NLRB ASSERTS THAT TELLING EMPLOYEES TO MAINTAIN CONFIDENTIALITY DURING INTERNAL INVESTIGATIONS VIOLATES SECTION 7 RIGHTS

The National Labor Relations Board (NLRB) has taken the position, in a recent Advice Memorandum dated January 29, 2013, that an employer's confidentiality rule may unlawfully interfere with employees' Section 7 rights. Section 7 of the National Labor Relations Act (29 USC § 157) guarantees employees the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Many employers incorrectly assume that if they do not have a unionized workforce, the NLRA does not apply to them. However, many of the protections afforded under the NLRA apply to both union and non-union employers alike.

Many employers have written policies providing that employees must maintain the confidentiality of internal investigations for such matters involving employee misconduct, employee theft or workplace harassment. During the investigation process, most employers warn employees involved with the investigation to keep matters discussed during the investigation strictly confidential and not to share such information with other employees. The obvious purpose of such admonition is to maintain the integrity of the investigation and to prevent employees from fabricating or colluding to get their respective stories straight.

The NLRB, however, takes a different view. The NLRB holds that an employer violates Section 8(a)(1) of the NLRA when it maintains a work rule that reasonably chills employees in the exercise of their Section 7 rights. According to the NLRB, employees have a Section 7 right to discuss discipline or disciplinary investigations involving their fellow employees.

An employer may prohibit employees' discussions during an investigation only if it demonstrates that it has a legitimate and substantial business justification that outweighs employees' Section 7 rights. The NLRB's position is that the employer must show more than a generalized concern with protecting the integrity of its investigations. Rather, an employer must show that in any particular investigation that witness(es) needed protection, evidence was in danger of being destroyed, testimony was in danger of being fabricated, or that there was a need to prevent a cover-up. Consequently, any blanket rule prohibiting employee discussions of ongoing investigations is invalid and will be held by the NLRB to violate employees' Section 7 rights.

Most, if not all, employers recognize the importance of employees maintaining the confidentiality of any pending internal investigation. Even the NLRB has not gone as far as to hold that employees have an unfettered right to communicate about internal investigations. Employers should review their employee handbook and other policies that address

confidentiality of internal investigations and make sure such policies do not contain a blanket rule regarding confidentiality. In addition, where applicable, employers should add savings clauses to their policies providing that the employer's policy shall not be construed or interpreted to interfere with employees' Section 7 rights. Finally, to avoid NLRB interference, employers should address the issue of maintaining the confidentiality of any internal investigation on a case-by-case basis when it can be demonstrated that maintaining confidentiality is significant to preserving the integrity of the investigation. When such a need arises, employees should be instructed on an individual basis regarding the need to maintain confidentiality about the investigation.