When "Confidential" is Not: NLRB Orders Disclosure of Witness Statements

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A recent decision of the National Labor Relations Board (NLRB) overturned a long-standing rule related to confidential witness statements given during internal employer investigations. In doing so, the Board removed the "confidential" aspect of those statements in many, if not most, instances.

The union in this case represents a bargaining unit that includes certified nursing assistants at Piedmont Gardens, an American Baptist Homes facility in Oakland, California. In June 2011, a nurse informed Piedmont's Human Resources Director that she witnessed a CNA sleeping on the job. She and two other employees at the facility wrote statements reporting the misconduct. After the statements were reviewed, the CNA was terminated. A union representative requested copies of statements used in the investigation, along with the names and titles of anyone involved in the investigation. Piedmont provided the names of the managers who conducted the investigation, but did not provide the statements or the names and titles of those employees who wrote the statements. The union challenged Piedmont's action by filing unfair labor practice charges with the NLRB. An NLRB Administrative Law Judge (ALJ) found that Piedmont violated the National Labor Relations Act by failing to provide the requested names and job titles, but held that the statements were exempt from disclosure under an NLRB decision issued in 1978 (*Anheuser-Busch*).

On appeal by the union, a three-member panel of the NLRB disagreed with the ALJ and ordered disclosure of the statements, explaining that an employer is required to provide a union with relevant information that is necessary to the union's performance of its duties, including processing grievances. It noted that a legitimate confidentiality interest requires more than a general desire to protect the integrity of internal investigations. Rather, the employer needs to show a need for witness protection or a danger that evidence will be destroyed, testimony fabricated, or facts covered up. Further, the employer cannot simply refuse to share information based on a confidentiality interest. It must instead seek an accommodation that allows the requester to obtain the information needed while protecting the employer's confidentiality interest. The NLRB recognized that its decision overturned the long-standing *Anheuser-Busch* exemption, noting that "the rationale of *Anheuser-Busch* is flawed," and no basis exists for broadly exempting ***all*** witness statements from disclosure.

The NLRB's new decision will likely have a major impact on employers' workplace investigations, unless Piedmont successfully challenges NLRB's ruling in the Court of Appeals. Employers should recognize that they may not be able to avoid disclosing witness statements simply because they advise witnesses that those statements will be confidential. Additionally, employers should seek the advice of counsel in conducting investigations and before withholding witness statements or other potentially relevant information from union representatives.

If you have any questions regarding internal investigations or the confidentiality of documents related to those investigations, please contact Michael Kraemer (617.748.5223; kraemerm@whiteandwilliams.com) or Ashley Park (610.782.4903; parka@whiteandwilliams.com), another member of our Labor and Employment Group, or any member of the firm whom you regularly contact.