

Questions?

If you have any questions
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Your Investigation Can Backfire and Lead to Unexpected Problems

It seems like every week there is a need to conduct an investigation because of an employee complaint. Responding quickly is imperative, as the failure to address issues promptly can result in the filing of complaints with state and/or federal agencies, or possibly lawsuits. Additionally, employees who feel their issues are being ignored become disgruntled and can become less productive.

How that investigation is conducted and what restraints are placed on employees in the interest of preserving confidentiality have come under scrutiny by the National Labor Relations Board in a recent decision. The problem arose when a human resources manager asked an employee she was interviewing not to discuss his complaint with others. This was a regular part of the HR department's procedure, although never a part of the employee handbook or a written policy. The Labor Board reviewed this practice and found that it was overbroad in that it inhibited employees from engaging in concerted activities by implying discipline if there was a discussion about the investigation. This was viewed as limiting employees from discussing their terms and conditions of employment, a right protected by the National Labor Relations Act.

While there was no dispute that the employer had an interest in preserving the integrity of its investigation, the Labor Board held that a blanket prohibition on discussing the investigation was overly broad and violated the law. According to the Labor Board, employers cannot impose a blanket restriction, but must be able to justify the restriction based on the specifics of the situation.

The Labor Board has indicated that there must be support for any restriction on the exchange of information about employment concerns by employees, if the restraint comes with the implied threat of discipline or termination. The following questions must be examined and answered: 1) do the witnesses need protection from possible retaliation or physical violence, 2) is there a risk that evidence will be destroyed, 3) is there a risk that if employees start talking about the subject of the investigation, that testimony will be fabricated or memories will "fade," or 4) is there a risk of a cover up? Undertaking a



specific review of the circumstances and documenting those concerns before instructing employees not to discuss their testimony or the investigation will provide a legitimate basis for the directive.

PLEASE NOTE: The Labor Board's position on these issues is not dependent on the employer's union or non-union status. All private sector employees have the right to engage in "concerted protected activity," whether or not they are unionized, as complaining about working conditions is protected by the law. With union membership at or below 10% of the workforce, the Labor Board recently has been making a significant push to clarify the rights that apply to non-union workplaces, and this is only one more example. Given the Labor Board's current composition, there is likely more to come.

Questions or Assistance?

If you have questions regarding this alert, please contact Gary Starr at (860) 251-5501 or Robin Frederick at (203) 324-8114.

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