Important NLRB Opinion on Separation and Release Agreements Impacts All Employers

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NLRB Finds Inclusion of Confidentiality, Non-Disparagement Requirements in Severance Agreements to Be Unfair Labor Practice

On February 21, 2023, the National Labor Relations Board ("NLRB") released an opinion with sweeping consequences for employers who utilize separation and release agreements with provisions that secure the employees' agreement not to disparage the company or openly discuss the terms of their separation agreement in exchange for severance benefits. The opinion is *McLaren Macomb and Local 40 RN Staff Council, Office and Professional Employees, Internal Union OPEU, AFL-CIO.* Case No. 07-CA-263041.

What did the Board Decide and Why?

The Employer in this case ("Respondent") operates a hospital in Mt. Clemens, Michigan, and its workforce had unionized. In response to COVID, Respondent permanently furloughed eleven employees and presented each with a Severance Agreement. All eleven employees signed. The agreement contained the following confidentiality / non-disclosure provisions:

1. **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.

2. **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.

The agreement also contained a remedies provision that secured the Respondent's right to obtain injunctive and other legal relief against employees who violated their promise of confidentiality and non-disparagement. In *McLaren Macomb*, the NLRB characterized the above provisions as unlawful, claiming the provisions interfered with the employees' ability to engage in legally protected activity to secure better terms and conditions of employment.

Prior to 2020, the NLRB would analyze a severance agreement without regard to the context or circumstances of the separation and agreement, and instead focusing on the language of the severance agreement to determine whether the proffered agreement "had a reasonable tendency to interfere with, restrain, or coerce employees' exercise of their Section 7 rights."[1] In 2020, two NLRB decisions – *Baylor University Medical Center* (369 NLRB No. 43) and *IGT d/b/a International Game Technology* (370 NLRB NO. 50) – shifted the focus to ***the circumstances*** under which the severance agreement was being offered. If the circumstances were such that the discharge of the employee(s) violated the NLRA, or if the signing of the agreement was objectively coercive, only then would the proffer of a separation agreement be deemed to be a violation of the Act.

The *McLaren Macomb* Board has now overruled this 2020 precedent, and analyzed the agreements (without regard to the circumstances of separation) to determine whether the language on its face unduly restricts employees' rights, such as: "engaging in activity protected by the Act, … filing unfair labor practice charges with the Board, assisting other employees in doing so, or assisting the Board's investigative process" (collectively, "Protected Activity"). Noting that Protected Activity is "not limited to discussion with coworkers" and does "not depend on the existence of an employment relationship between the employee and employer," the Board overruled *Baylor* and struck down the provisions of the severance agreements' nondisparagement provisions and confidentiality provisions as violations of the NLRA due to the apparent or implied restraint on the employees' exercise of Protected Activity.

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What's the Impact?

Affected agreements

While this opinion applies to any language in a separation agreement that could have a "chilling" effect on an employee or former employee's ability to engage in Protected Activity, key provisions that will now be subject to scrutiny are:

- Confidentiality Provisions;
- Non-Disparagement Provisions;
- Non-Disclosure Provisions; and
- Releases and Covenants against Further Actions relating to the NLRA.

Can't I just use a disclaimer?

Yes and no. The *McLaren Macomb* Board made no indication that a "disclaimer" (e.g., "Nothing in this Section shall prohibit the Employee from engaging in activity protected by the National Labor Relations Act") would salvage an improperly drafted provision from being struck down. Therefore, at this time, that is probably not a safe option to protect a company's standard confidentiality or nondisparagement agreement from scrutiny. However, if used in conjunction with other changes to standard confidentiality and nondisparagement provisions, a properly drafted disclaimer may add some additional protection.

Can employees say **anything** *they want about my company now?*

No - but. It is clear that broad-nondisparagement provisions – those that effectively say, "don't bad mouth the company" – will no longer be legally enforceable under the NLRA. However, the Board indicated in its decision that employers may still be able to prevent employees from making "disloyal, reckless, or maliciously untrue" statements about the company and/or its products or services.

With regard to confidentiality, however, it appears clear that the Employer will no longer be able to keep the existence of a severance agreement or the details of its terms and conditions confidential. As such, the effect of potential disclosure should be considered when a severance proposal is made. Does the risk of disclosure outweigh the benefits of the release?

We are not unionized; does this decision apply to us?

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Yes. This decision applies broadly to unionized and non-unionized workforces alike. The protections of the NLRA extend to "Employees" (including former employees) but not "Supervisors[2]." It is important to involve counsel in making such determinations, as there's no bright line test to determine whether someone is an exempt Supervisor, but as a general matter Companies can continue to use these types of provisions in separation agreements with true supervisors, subject to appropriate legal analysis.

So what if I include a provision like this in my agreement but just don't enforce it?

Inclusion of a violating provision can result in an Unfair Labor Practice Charge. The NLRB has recently emphasized its authority to enter "make-whole" remedies that promote the purpose and spirit of the NRLA[3]. As such, potential remedies for unfair labor practices could include rescinding termination decisions, ordering employers to cease and desist use of such agreements, reinstatement of affected employees, and compensatory damages.

What Should We Be On The Lookout For?

While this decision focuses narrowly on "severance agreements," it signals that the Board – which predictably swings in accordance with the current administration – is currently aligned with stricter protections of employee rights. This means all policies and agreements – handbooks, procedures, notices, and potentially even settlement agreements – need to be closely analyzed for potential NLRA violations under this new NLRB position. Appropriate revisions to any offensive language should be carefully considered.

It is reasonable to assume that separation agreements entered into prior to February 21, 2023 that include confidentiality or non-disparagement provisions are likely "safe," as long as they were drafted, executed, and/or enforced in accordance with then-current precedent. Notably, the NLRA imposes a relatively short limitations window of six months to bring an unfair labor practice charge (29 U.S.C. § 160(b)), therefore, in our opinion, older separation agreements with the now-improper language present little to no risk.

In prior major NLRB decisions like this, the General Counsel of the NLRA has issued guidance to help interpret and implement the decision. Given the significant impact this decision has on agreements that most companies routinely prepare and enter into with separated employees, further guidance can be expected. Additionally, NLRB Decisions can be appealed to an appropriate federal circuit court, so there remains the real possibility that this decision will face legal challenges.

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Koley Jessen will continue to monitor this case and related cases and guidance for developments. In the meantime, please reach out to the employment and labor team for any questions or guidance about current or prospective agreements and policies.

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[1] Section 7 of the National Labor Relations Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," ..."

[2] The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. (29 U.S.C. § 152(11)).

[3] *See* GC 21-06 "Seeking Full Remedies" (Sept. 9, 2021).