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NLRB Changes Course About Legality of Non-disparagement and Confidentiality Clauses in Severance Agreements Given to Section 7 Employees

Non-disparagement and confidentiality clauses are standard language in most severance agreements. While recent state and federal laws have attempted to disincentivize confidentiality—at least for sexual harassment cases—these clauses are viewed as vital consideration in the decision to offer a severance package. Under a National Labor Relations Board (“NLRB” or “Board”) decision released February 21, 2023, however, an employer’s ability to utilize these clauses will be severely curtailed moving forward. The NLRB has jurisdiction over unionized and non-union private sector employers.

The Board’s decision in *McLaren Macomb* overturned two 2020 Trump-era decisions. Under those decisions, simply offering employees a severance agreement which contained non-disparagement, non-assistance, and confidentiality clauses did not violate an employee’s federal labor rights unless the employer had engaged in other unlawful conduct that made the agreements coercive. Under the new ruling, simply offering an employee a severance agreement containing these clauses can violate the National Labor Relations Act (“NLRA”).

The *McLaren Macomb* ruling stemmed from a pandemic-related 2020 layoff. The employer offered severance agreements which included confidentiality and non-disparagement clauses. That agreement did not include any disclaimer language. The Board declared those two clauses unlawful because, in part, they:

- Would “reasonably tend to coerce the employee from filing an unfair labor practice charge or assisting a Board investigation”;

- Would “prohibit the subject employee from discussing the terms of the severance agreement with his former coworkers who could find themselves in a similar predicament”;
- Would preclude “an employee from assisting coworkers with workplace issues concerning their employer and from communicating with others, including a union and the Board, about [their] employment.”

Notably, the *McLaren Macomb* decision is limited to non-disparagement and confidentiality provisions included in severance agreements presented to non-management employees with Section 7 rights under the NLRA. “Supervisor” (or “manager”) is defined by the NLRA. Generally, a supervisor has the authority (or effectively can recommend) to hire, discipline, discharge, promote, layoff, recall, or reward other employees. It is a highly fact intensive analysis; simply inserting “manager” or “supervisor” in an employee’s job title is not enough. Facts matter. Therefore, employers must continue to exercise caution when using generic, template severance agreements. They must determine if the employee meets the definition of “supervisor” under the NLRA before including the clauses at issue into their severance agreements.

Employers have asked if the Board provided disclaimer language (e.g., “nothing in this Agreement prevents you from exercising or enforcing your rights under the National Labor Relations Act...”) that would permit them to include these two clauses in severance agreements. It did not. Rather, the Board reasoned the chilling of Section 7 rights dictates “the Board’s traditional approach of viewing severance agreements requiring the forfeiture of Section 7 rights—whether accepted or merely proffered—as unlawful **unless narrowly tailored.**” (Emphasis added.)

In a footnote, the Board declared it was not (in this case) defining the meaning of a “narrowly tailored” forfeiture of Section 7 rights in a severance agreement. We believe the NLRB General Counsel will issue advice memoranda that (hopefully) provide examples of “narrowly tailored” disclaimer language satisfactory to the Board.

One final note. The NLRB’s pro-union, aggressive march has not abated. In the upcoming months, the Board will issue its decision in

Stericycle, Inc., 371 NLRB No. 48 (2021). We fully expect the Board to adopt a difficult-to-manage legal standard to determine whether employer work rules (e.g., handbook policies) violate the NLRA—reversing the Board’s 2017 decision in *Boeing Co.*, 365 NLRB No. 154 (2017), which provided much needed certainty and predictability for employers assessing the legality of their work rules.

If you have any questions about this decision or other labor law issues, please contact the authors of this article or any attorney in Frost Brown Todd’s [Labor & Employment](#) practice group.

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