

“Please keep confidential what is said during this interview.” Famous last words...

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Employers *must* investigate complaints of harassment or discrimination. Employers *must* also protect the participants in an investigation from retaliation by supervisors and co-workers. These “musts” are non-negotiable under the law. As a result, most employers advise employees who are involved in an investigation, to refrain from discussing the investigation or interview and to keep information about the process strictly confidential. Moreover, from the employer’s perspective, the request for confidentiality makes sense—limiting the discussion regarding the investigation/interviews is an attempt to ensure that candid and truthful information is provided—if the information is freely shared and discussed between employees it could be compromised by a “group think mentality” or fear of retaliation. However, such blanket prohibitions on discussing the interview/investigation violates an employee’s Section 7 rights: “to engage in other concerted activities for the purpose of ... other mutual aid or protection.”

But often there is a way to comply with the law while at the same time advising an employee to keep the details of the investigation/interview confidential. The question an employer must ask *in each case before* insisting on confidentiality is as follows: “will the employer be able to satisfy the court that *the employer’s interest in requesting confidentiality in the investigation outweighs any potential infringement of an employee section 7 rights?*” In making that determination, the employer should consider if confidentiality is required for one or more of the following permissible reasons:

- Protection of witnesses;
- Avoiding the destruction of evidence;
- The testimony is at risk of being fabricated or altered; or
- It is necessary to prevent a cover-up of the facts.

An employer must show that the confidentiality is warranted based on an objectively reasonable grounds for believing that “the integrity of the investigation will be compromised without confidentiality.”

Takeaway: Before an investigation (regarding any issue) starts, an employer should document the reasons they believe confidentiality is required.

Attorney

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