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NLRB Rules Broad – Yet Common – Confidentiality and Non-Disparagement Provisions in Severance Agreements Are Unlawful

* ***Updated March 24 to reflect the views of the NLRB General Counsel.***

On Feb. 21, the National Labor Relations Board (NLRB) ruled that severance agreements with broad – yet common – confidentiality and non-disparagement provisions are unlawful. Employers routinely include confidentiality and non-disparagement provisions in separation or severance agreements that generally prohibit a departing employee from disclosing the terms of the agreement or disparaging the company in exchange for a payment to which the employee would not otherwise be entitled. The decision applies to separation agreements with both Union-represented employees and non-Union employees at virtually all private-sector employers in the United States due to the law's broad applicability to employers engaged in interstate commerce under the National Labor Relations Act (NLRA).

In *McLaren Macomb*, a Michigan hospital permanently furloughed 11 employees in the midst of the COVID-19 pandemic and offered each of them a severance agreement. The severance agreement contained a confidentiality provision prohibiting each employee from disclosing the terms of the agreement to any third person. It also contained a provision prohibiting the employee from making "statements to the Employer's employees or to the general public which could disparage or harm the image of [the] Employer, its parent and affiliated entities and their officers, directors, employees, agents and representatives."

The NLRB found that both the confidentiality and non-disparagement provisions were unlawful because – according to the Board – they had a chilling effect on the employees' exercise of their rights under the NLRA, including the right to disclose that the employer had violated the NLRA, to file charges or assist with Board investigations, and to discuss the terms of the severance agreement or prior employment with former coworkers. As a remedy for this violation of the law, the NLRB ordered the employer to cease using the severance agreements with these provisions, and to post a notice of its violation.

The NLRB's decision reverses its prior rulings in *Baylor University Medical Center* and *IGT d/b/a International Game Technology*, both issued in 2020, where it found that offering similar severance agreements to employees was not unlawful, by itself. In *McLaren Macomb* the NLRB expressly rejects the reasoning of the Trump-era rulings that severance agreements with these types of provisions are lawful because they are voluntary, do not explicitly prohibit protected conduct, and apply only to post-employment activity. Going forward, "a severance agreement is unlawful if its terms have a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, and that employers' [mere] proffer of such agreements to employees is unlawful," regardless of whether the employee has been separated for lawful reasons or whether the employer actually seeks to enforce the agreement.

On March 22, the NLRB General Counsel, who is responsible for the investigation and prosecution of unfair labor practices, issued a Memorandum providing her view of the decision's scope and effect. Although the GC states that employers may continue to offer and enforce lawful severance agreements without overly broad provisions that chill protected activity, she makes clear that the Agency's enforcement position is far reaching and may extend to many other types of provisions commonly included in separation agreements. The GC's Memo outlines her positions as follows:

- The NLRB's decision applies to "overly broad provisions in *any employer communication* to employees that tend to interfere with, restrain, or coerce employees' exercise of Section 7 rights."
- The NLRB's decision applies retroactively, meaning that maintaining or attempting to enforce past severance agreement with such overly broad provisions will be considered a violation.
- Employers should notify employees subject to severance agreements with overly broad provisions that those provisions are void and the employer will not seek to enforce them.
- Confidentiality clauses may be lawful only if they are narrowly tailored to restrict the dissemination of proprietary or trade secret information based on legitimate business justifications.
- Non-disparagement provisions are lawful only if narrowly tailored to limit employee statements about the employer that meet the definition of defamation, i.e., maliciously untrue statements made with knowledge of their falsity or with reckless disregard for their truth or falsity.
- Other provisions that might interfere with employees' protected activity include noncompete clauses, non-solicitation clauses, no-poaching/hiring clauses, cooperation requirements, and broad releases or covenants not to sue that go beyond employment claims and matters that exist at the time of the agreement.
- A prominent "savings clause" or disclaimer that affirmatively sets out employees' statutory rights under the NLRA and explains that no rule should interpreted as restricting those rights may be useful but will not necessarily cure overly broad provisions.

Note: these are the GC's opinions and – while they reflect her office's enforcement position and serve as a barometer for the approach the NLRB's regional offices may take in cases raising these issues – the Board

or reviewing courts may not necessarily agree with them. Nevertheless, employers should keep these points in mind when drafting and presenting employees with any agreement.

Notably, because the NLRA does not apply to "supervisors," the NLRB's decision does not impact these types of provisions in agreements with managers, executives, and other senior personnel. *See* 29 U.S.C. § 152(3). Whether an employee is a supervisor under the NLRA is often a fact-intensive inquiry that employers may need to make prior to presenting an employee with a severance or separation agreement. Although the GC notes that the NLRB's decision may protect supervisors from retaliation in limited circumstances (such as when a supervisor is fired for refusing to commit an unfair labor practice), the situations it describes arise in few cases.

Employers should keep the NLRB's decision in *McLaren Macomb* and the GC's Memorandum in mind when preparing severance agreements – and all employment agreements generally. Employers should also be aware that the NLRB is currently assessing whether it should adopt a similar standard for all work rules, including confidentiality and non-disparagement policies.[1] The NLRB's decision in *McLaren Macomb* (or other decisions applying it) is potentially subject to review in the federal courts of appeal. Until there are definitive court rulings, employers will need to carefully assess the risks associated with having broad confidentiality and non-disparagement provisions in both published policies and separation agreements applicable to non-supervisory employees.

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[1] *See Stericycle, Inc. and Teamsters Loc. 628*, 371 NLRB No. 48 (N.L.R.B. Jan. 6, 2022) (inviting briefs "to consider whether the Board should adopt a new legal standard to apply in cases where an employer's maintenance of a facially-neutral work rule is alleged to violate Section 8(a)(1) of the National Labor Relations Act").