

## Unwarranted leaps of logic save investigation confidentiality policy

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*Confidentiality policies for internal investigations seem like a no-brainer on the surface. As an investigator, I can speak from firsthand experience on how the failure of witnesses to maintain the confidentiality of their statements during interviews has compromised an investigation. The memory of one witness becomes a collective memory rather than allowing other witnesses to recall the events on their own during individual interviews. In some instances, interviewees "remember" events they actually never witnessed.*

*Cue the National Labor Relations Act (NLRA), a statute making it an unfair labor practice to "interfere with, restrain, or coerce employees" from engaging in "concerted activities." The NLRA applies to policies that explicitly limit employees' protected concerted activities as well as policies that can reasonably be construed by employees to restrict such activities. The District of Columbia Circuit Court of Appeals recently chastised the National Labor Relations Board (NLRB) for making "unwarranted logical leaps that the evidence cannot fairly support" when it overturned the Board's rejection of an Arizona hospital's confidentiality policy for internal investigations as too broad. But don't go ahead and implement a confidentiality policy without finishing this article.*

### **Background**

James Navarro filed an unfair labor practice charge with the NLRB alleging that Banner Health retaliated against him by giving him "nondisciplinary coaching" and a negative performance evaluation after he refused to clean instruments using a method he thought was unsafe

and then raised concerns about his job security with the hospital's HR consultant.

While Navarro's retaliation claim against the hospital never gained any traction, the NLRB's regional director amended his complaint based on documents unearthed in discovery (the prehearing exchange of evidence). The amended complaint added claims that the hospital (1) made employees sign an overly broad confidentiality agreement and (2) maintained an overly broad rule requiring nondisclosure of investigative interviews.

The NLRB agreed with the allegations in the amended complaint, concluding that the confidentiality agreement unlawfully barred employees from sharing information about the terms and conditions of their employment. The Board also found that the hospital unlawfully had a categorical policy requiring all employees to maintain the confidentiality of HR investigations. The hospital appealed the decision, and the D.C. Circuit agreed with the NLRB on the one hand, but with the hospital on the other.

### **Confidentiality agreement**

All new hires at the hospital were required to sign the agreement, which defined "confidential information" to include "private employee information (such as salaries, disciplinary action, etc.) that is not shared by the employee." The agreement further provided, "Keeping this kind of information private and confidential is so important that if I fail to do so, I understand that I could be subject to corrective action, including termination and possibly legal action." The court upheld the NLRB's conclusion that the agreement was overly broad, stating that the "Board's invalidation of the [c]onfidentiality [a]greement was reasonable and supported by substantial evidence."

The court noted that it has previously approved a hospital's rule barring employees' discussion of confidential information about patients and coworkers because a reasonable employee wouldn't believe such a policy would include his terms and conditions of employment. An agreement limited to maintaining the confidentiality of patient information would have a substantial business justification that outweighs the burden placed on employees. But the agreement in this case more broadly prohibited discussions about employee information and could be construed to include working conditions, which is unlawful under the NLRA.

Moreover, the court noted that it was unclear whether the hospital would apply the agreement to situations in which information was leaked inadvertently (e.g., a pay stub left at a photocopier) or learned secondhand. And the NLRB has recognized that restricting employees' "use of confidential information innocently obtained" interferes with their rights under the NLRA. The ambiguity in the agreement likewise doomed its enforcement under the Act.

### ***Policy on nondisclosure during investigations***

The hospital's HR interviewers use an "Interview of Complainant" form when they investigate complaints. The "Introduction for all interviews" section on the form contains a nondisclosure policy that states, "I ask you not to discuss this with your coworkers while this investigation is going on, for this reason[:] when people are talking[,] it is difficult to do a fair investigation and separate facts from rumors." No employees other than the investigators were given the form. The investigator in this case testified that she had requested confidentiality "half a dozen times" in 13 months.

The investigator also explained that she uses the nondisclosure statement when she is conducting multiple interviews and only "in more sensitive situations," not for every investigation. Specifically, she stated that she would ask someone to maintain confidentiality if she was investigating a complaint of sexual harassment. She didn't request nondisclosure from Navarro during his interview.

Based on that evidence, the NLRB penalized the hospital for maintaining a "categorical

nondisclosure rule" for workplace investigations. However, the court declined to enforce the NLRB's order because there was no substantial evidence that the hospital actually has such a policy. The court noted that there was no evidence that employees are aware of the content of the interview form or that the investigator categorically requests nondisclosure in all investigations. The NLRB based its ruling on a hypothetical confidentiality policy rather than on the policy the hospital actually uses.

### ***Practical tips***

It's worth noting that although the original retaliation complaint had no traction, the hospital has been involved in litigating the confidentiality agreement and nondisclosure policy since 2011, demonstrating the importance of limiting the definition of "confidential information" to information the business has a substantial justification for keeping confidential. Crafting a proper definition of "confidential information" in company policies has implications beyond the NLRA, including the enforceability of restricting an employee's use of such confidential information for purposes unrelated to employment.

What's more, HR investigation policies need to be carefully crafted, and the use of nondisclosure policies during an investigation should be handled on a case-by-case basis. While sensitive investigations involving several employees may give rise to the need for a nondisclosure policy, a basic investigation involving one or a few employees may not. As the court noted, confidentiality policies may be employed when necessary during investigations, but what saved the hospital in this case was its limited use of what appeared to be a categorical nondisclosure policy.

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