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Can You Require Employees To Keep Harassment And Other Workplace Investigations "Confidential"?

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The wave of harassment claims sweeping the nation recently has spawned countless workplace investigations. But can companies require employees to keep such investigations "confidential" (*i.e.*, direct employees to refrain from discussing an investigation while its ongoing)? The National Labor Relations Board (NLRB), unfortunately, has placed limits on employers' – both union and non-union alike – ability to do so. Specifically, in a 2015 decision – *Banner Health System*, 362 NLRB No. 137 (June 26, 2015) – the NLRB ruled that an employer violated the National Labor Relations Act (NLRA) by asking an employee, who was the subject of an internal investigation, to refrain from discussing it while the investigation was pending. The NLRB held: "[T]o justify a prohibition on employee discussion of ongoing investigations, an employer must show that it has a legitimate business justification that outweighs employees' Section 7 rights." The agency held that NLRA Section 7 rights include a general right to discuss workplace issues, including workplace investigations. According to the board's ruling in that case, before telling employees to refrain from discussing an ongoing investigation, the employer has the burden to first determine whether in any given investigation one or more of the following issues is present: (1) witnesses needing protection; (2) evidence in danger of being destroyed; (3) testimony in danger of being fabricated; or (4) there is a need to prevent a cover-up. The agency explicitly ruled that an employer's general assertion of protecting the integrity of an investigation "clearly fail[s] to meet" that burden. Thus, the NLRB requires actual proof that one of the four potential issues it identified is in play before an employer can require that its ongoing workplace investigation remain confidential. Fast forward to now. On Feb 2., the NLRB affirmed an administrative law judge's ruling that Costco violated the NLRA when it verbally instructed just one employee who was the subject of a workplace investigation to refrain from discussing the matter while the investigation was ongoing. In essence, the board reaffirmed its commitment to its ruling in *Banner* Health – at least for now. Accordingly, employers need to be mindful – or at least aware – of the NLRB's stance on requiring employees to keep investigations "confidential" both in unionized and non-unionized settings. This decision may be somewhat surprising to employers given the NLRB recently overruled a significant amount of prior precedent that hamstrung employers on multiple fronts, including with respect to standard handbook policies. There is hope, however, that this could change. On Dec. 1, 2017, new NLRB General Counsel Peter Robb issued a memo signaling his office may be seeking to have the board overturn NLRB precedent in a number of

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areas. One of the cases specifically noted in his memo? *Banner Health* and its holding with respect to workplace investigations. The *Costco* case was litigated and briefed before Robb took office, so there is a chance the NLRB could revisit this issue in the future and ease up limitations on this front. In addition, the NLRB historically waits to overrule significant precedent until it has a complement of five members, and it currently only has four since former Chairman Philip Miscimarra stepped down last year. Here's hoping the issue is revisited and the board softens its view, as having the ability to keep investigations confidential often can help ensure the integrity of the process and maximize opportunity for reaching the right result. Stay tuned.