March 7, 2023

NLRB Limits Use of Confidentiality and Non-Disparagement Provisions

In a far-reaching decision that affects all employers, whether or not their employees are represented by a union, the National Labor Relations Board (Board) recently ruled that merely offering non-supervisory employees severance agreements containing common broad confidentiality and non-disparagement provisions violates the National Labor Relations Act (NLRA).

In *McLaren Macomb*, the employer offered severance agreements to 11 permanently furloughed union-represented employees without first providing the union with an opportunity to bargain the employer's furlough decision or the effects of that decision as required by the NLRA. The severance agreements contained broad confidentiality and non-disparagement provisions and allowed the employer to seek monetary damages and injunctive relief if the furloughed employees breached those provisions. The Board concluded that the confidentiality and non-disparagement provisions could reasonably be interpreted to interfere with, restrain or coerce employees' exercise of their Section 7 rights (i.e., their rights to engage in protected concerted activity) under the NLRA. Although all 11 employees signed the severance agreements, those agreements were set aside and the employees were reinstated with back pay due to the employer's other violations of the NLRA. The Board's analysis of the provisions is set forth below.

The confidentiality provision in question stated as follows:

> 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 [a] 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.

While employers routinely include similar provisions in their severance agreements, the Board found it to be unlawful for a couple of reasons. The Board found it prevented employees from providing information to the Board concerning the employer's unlawful interference with employees' NLRA rights. For instance, according to the Board, the confidentiality provision would prohibit the employees from reporting even the existence of an unlawful provision contained in the severance agreement to the Board. The Board also found the confidentiality provision, including its prohibition on the disclosure of the terms of the agreement, would impair the rights of current and/or former employees to assist each other when dealing with comparable work-related issues.

The non-disparagement provision in question stated as follows:

> 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 Board also found this provision to be unlawful for several reasons. The Board found that the provision did not define "disparagement" in a way traditionally found acceptable by the Board, but instead broadly prohibited employees from making any statements about the workplace. The Board further found that the provision applied to statements not only about the

employer but also, too expansively, about the employer's "parents and affiliated entities and their officers, directors, employees, agents and representatives." Lastly, the Board found that the provision was not limited to past conduct and did not impose any temporal limitation on employees' non-disparagement obligation. Thus, according to the Board, the provision would impede employees' future cooperation with any Board investigation or unfair labor practice litigation.

To support its position, the Board cited prior cases finding unenforceable provisions that prohibited employees from cooperating with or providing voluntary assistance to the Board and communicating with third parties about issues in the workplace.

The Board maintained that any relinquishment of employees' Section 7 rights must be "narrowly tailored," but unfortunately did not provide guidance on how employers may do so. It did, however, confirm that a release of prior employment claims continued to be valid.

It is important to note that this decision applies only to employees who are not "statutory supervisors" under the NLRA, which may include employees at high levels of an organization. The decision also applies to merely offering employees severance or separation agreements containing problematic provisions, regardless of whether those employees sign the agreement or the employer attempts to enforce those provisions.

One Board member issued a well-reasoned dissent, and the Board's decision may ultimately be appealed to federal court.

Key Takeaways

Although the Board's decision does not prohibit an employer's use of confidentiality and non-disparagement provisions in their entirety, it makes clear that employers must carefully and narrowly draft severance agreements so as to not violate the NLRA. Even if employers do not otherwise violate the NLRA, by simply offering employees severance or separation agreements with overly broad terms, they may not only face unfair labor practice charges but also risk their agreements being unenforceable as written. Given these risks, employers should seek assistance from experienced labor counsel to best protect their interests.

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