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Employer Asking Employees Not To Discuss With Co-Workers Employment-Related Matters Under Ongoing Internal Investigation Violates The NLRA

Section 7 of the National Labor Relations Act (NLRA) protects the right of employees, both union-represented and non-union, to engage in “concerted activities” for their mutual aid and protection. Discussions with co-workers concerning matters related to terms and conditions of employment is protected concerted activity.

In a case entitled Banner Health System, decided July 30, 2012, the National Labor Relations Board (NLRB) ruled that the employer’s policy of asking employees not to discuss employment-related matters under ongoing internal investigation with co-workers violates Section 7 of the NLRA.

In the course of investigating a work-related dispute between an employee and his supervisor, a Human Resources Assistant interviewed the employee. In accord with company policy, the Human Resources Assistant asked the employee not to discuss the matter with his co-workers while the investigation was ongoing in order to protect the integrity of the investigation.

The NLRB held that the employer’s generalized concern with protecting the integrity of the investigation was insufficient to outweigh the employee’s Section 7 rights. Further, the NLRB said that even if the Human Resources Assistant’s asking the employee to maintain confidentiality could be viewed as only a “suggestion,” not a command, it would have a tendency to coerce employees and so constituted an unlawful restraint of Section 7 rights.

In a given situation, the NLRB noted that a confidentiality directive might be supported by a legitimate business justification such as where the 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.

The NLRB has recently launched a web site that focuses on the Section 7 rights of employees to engage in protected concerted activity and describes several cases where employers have been found to have violated employees’ Section 7 rights. The web site is <http://nlrb.gov/concerted-activity>. All employers, in both unionized and non-unionized work environments, should be knowledgeable about what are protected “concerted activities” and how they may affect their policies and procedures, including, for example, social media policies. For further information, please contact your Butzel Long attorney or the authors of this Client Alert.

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