CARLTON FIELDS

NLRB New Rule Affects How All Employers Should Approach Severance Agreements and Other Employment Contracts

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On February 21, 2023, in *McLaren Macomb*, No. 07–CA–263041, the National Labor Relations Board held that confidentiality and nondisparagement provisions are prohibited in severance agreements where they purport to limit an employee's ability to discuss the agreement with coworkers, or otherwise communicate about their employment, reversing its prior decisions under the Trump administration.

The decision has significant implications for all employers, whether or not they employ unionized workforces, because the provisions of the National Labor Relations Act that the case was decided under are not limited to unionized workforces. The decision will require employers to reexamine use of severance agreements and any type of waiver or contract signed by an employee that waives the employee's rights to discuss the agreement with coworkers or disparage their employer.

Background of the Case

In 2019, McLaren Macomb, a Michigan-based hospital, offered severance agreements to 11 employees it was permanently furloughing, who were part of the Local 40, RN Staff Council, OPEIU, AFL-CIO union. All 11 employees signed the severance agreements, which contained provisions broadly prohibiting disparagement of McLaren Macomb and required confidentiality regarding the terms of the agreements.

In 2021, Administrative Law Judge, Robert A. Ringler, took no issue with the nondisparagement and confidentiality provisions of the severance agreements, holding them to be lawful under the previous NLRB decisions of *Baylor University Medical Center* and *IGT d/b/a International Game*

Technology, issued in 2020*,* which held that offering similar severance agreements to employees was not unlawful. The parties filed exception briefs, seeking reversal.

NLRB Overrules *Baylor* and *IGT* and Invalidates McLaren Macomb's Nondisparagement and Confidentiality Provisions

The NLRB's decision, from which the lone Republican appointee dissented, overruled its decisions in *Baylor* and *IGT,* holding that a severance agreement is unlawful if its terms have a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their rights under section 7 of the NLRA. Section 7 of the NLRA protects an employee's right to engage in concerted activity, whether or not the employee is involved in a union, meaning this decision could have significant impact on all employers moving forward. In turn, section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

The NLRB reviewed "the language of the agreement, including whether any relinquishment of section 7 rights is narrowly tailored.*"* It found the nondisparagment provision unlawful because it "substantially interfere[d]" with the employees' section 7 rights by prohibiting "employee critique of employer policy," with no temporal restriction, and broad application to the employer and all of its affiliates, employees, etc. The NLRB observed that: "Public statements by employees about the workplace are central to the exercise of employee rights under the Act."

The NLRB also struck down the confidentiality provision as unlawful because it broadly prohibited the employees from disclosing the terms of the agreement "to any third person." It found "the confidentiality provision would [unlawfully] prohibit the subject employee from discussing the terms of the severance agreement with his former coworkers who could find themselves in a similar predicament facing the decision whether to accept a severance agreement." The NLRB held that "[a] severance agreement is unlawful if it precludes an employee from assisting coworkers with workplace issues concerning their employer, and from communicating with others, including a union, and the Board, about his employment."

The NLRB held that McLaren Macomb had committed an unfair labor practice under section 8 of the NLRA by offering these provisions to its employees and ordered, among other things, the furloughed employees be reinstated, with back pay.

Implications for Employers

Confidentiality and nondisparagement clauses are used frequently in a variety of employment contracts, in union and nonunion settings. *McLaren Macomb* must therefore be carefully considered

when drafting and negotiating such provisions. The provisions should be narrowly tailored to the circumstance, accounting for NLRB precedent.

All employers must be mindful of the NLRA's protections and avoid taking actions that could reduce employees' willingness to engage in protected concerted activity. This includes avoiding the use of broadly worded severance agreements that require employees to refrain from discussing the terms of an agreement with coworkers. Instead, employers must ensure severance agreements use very narrowly tailored language that is limited in both temporal proximity and subject matter.

Employers should also ensure that their human resources departments and legal teams are well-versed in the NLRA's protections and understand the potential consequences of violating the NLRA.

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