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Confidentiality Guaranteed? The D.C. Circuit Calls Into Question NLRB's Banner Health Decision

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* This post was co-authored by Keith Brodie and Jackie Gessner It's been a while since we've discussed the National Labor Relations Board's comprehensive guidelines for employee handbook rules. Since the guidelines were released in March 2015, experts have analyzed case after case and one thing is evident – the guidelines and the ALJ and Board decisions are anything but clear, and in many cases the difference between legal or illegal will turn on a particular word choice. A recent case out of the D.C. Circuit demonstrates the level of nuance and particularity that too often prevails: *Hyundai America Shipping v NLRB*, No. 11-1351 (Nov. 6, 2015).

Background: Employer Confidentiality Policies The Board has analyzed a variety of different types of employer handbook policies, and the general legal standard is always the same: Does the policy or rule unlawfully restrict or infringe upon an employee's Section 7 rights to engage in protected, concerted activity? However, when analyzing confidentiality policies, the Board has overlaid additional factors that it says must be considered to justify an employer's policy. In its 2012 *Banner Health* decision, the Board analyzed an employer's rule requiring confidentiality for employees involved in internal employer investigations. The Board said that confidentiality rules would not be upheld where they were based solely on the employer's interest in protecting "the integrity of the investigation." In other words, there had to be some additional "legitimate business justification that outweighs employees' Section 7 rights." The Board explained that the employer had to consider the individual circumstances of the investigation to meet its burden to show a legitimate justification for the rule, specifically the presence of the following:

1. witnesses in need of protection;
2. evidence in danger of being destroyed;
3. testimony in danger of being fabricated; or
4. a need to prevent a cover-up.

When it described this special rule in *Banner Health*, the Board cited to its 2011 decision in *Hyundai America Shipping Agency*, 357 NLRB No. 80 (2011). ***Banner Health* Questioned:** On November 6, 2015 the D.C. Circuit Court decided *Hyundai America Shipping*, the case *Banner Health* was predicated upon. In *Hyundai American Shipping* the Court questioned whether the Board got the *Banner Health* rule right. *Hyundai America Shipping v NLRB*, No. 11-1351 (Nov. 6, 2015). The Board held that Hyundai's investigation confidentiality rule was overly broad and that Hyundai failed to present a "legitimate business justification" for it. Hyundai, however, argued to the Court "that federal and state antidiscrimination statutes and guidelines, which require confidentiality in many investigations, constitute a legitimate and substantial business justification for its rule." No. 11-1351 at 6. The Court also noted its disagreement with the Board's view that "in order to demonstrate a legitimate and substantial justification for confidentiality, an employer must determine whether in any given investigation witnesses need

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protection, evidence is in danger of being fabricated, and there is a need to prevent a cover up." No. 11-1351 at 7. The Court, instead, agreed with the employer's position that it should be sufficient to require the policy in order to ensure compliance with anti-discrimination laws and guidelines. However, the Court ultimately agreed that the employer's particular rule was overbroad, finding that Hyundai had not shown that "these concerns offer a legitimate business reason **to ban discussions of all investigations**." No. 11-1351 at 6. Thus, under the Court's view, employers would not have to undergo the particularized analysis for each investigation as the Board required in *Banner Health*, but the employer's rule also cannot be worded so broad as to leave an employee to believe the rule applied even to non-legally required employer investigations. While the D.C. Circuit's ruling may serve to undermine *Banner Health*, that decision remains in place. As has become abundantly clear, the Board will not be deterred by one Federal Circuit Court decision as it is not the Board's practice to cater to individual federal circuit court decisions. Those of you who have followed the *D.R. Horton/Murphy Oil* line of Board decisions (here and here) and the Board's recent decisions on class action waivers that have followed those decisions know this is true.

Bottom Line Employers might look to *Hyundai* for support if their more narrowly drawn confidentiality policies are challenged, but *Hyundai* ultimately offers only one thing: more blurry lines in the handbook-policy line of cases.