rule on the NLRB's "requirement of a case-by-case approach to justifying investigative confidentiality." It also decided that there was insufficient factual evidence to support the NLRB's order regarding "a categorical investigative nondisclosure policy," so the court refused to enforce it. *Banner Health Sys. v. National Labor Relations Bd.*, 851 F.3d 35 (D.C. Cir., 2017).

Concerned about how the NLRB's approach will affect discrimination, harassment, and retaliation cases, the Equal Employment Opportunity Commission (EEOC) and California's Department of Fair Employment and Housing (DFEH) have not quite bought in to the NLRB's approach. But they aren't addressing this issue head-on, either.

In its June 2016 report on sexual harassment, the EEOC addressed the NLRB's prohibition of blanket confidentiality rules, saying that "investigations should be kept *as confidential as possible,* recognizing that complete confidentiality or anonymity will not always be attainable" and that the *"EEOC and the [NLRB] should confer, consult, and attempt to jointly clarify and harmonize the interplay of the National Labor Relations Act [NLRA] and federal EEO statutes with regard to the permissible confidentiality of workplace investigations."* (See www.eeoc.gov/eeoc/task_force/harassment/report.cfm.) So far, however, there has been no joint clarification.

The DFEH has ducked the question, calling this "a complicated issue" and advising that "if you want to require confidentiality, you might want to check with an attorney about when it is appropriate and how to do so." So much for concrete guidance from authoritative sources.

On one important point, the DFEH did advise, "Managers can, and should, be told to keep the investigation confidential." This advice is consistent with the fact that managerial employees are the lawful representatives of the employer and must support the employer's efforts to address allegations of discrimination, harassment, and retaliation under Title VII of the Civil Rights Act of 1964 and the California Fair Employment and Housing Act (FEHA). It's also consistent with the fact that managers don't have collective bargaining rights under the NLRA or under most (but not all) California public-sector labor relations statutes. The fact that managers under the Meyers-Milias-Brown Act do have collective bargaining rights is presumably subordinate to their fundamental managerial duties.

What's an employer to do?

In response to the prospect that legitimate personnel investigations could be jeopardized by requiring strict confidentiality, many employers have abandoned confidentiality admonitions. Others have politely "requested" confidentiality (an approach that *Banner* itself rejects), while still others have qualified their confidentiality requests with boilerplate language that permits employees to confer with their representatives and "exercise other rights as recognized under [the applicable labor relations statute]."

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Since each of those approaches has its own pitfalls, what's an employer to do?

(1) Don't have a blanket policy requiring or even requesting confidentiality. Instead, have a blanket policy by which you will determine case-by-case the extent to which you need to require confidentiality.

(2) In each case, you should assess whether the integrity of the investigation will be compromised without confidentiality, including the factors the NLRB identified.

Bottom line

Consider critically, on a case-by-case basis, whether there is reason to believe the integrity of the investigation will be compromised without confidentiality, and proceed accordingly. Some factors to consider are whether witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, or there is a need to prevent a cover-up.

Investigations into allegations of harassment, discrimination, and retaliation likely enjoy a special status, given Title VII and FEHA imperatives. In such investigations, as well as those involving other types of serious misconduct—especially where credibility issues exist—requests for confidentiality are more likely to be upheld so long as they are particularized and based on the above criteria.

When the employer uses an outside investigator, it is the *employer's* decision—not the investigator's—as to how much, if at all, to require confidentiality. The employer, however, should seek and consider the investigator's assessment of the extent of the need for confidentiality.

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