



Additional Guidance Released by NLRB on Confidentiality and Employee-Related Investigations

05.01.2013

As we reported on August 27, 2012, in *Banner Health System** the National Labor Relations Board (NLRB) ruled that an employer violates Section 7 of the National Labor Relations Act (NLRA) when it maintains a blanket policy that prohibits employees from discussing workplace investigations.

On April 16, 2013, the NLRB's Division of Advice released a memorandum of advise providing further guidance to employers regarding the confidentiality of investigations. The Division found the following policy from Verso Paper's Code of Conduct in violation of Section 7 of the NLRA:

Verso has a compelling interest in protecting the integrity of its investigations. In every investigation, Verso has a strong desire to protect witnesses from harassment, intimidation and retaliation, to keep evidence from being destroyed, to ensure that testimony is not fabricated, and to prevent a cover-up. To assist Verso in achieving these objectives, we must maintain the investigation and our role in it in strict confidence. If we do not maintain such confidentiality, we may be subject to disciplinary action up to and including immediate termination.

However, the Division also stated that the policy would be lawful if the last two sentences were deleted and replaced with:

Verso may decide in some circumstances that in order to achieve these objectives, we must maintain the investigation and our role in it in strict confidence. If Verso reasonably imposes such a requirement and we do not maintain such confidentiality, we may be subject to disciplinary action up to and including immediate termination.

Accordingly, to be compliant with the NLRB's current position, employers must establish in each investigation that there are case specific reasons/facts that justify maintaining an investigation as confidential.

**Banner Health System* is currently on appeal to the U.S. Court of Appeals for the District of Columbia Circuit. Stay tuned for updates on this issue.