

Workplace Investigations – When May a Company Require Confidentiality?

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Practices: Employment, Labor & Benefits

An employee complains about sexual harassment. Another employee is accused of embezzlement. At the end of their conversations with the employee complaining and possible witnesses, should the supervisor or human resource professional tell the employees that they must keep their conversation confidential? The answer is "no," if the instruction is a blanket rule. If the company terminates the employees for talking about the investigation, the terminations are unlawful.

Companies need to protect the employee filing the complaint and witnesses from retaliation. Companies also need to ensure a thorough and unbiased investigation. However, those needs conflict with the federal law right of employees to discuss their wages, hours and working conditions with their co-workers. Section 7 of the National Labor Relations Act enshrines this right for employees in both non-unionized and unionized companies

How should the company instruct the employee as well as other employees/witnesses interviewed as part of the investigation? In *Verso Paper*, the National Labor Relations Board's Division of Advice ruled that a company may state its compelling interest in protecting the integrity of its investigations. However, a company may not automatically threaten to discipline employees. Instead, the company should "reasonably impose" restrictions due to the circumstances of the situation. In each instance, human resources and supervisors should determine and state the company's concerns to the employee, such as retaliation or the need to preserve testimony and evidence. Therefore, before conducting an investigation, supervisors and human resource professionals should draft a script for the interviews. Part of the script should be an articulation of the need for confidentiality before stating that the information is confidential.