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Court Affirms Confidentiality Agreement Is Unlawful

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Although confidentiality agreements that prohibit employees from discussing their salaries, benefits, or internal disciplinary investigations with other employees may sound reasonable, such policies generally violate federal labor law. A [recent decision](#) by the D.C. Circuit Court of Appeals affirmed that a Phoenix hospital's confidentiality agreement was unlawfully restrictive of employees' Section 7 rights under the [National Labor Relations Act \(NLRA\)](#).



This decision is an important reminder that employees have the right to share employment-related information with one another and that even nonunion employers are subject to certain provisions of the NLRA. (*Banner Health System v. NLRB*, March 24, 2017, Pillard, C.).

The Facts

Banner Health is a healthcare system that includes Banner Estrella Medical Center in Phoenix, Arizona. Due to a malfunction in Banner's pressurized steam sterilizer, which is normally used for sterilizing reusable medical instruments, the employee responsible for sterilizing surgical equipment (James Navarro) was unable to do the job. His supervisor instructed him to instead use hot water from the coffee machine and then to use a low temperature sterilizer with hydrogen peroxide to sterilize the instruments.

Navarro felt this procedure violated protocol and did not sterilize the instruments using this method. His supervisor was not pleased and gave him a coaching session and later a negative annual performance evaluation. Navarro reported his concern about his job and the prescribed sterilization procedures to the Human Resources (HR) consultant, JoAnn Odell.



Navarro filed an unfair labor practice charge with the National Labor Relations Board (NLRB or Board), and the Board filed a retaliation complaint against Banner. During the discovery process, new documents were uncovered and the Board amended the complaint to include claims that Banner:

1. Made employees sign an overbroad confidentiality agreement, and
2. Maintained an overbroad rule requiring nondisclosure of investigative interviews.

At Issue: The Employer's Policies

Confidential agreement. Banner's policy required each newly hired employee to sign a confidentiality agreement. The agreement lists examples of confidential information, one of which is "Private employee information (such as salaries, disciplinary action, etc.) that is not shared by the employee." The agreement also states that employees may be "subject to corrective action, including termination and possibly legal action" for disclosing such information.

Nondisclosure policy. The nondisclosure policy was included on an "interview of complainant" form that Odell (HR consultant) relied upon when investigating complaints and was used during her interview of Navarro. The policy opened with an "Introduction for all interviews," part of which stated: "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."

Odell testified that employees were never given a copy of the form and that she requested nondisclosure "half a dozen" times in 13 months, and only "in the more sensitive situations." She further stated that in spite of the form's reference to "all interviews," she did not "necessarily" request nondisclosure in every interview and did not do so of Navarro.

Legal Background

Section 7 of the NLRA gives all employees the right to "engage in concerted activities," including the right to discuss their terms and conditions of employment with each other. Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer to deny or limit the Section 7 rights of employees. It is important to note that these sections of the NLRA apply to both union and nonunion employees, including companies where the employees are nonunionized.

Initial Rulings

The Board issued a complaint and the matter was tried before an Administrative Law Judge (ALJ). The ALJ decided the confidentiality agreement violated the NLRA but that its investigative nondisclosure policy did not. The Board affirmed the ALJ's decision in part, affirming as to the "overbroad" confidentiality agreement, but reversing as to the investigative nondisclosure policy. Contrary to the ALJ's finding, the Board found that Banner had an unlawful policy of asking employees not to discuss certain types of workplace investigations without performing the requisite individualized inquiry into the need for confidentiality.



D.C. Circuit Court of Appeals Ruling

Upon review, the D.C. Appeals Court noted the NLRB's determinations are "entitled to considerable deference." The court will uphold the Board's decision unless it "relied upon findings that are not supported by substantial evidence, failed to apply the proper legal standard, or departed from its precedent without providing a reasoned justification for doing so."

The court affirmed the Board's decision on the employer's confidentiality agreement, explaining that the agreement "expressly reached information about salaries and employee discipline," which "is the sort of overbreadth our precedents squarely forbid."

Further, the court stated that the agreement's permission to discuss information "shared by the employee" is ambiguous in at least two ways: First, it was not clear with whom the information must be shared in order to allow discussion, and second, it was unclear how the rule would apply to situations where the information was obtained inadvertently.

In light of such ambiguities, the court held that the phrase "shared by the employee" was inadequate to protect the employees' right to share innocently obtained information and thus could not save the rule.

However, the appeals court rejected the Board's decision as to Banner's nondisclosure policy regarding confidential workplace investigations. The court found there was no testimony that the script ("I ask you not to discuss this with your coworkers while this investigation is going on") was read categorically to all employee witnesses in all investigations, that testimony of the HR consultant (Odell) indicated that she selected which interviews in which to use it, and that the record lacked evidence that any employee was aware of the nondisclosure script. Accordingly, the court remanded the issue to the Board for further proceedings consistent with its opinion.

What Do Employers Need to Know?

The issues in this case serve as a reminder that confidentiality policies and nondisclosure rules should be narrowly tailored to ensure the agreement does not prohibit an employee's right to discuss wages or terms and conditions of employment with other employees or individuals.

As occurred in *Banner*, overbroad policies often interfere with these rights. Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the Act. These rules apply to both union and nonunion employees, including companies where the employees are nonunionized.

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