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### Labor Pains: "Confidential" Investigations Create Risk

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Are you looking for a way to get sued when you investigate employee misconduct? Then prohibit employees from discussing the investigation with their co-workers. If you are scratching your head at that bizarre pronouncement, you are not alone. A federal agency that enforces employment laws recently decided that blanket confidentiality instructions to employees during internal investigations can violate the law and are not justified by the employer's generalized need to protect the integrity of the investigation. There are, however, ways to minimize the risk of liability under this new standard.

Ignoring allegations of workplace harassment, discrimination, theft, or other misconduct increases potential liability on several fronts. On the other hand, a prompt investigation followed by appropriate remedial action can help insulate your company from liability. Most employers routinely instruct employees who are interviewed during an internal investigation to keep the matter confidential. Maintaining confidentiality not only reduces the chance that someone will destroy evidence or improperly influence witnesses, it also promotes anti-discrimination policies. For example, an employee who has been subjected to sexual harassment may be too embarrassed to complain if she thinks the circumstances will become widely-known. That, of course, is a ticking time bomb in your workplace.

Notwithstanding these realities, the National Labor Relations Board ("NLRB") recently decided that an employer violated federal law by instructing its employees not to discuss a pending internal investigation with co-workers. *Banner Health System*, 358 NLRB No. 93 (July 30, 2012). The NLRB reasoned that the blanket confidentiality instruction interfered with employees' legal rights under federal law because it had the effect of prohibiting them from discussing matters of mutual interest, such as compensation and discipline. To avoid liability, the NLRB continued, the employer must prove that it had specific reasons to require confidentiality and those reasons outweigh the employees' rights to communicate with each other. Although the NLRB usually deals with unionized workforces, this ruling also applies to non-union employers.

Because employers should continue to investigate suspected employee misconduct, they should modify their procedures to minimize the risk of a claim under this ruling. Employers can instruct supervisors and managers (who are not covered by the particular law in the *Banner Health* case) to keep investigations confidential. With respect to non-supervisory employees, however, rather than impose an absolute confidentiality requirement, give a modified instruction depending on the particular employees involved and the circumstances of the investigation. An individualized approach can better protect the employer if it specifically determines that confidentiality is required because an employee needs protection from retaliation, there is a danger of evidence being destroyed or fabricated, or there is a need to prevent a cover-up. The employer also can include in its instructions that the confidentiality requirement is limited to matters related to the investigation, but not to other terms and conditions of employment. As with other employment actions, it is important to document this analysis and the specific instructions given in the event the investigation is challenged.

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Todd Horn is the co-author of *Maryland Employment Law*, a book cited by courts and attorneys as a leading reference. Mr. Horn was selected as the 2011 "Lawyer of the Year" for employment law in Maryland based on peer review surveys conducted by the rating organization *Best Lawyers in America*. Based on client interviews, *Chambers USA* also ranked Mr. Horn in the top category in employment litigation, reporting that he "is admired as a fantastic litigator – one of the best in the courtroom, and is very professional and efficient."

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