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Non-Disparagement, Non-Disclosure, Non-Allowed: The NLRB Finds Unlawful Confidentiality and Non-Disparagement Provisions in Severance Agreements

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On February 21, 2023, the National Labor Relations Board ("NLRB" or "Board") continued its aggressive application of the National Labor Relations Act ("Act" or "NLRA") to workplaces without union representation and lessened the value of severance agreements for all employers by finding it unlawful for an employer to merely proffer a severance agreement that includes broad non-disparagement and confidentiality provisions to an employee. In *McLaren Macomb,* the Board held that a severance agreement that contains a confidentiality clause and a non-disparagement clause was unlawful because, in the Board's view, these provisions impermissibly infringe on employees' rights under the Act. Specifically, the Board found that these two provisions limit employees' ability to discuss their wages, hours, and working conditions (which could include disparaging remarks) with other employees, prevent employees from assisting other employees seeking assistance, and hinder employees themselves from seeking assistance from the NLRB, unions, and other outside organizations.

Importantly, this decision applies only to employees covered by the Act, which means that supervisory and managerial employees are generally excluded; however, it is likewise important to note that neither title nor compensation are determinative in assessing whether an individual is included in the Act's expansive definition of "covered employees." It is also notable that union representation is not a prerequisite for the Act to apply to employees and their workplaces. Thus, the *McLaren Macomb* decision applies to employees at non-unionized workplaces who fall within the Act's statutory definition of an "employee."

This decision from the Biden Board overturned two Trump Board decisions, *Baylor University Medical Center* and *IGT d/b/a International Game Technology*, both of which allowed employers to include confidentiality and non-disparagement provisions in severance agreements.

The Language of the Provisions the Board Found Unlawful

The severance agreement at issue in this case contained generic confidentiality and non-disparagement clauses.

The confidentiality provision required the employee recognize the terms of the Agreement as confidential and agree not to disclose such terms to "any third person, other than [a] 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."

The non-disclosure provision broadly barred the employee from disclosing any information or knowledge the employee gained from their employment and prohibited the employee from making statements to other employees or 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."

Importantly, neither disputed clause contained any carveout language that would permit exceptions, such as for communication with a government agency or cooperation with an administrative proceeding.

The Board's Holding

The Board held that these clauses were unlawful because they "broadly prohibited" employees from discussing wages, hours, working conditions, and labor disputes and that such "sweepingly broad" prohibitions have a "chilling tendency" on employees. The Board believes these provisions could prevent employees from criticizing an employer, complaining about or discussing their current or former workplace, cooperating with a government investigation, participating in agency proceedings, or supporting other employees – past present, or future – in such activities. The Board noted that such "public statements by employees about the workplace are central to the exercise of employee rights under the Act." The Board, consistent with its ongoing attempts to unravel non-disparagement clauses, took particular issue with the lack of temporal limitations or subject limitations in the agreement.

The Board opined that without these limitations, the provisions would apply to any labor issue, dispute, or term and condition of employment with the Employer. Pointing to past precedent, the Board held that "…employee critique of employer policy pursuant to the clear right under the Act to publicize labor disputes is subject only to the requirement that employees' communications not be so 'disloyal, reckless or maliciously untrue as to lose the Act's protection.'"[1]

The Mere Act of Proffering Such Provisions Found Unlawful

The Board has also taken the position that it is its duty is to protect the "broad grant of rights" afforded employees by Section 7 of the Act and concluded that the ***mere proffer*** of a severance agreement that conditions receipt of its benefits on the forfeiture of Section 7 rights violates the Act. In other words, whether or not the employee actually signs the agreement and accepts its terms is irrelevant. According to the Board, employers typically present separation agreements as "the quid pro quo" for severance benefits when employees are "particularly vulnerable." As such, according to the Board, merely proposing any such agreement that could reasonably be construed to interfere with or restrain the exercise of employee rights under Section 7 of the NLRA is unlawful.

What Should Employers Do Now?

While the Biden-Board has made it a habit of undoing all Trump-Board precedent, the *McLaren Macomb* decision follows a growing trend by federal agencies to examine the terms commonly included in severance agreements. Separation agreements have long been subject to scrutiny by the Equal Employment Opportunity Commission. More recently, as we reported here, here, and here, the Securities and Exchange Commission has increased its focus on employers' agreements and procedures it contends interfere with employee access to the agency. Likewise, the Federal Trade Commission is currently seeking to prohibit certain restrictive covenants between employers and employees altogether, as we most recently discussed here. Several states have also enacted restrictions on the use of non-disclosure agreements in the wake of the #MeToo movement. Employers should review existing severance agreement templates in light of this recent NLRB ruling and other agency and legislative actions, and exercise caution before seeking to enforce an existing non-disclosure or non-disparagement provision against an individual who previously signed an agreement containing such a provision.

FOOTNOTES

[1] *Citing Emarco, Inc.,* 284 NLRB 832, 833 (1987).

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