New NLRB Decision Finds That Employer Severance Agreements Conditioned on Broad Non-Disparagement and Confidentiality Provisions Violate Employee's Rights Under The NLRA

Employment

March 13, 2023 | **CLIENT ALERTS**

On February 21, 2023, the Board issued a decision in *McLaren Macomb*, Case 07-CA-263041, ruling that broad non disparagement and confidentiality provisions in an employee severance agreement are unlawful. This decision overturned the Board's precedents in two prior decisions, which had permitted these provisions in severance agreements.

The employer in *McLaren* operated a hospital where it employed approximately 2300 employees. During the COVID-19 pandemic, government regulations prohibited the hospital from performing elective inpatient and outpatient procedures. Due to the suspension of certain services, the hospital furloughed 11 union member employees deemed to be nonessential. As part of the furlough, the 11 employees were presented with Severance Agreements, which included the following terms: (1) a release by the employee of any claims arising out of their employment or termination, (2) the employee's agreement to a broad prohibition of disparagement of the employer, and (3) the employee's agreement to keep the terms of the agreement confidential. The hospital did not provide the

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employees' Union with notice of the furlough, an opportunity to bargain regarding the decision, nor notice of the severance agreements. The administrative law judge found that the employer violated Sections 8(a)(5) and (1) of the National Labor Relations Act (the "Act") by failing to notify the Union and give the Union an opportunity to bargain but did not violate Section 8(a)(1) of the Act by proffering the severance agreements to the furloughed employees.

The Board disagreed only with the administrative law judge's finding that the severance agreements did not violate Section 8(a)(1). Section 8(a)(1) of the Act prohibits employers from interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in section 7, which guarantees employees the right to engage in certain activities, including to join labor organizations, bargaining collectively with employers, and refrain for such activities.

The severance agreement contained the following non-disparagement and confidentiality provision at issue in the case:

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 which could disparage or harm the image of Employer, its parent and affiliated entities and their officers, directors, employees, agents and representatives.

Although confidentiality and non-disparagement provisions are standard in employer severance agreements, the Board found that these two provisions violated employees' rights. Specifically, the Board found the non-disparagement provision to violate an employee's Section 7 rights because "[p]ublic statements by employees about the workplace are central to the exercise of employee rights under the Act." Likewise, the Board found the confidentiality provision overly broad because it prohibited employees from disclosing the terms of the agreement to "any third person." Both provisions were found to be overly broad, containing no temporal limitations or limitations of persons who the employee may speak to regarding the severance agreement. Such limitations, the Board determined, would prohibit an employee from filing unfair labor practice charges or assisting the Board in an investigation. It is important to note that neither provision contained a disclaimer regarding preservation of the employee's rights under the Act, nor did the Board discuss what effects such a disclaimer would have on the validity of the provisions. Additionally, the Board's decision related to the specific language of the provisions above and does not necessarily outlaw all non-disparagement and confidentiality agreements.

The main takeaway for employers from this case is that a severance agreement cannot be conditioned on broad non-disparagement and confidentiality provisions. The Board did not address whether this decision will be applied to severance agreements existing prior to February 21, 2023, and employers may wish to review all pending severance agreements and consult with counsel to determine if they should be rescinded, revised, and/or reissued. In the event that the Board does apply this decision to prior severance agreements, the provision may be severable, depending on the language of the agreement. It is also important to note that this decision does not apply to executives, managers, supervisors, or independent contractors, which are not "employees" within the meaning of

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the Act.

We expect the Board to issue guidance on future severance agreements based on *Mclaren,* potentially expanding this determination beyond severance agreements, including other employer-employee agreements. The Board may also find in other cases that a more narrowly tailored non-disparagement and confidentiality provisions or disclaimer in a severance agreement does not violate employees' rights under Section 7.

If you have any questions about how these new cases affect your liability as an employer, please contact Amy Habib Rittling (716.853.5100 x1276), Robert Riegel, Jr.
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