



## **A Letter to the NLRB on Its Latest Position Against Confidential Workplace Investigations**

Dear National Labor Relations Board,

You and I have not always seen eye to eye, especially on the issue of protected concerted activity. You might think I'm out to get you. I'm not. I just want to make sure that you fully understand the real-world implications of the rules you are making. For example, take your latest target: workplace investigations.

In *Banner Estrella Medical Center*, you concluded that an employer's request to employees not to discuss a workplace investigation with their coworkers while the investigation was ongoing violated the employees' rights to engage in protected concerted activity:

To justify a prohibition on employee discussion of ongoing investigations, an employer must show that it has a legitimate business justification that outweighs employees' Section 7 rights.... Respondent's generalized concern with protecting the integrity of its investigations is insufficient to outweigh employees' Section 7 rights. Rather, in order to minimize the impact on Section 7 rights, it was the Respondent's burden "to first determine whether in any give[n] investigation witnesses need[ed] protection, evidence [was] in danger of being destroyed, testimony [was] in danger of being fabricated, or there [was] a need to prevent a cover up."

Workplace interviews are high-stakes affairs that carry serious liability repercussions for the employer. Moreover, it is often difficult to determine who is telling the truth and who is lying. The fact that those conducting these investigations are not trained detectives, but often HR personnel, only exacerbates this difficulty.

One sure-fire tool one can use to figure out who is telling the truth and who is lying is to see how everyone's stories jive or contradict. For this reason, one of the key instructions that should be given in any workplace investigatory interview is that the employee should keep everything said confidential. That way, later interviewees will not be influenced, and do not have an opportunity to compare (and prepare) their stories.

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By prohibiting employers from requiring that workplace investigations remain confidential, your decision in *Banner Estrella* neuters the ability of employers to make key credibility determinations. Limiting confidentiality in this manner will severely constrain the ability of employers to conduct thorough and accurate workplace investigations, which, in turn, limits the ability of employers to stop the workplace evils they are investigating (discrimination, harassment, theft, etc.).

NLRB, I implore you to consider the real-world implications of your rulings on protected concerted activity. Halting confidential workplace investigations serves no one's interest, including the employees you are sworn to protect.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jon Hyman". The signature is stylized with a large, sweeping loop and a vertical stroke.

Jon Hyman