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## Attorneys at Law

### CLIENT ALERT:

Labor and Employment Law

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#### **NLRB RULING JEOPARDIZES CONFIDENTIALITY OF INTERNAL INVESTIGATIONS**

Businesses long have been able to maintain a policy of confidentiality when conducting internal employee investigations, such as disciplinary matters or employment discrimination complaints. According to a recent ruling by the National Labor Relations Board, ("NLRB") asking employee to refrain from discussing ongoing internal investigations might be a violation of the National Labor Relations Act ("NLRA"). The ruling prevents employers from issuing blanket rules ordering workers to keep investigations confidential and could seriously hamper and even undermine such investigations.

#### What did the NLRB Do?

Section 8(a)(1) of the NLRA defines an employer's interference with employees' rights to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection" as an "unfair labor practice." In recent years, the National Labor Relations Board has made clear that the prohibition on such interference applies not only to union companies, but also to non-union employers. In addition, the NLRB has made quite clear it intends to broaden the scope of the NLRB's definition of both "interference" and "concerted activities."

For instance, on July 30, 2012, the National Labor Relations Board issued an opinion broadening even further the scope of the NLRA. In *Benner Health System and James A. Navarro*, the NLRB found that a company policy that asked employees to not discuss with their coworkers ongoing internal investigations of employee misconduct violated Section 8(a)(1). The NLRB held that in order to protect employees' rights to discuss the "terms and conditions" of their employment, it is the employer's burden to determine prior to requesting confidentiality about an investigation, "whether in any given investigation witnesses needed protection, evidence was in danger of being fabricated, or there was a need to protect a cover up." Because the employer in *Benner Health* failed to meet that burden, the NLRB held that its "blanket approach" of maintaining and applying a rule prohibiting employees from discussing ongoing investigations violated Section 8(a)(1) of the NLRA.

Far from an anomaly, the decision in *Benner Health* expanded upon a 2011 NLRB decision invalidating a different blanket confidentiality clause. The impermissible clause in that case deemed "terms of employment, including compensation" to be confidential and made discussion of them by employees with "other parties" to be a terminable offense. In a similar finding to that in *Benner Health*, the NLRB held that the general confidentiality designation had a chilling effect on employees' Section 7 rights and therefore found it to be an unfair labor practice.

Over the past several years, then, the NLRB has raised questions about the legality of confidentiality clauses in a substantial number of employee handbooks and internal investigation policies. This appears to be an area of focus for the NLRB and it should make employers wary.

#### How Should Employers Respond?

Although the NLRB now requires a case-by-case determination, nearly every internal investigation will continue to require confidentiality at least until all witnesses are interviewed. There are legitimate business needs for requesting confidentiality such as protecting the reliability of the investigation and ensuring the rights of the complainant and the accused. Even so, employers should be aware that once the investigation is completed it is likely that the need for confidentiality will evaporate.

once the investigation is completed, it is likely that the need for confidentiality will evaporate, particularly in cases in which the results were made public.

Employers should take advantage of this decision by reviewing and revising their employee manuals and internal investigation policies. They should ensure that there is a procedure to determine particularized need for confidentiality in each internal investigation based on the facts of the case and should revise any blanket confidentiality requirements to allow for individualized assessments of the need for confidentiality while at the same time preserving the integrity of internal investigation procedures.

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If you have a question concerning an employment matter or if you would like additional information on the subject of this Client Alert, please contact;

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