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NLRB Challenges Overly Broad Confidentiality and Non-Disparagement Provisions in Severance Agreements

Authors: Jennifer K. Dunlap, Grant M. Wills
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Earlier this week, the National Labor Relations Board (NLRB) issued an important decision in which it ruled that employers who offer severance agreements to employees with broad non-disparagement or confidentiality provisions violate Section 8(a)(1) of the National Labor Relations Act (NLRA). What do employers need to know about this recent development in labor law?

Background

Section 7 of the National Labor Relations Act (NLRA) protects workers at both unionized and non-unionized workplaces who engage in concerted activity for the purpose of mutual aid and protection. The NLRA prohibits employers from interfering with, restraining, or coercing employees who exercise their Section 7 rights, such as the right to organize, bargain collectively, and engage in protected, concerted activities.

In *McLaren Macomb*, 372 NLRB No. 58 (2023), the NLRB examined whether a unionized hospital violated the NLRA by offering severance agreements to 11 bargaining unit employees who were permanently furloughed during the COVID-19 pandemic. In addition to containing a release of claims arising out of their employment or separation, the severance agreements also contained standard confidentiality and non-disparagement provisions. Those provisions prohibited the furloughed employees from making statements that could disparage or harm the image of the hospital and further prohibited them from disclosing the terms of their severance agreements. All 11 employees signed the agreements, although, as with any severance agreement offered to a departing employee, none were required to do so.

The severance agreements at issue contained the following provisions, which the NLRB viewed as unlawfully violating employees' Section 7 rights:

Confidentiality Agreement. The Employee acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction.

Non-Disclosure. At all times, hereafter, the Employee promises and agrees not to disclose information, knowledge[,] or materials of a confidential, privileged, or proprietary nature of which the Employee has or had knowledge of, or involvement with, by reason of the Employee's employment. At all times hereafter, the Employee agrees not to make statements to Employer's employees or to the general public [that] could disparage or harm the image of Employer, its parent and affiliated entities and their officers, directors, employees, agents[,] and representatives.

The Board Reverses Trump-Era NLRB Precedent

The Board viewed these provisions as being an unlawfully broad waiver of Section 7 rights for several reasons. For example, with regard to the non-disparagement provision, the Board noted that it effectively prohibited the furloughed employees from making any public statement asserting that the hospital violated the NLRA, without any limitation as to time. The Board also noted that the non-disparagement provision had the tendency to chill

efforts to assist fellow employees, which would include future cooperation with an investigation by the Board. The Board invalidated the confidentiality provision for similar reasons, noting that the furloughed employees were prohibited from discussing the severance agreement with former co-workers who may receive similar agreements, as well as union representatives or other employees seeking to organize.

The *McLaren Macomb* decision reverses a pair of Trump-era NLRB decisions issued in 2020. Those two decisions were beneficial to employers in that they upheld the legality of confidentiality and non-disparagement provisions in severance agreements, provided the circumstances surrounding the severance did not involve an employee discharged in violation of the Act or another unfair labor practice evidencing animus toward the exercise of Section 7 activity.

In reversing these decisions and finding the severance agreement provisions to be unlawful, the Biden Board revived an old standard in which the NLRB will conclude that a severance agreement violates the NLRA if its terms tend to interfere with employees' organizing rights.

Takeaways for Employers

The Board's decision applies to severance agreements in both unionized and non-unionized workplaces. However, the decision applies only to "employees" as defined under the NLRA – not managers or supervisors, who are not afforded Section 7 rights under the NLRA.

Notably, the Board's decision stops short of outlawing confidentiality and non-disparagement provisions in severance agreements altogether. Rather, the decision indicates that such provisions may be included in severance agreements as long as they are "narrowly tailored."

The NLRB did not provide explanation as to how employers may "narrowly tailor" such provisions; however, it is notable that neither provision at issue in *McLaren Macomb* was accompanied by a comprehensive disclaimer (e.g., "These provisions are not intended to restrict Employee's Section 7 rights," etc.). Further, neither provision contained other safeguards discussed by the Board. For example, the non-disparagement provision was not limited to matters regarding past employment, contained no temporal restriction, and failed to include a definition of "disparagement" (such as, "so disloyal, reckless, or maliciously untrue as to forfeit the Act's protection.").

Employers should also be aware that a violation of the NLRA will be found under the *McLaren Macomb* decision where an employer merely "proffers" an unlawfully broad severance agreement to an employee. This means the Board could find that an employer has committed an unfair labor practice simply by *offering* employees severance agreements with overly restrictive language. Importantly, this remains the case even where the employee chooses not to accept the agreement. Essentially, the Board will view the employer's offer as an unlawful attempt to deter employees from exercising their statutory rights, at a time when employees may feel they must give up their rights to get the benefits provided in the agreement.

The Board's February 21, 2023, ruling is effective immediately. Moving forward, employers should coordinate with their labor counsel to review – and, if necessary, revise – their severance agreements to ensure they do not include overly broad language that the Board could view as restricting employees' Section 7 rights.

Baker Donelson will continue to monitor these developments at the NLRB. If you have questions about this topic or need assistance with reviewing your severance agreements, reach out to Grant Wills, Jenni Dunlap, or any member of Baker Donelson's Labor & Employment Team.