



Blanket Confidentiality Requirements Regarding Employment-Related Investigations Violate Section 7 of the NLRA

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As part of its current campaign to take more aggressive positions regarding policies applicable to nonunion workers, the National Labor Relations Board recently ruled that a human resources consultant's routine practice of asking employees involved in employment-related investigations not to discuss them with co-workers ran afoul of the National Labor Relations Act (NLRA). The majority held that the employer's concern with protecting the integrity of its investigations was not enough to outweigh the potential effect on employees' Section 7 rights.

Section 7 of the NLRA gives employees the right to form, join, or assist unions, to bargain collectively with their employers, and to **engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection** (or to refrain from engaging in such activities). Although less than 7% of private sector employees are represented by unions, the NLRA's protections extend to nonunion employees as well as union-represented employees. Further, Section 8(a)(1) of the NLRA makes it unlawful for employers to interfere with, restrain, or coerce employees regarding their Section 7 rights.

In investigating workplace matters (i.e., alleged harassment, discrimination, retaliation, or other potentially unlawful activity), employers typically request that employees maintain the confidentiality of the investigation. Now, employers will have to justify why confidentiality is warranted for each investigation by showing it has a legitimate business need for it that outweighs the employees' Section 7 rights. Notably, the NLRB's admonition is not absolute. An employer may be justified if: a witness needs protection; evidence is at risk of being destroyed; testimony is in danger of being fabricated; or there is a need to prevent a cover-up.

Employers should review any company policies and employment agreements to make sure they are free of any broad confidentiality policies the NLRB could find violative of Section 7 of the NLRB. Notwithstanding, employers should address how they can justify insisting upon confidentiality in connection with investigations into particularly sensitive complaints, such as those of sexual harassment, discrimination, or fraud. To avoid running afoul of Section 7 of the NLRA, employers should work with counsel in analyzing each investigation individually to determine the level of confidentiality required.