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Labor + Employment

NLRB Finds Confidentiality and Non-Disparagement Clauses in Severance Agreement Unlawful

The Bottom Line

- The National Labor Relations Board has ruled that inclusion of confidentiality and non-disparagement provisions in separation agreements is unlawful.
- Employers should consult with counsel on how to update their agreements in light of this decision.
- It is unclear whether inclusion of confidentiality and non-disparagement provisions can result in the entire separation agreement (including the release) being invalidated, and whether inclusion of carve-out language and severability clauses will work to limit such an outcome.

In a groundbreaking decision, the National Labor Relations Board (Board) ruled that a severance agreement with confidentiality and non-disparagement provisions was unlawful because it restricted the rights of employees to engage in protected concerted activity under Section 7 of the National Labor Relations Act (NLRA). Given how prevalent such provisions are in separation agreements, employers will have to consider very carefully what revisions they may need to make to these agreements when offering severance in exchange for a release.

NLRB Decision

In *McLaren Macomb*, decided on Feb. 21, 2023, the employer provided a severance agreement to permanently furloughed employees. In addition to including a full release of claims, the agreement included a confidentiality provision prohibiting disclosure of the agreement's terms to any third party (with limited exceptions for obtaining tax or legal advice, or disclosure to spouses, and if compelled by a court or administrative agency). The agreement also included a non-disparagement provision prohibiting employees from making statements to other employees or the general public that could disparage or harm the image of the employer, affiliated entities and their officers, directors, employees, agents and representatives. Violation of these terms could have resulted in injunctive relief against the employees and payment of damages and attorneys' fees and costs.

The Board held that both provisions were unlawful as they interfered with employees' exercise of their Section 7 rights to discuss the terms and conditions of employment.

- The Board found that the non-disparagement provision placed a broad restriction on Section 7 rights, noting that "[p]ublic statements by employees about the workplace are central to the exercise of employee rights" under the NLRA. It further scrutinized the provision for having no timing restriction, not defining "disparagement," not being limited to matters regarding past employment and applying not only to the employer but also its parents and affiliates, directors, employees, agents and representatives. The Board ultimately found this to be a "sweepingly broad bar that has a clear chilling tendency" on employees' rights, including assisting fellow employees or raising or assisting with complaints before the Board, a union, a government agency, the media or anyone else.
- As for the confidentiality provision, the Board noted that prohibiting disclosure of the agreement's terms to *any* third person could preclude the disclosure of an unlawful provision of the agreement and coerce an employee from filing an unfair labor charge or assisting the Board in an investigation over use of the agreement. The Board also highlighted that the prohibition would prevent disclosure to former coworkers who could, in the future, find themselves asked to sign similar agreements and prevent employees from discussing the provisions with a union.

Implications and Open Questions

Not only did the Board find the non-disparagement and confidentiality provisions to be "unlawfully coercive terms," but specifically held that the agreement *itself* was unlawful and the mere proffering of an agreement with such terms violates the NLRA. Such a holding raises the critical question of whether inclusion of these provisions would invalidate an entire separation agreement, including the release of claims. While separation agreements typically have severability clauses specifying that even if one provision of an agreement is found to be unenforceable or unlawful the rest of the agreement remains valid, it remains to be seen whether a court would strike down an entire separation agreement if it found that inclusion of non-disparagement and confidentiality provisions is unlawful under Board precedent.

In addition, the severance agreement in the *Macomb* case did not appear to include carve-out language stating that nothing in the agreement should be construed to interfere with or restrict the employees' Section 7 rights. Therefore, it is unclear whether including this type of carve-out language could save an agreement from a finding that confidentiality and non-disparagement provisions unlawfully chill protected concerted activity. It also remains an open question whether an employee could waive their Section 7 rights if represented by counsel and the waiver is entered into knowingly and voluntarily.

Finally, it is worth noting that managers and supervisors are not afforded Section 7 rights under the NLRA. Accordingly, this decision generally should not impact inclusion of non-disparagement and confidentiality provisions in separation agreements with managers and supervisors.

For More Information

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