



NLRB Squares Itself With EEOC: Employers May Require Confidentiality During Open Investigations

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Imagine this scenario: A female employee complains to HR claiming she is being sexually harassed by a male coworker. HR immediately convenes an investigation, and to protect the integrity of the investigation, reminds the accuser, the accused and witnesses of its policy that employees are prohibited from discussing the investigation with coworkers during the investigation. The accused employee files a claim with the National Labor Relations Board, stating the company's policy violates his rights under federal labor law. Until recently, the accused employee stated a valid claim under federal labor law because of *Banner Health Systems* (362 NLRB 1108 (2015)).

On Dec. 17, the NLRB reversed the confounding *Banner Health* decision that had placed employers in the untenable position of potentially violating the NLRA in order to protect the integrity of internal investigations, which are critical to enforcement of anti-harassment policies. In an early holiday gift, in [Apogee Retail](#), the NLRB reversed *Banner Health*, and found that employer policies that require confidentiality during internal investigations are per se lawful.

The NLRB's previous stance had placed the NLRB at odds with the EEOC, which encouraged employers to maintain confidentiality requirements in internal investigations, particularly sexual harassment investigations, noting confidentiality provisions encourage victims and witnesses to come forward.

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Under the new NLRB standard announced Dec. 17, an employer may properly require confidentiality during open investigations. However, confidentiality requirements that are not, on their face, limited to open investigations remain subject to challenge to see if they unlawfully interfere with employee rights under federal labor law.