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Drafter Beware: NLRB Finds That Employers Who Offer Severance Agreements With Broad Non-Disparagement or Confidentiality Restrictions Violate The NLRA

Labor Relations Update on **February 23, 2023**

The National Labor Relations Board ("Board") issued a ruling on February 21, 2023, in *McLaren Macomb*, 372 NLRB No. 58 (2023), which in effect finds broad confidentiality and non-disparagement clauses in severance agreements violate Section 8(a)(1) of the National Labor Relations Act ("Act").

The decision applies to all employers regardless of union status. However, the decision applies only to "employees" under the Act—not separation agreements involving managers or supervisors, who are not afforded Section 7 rights under the NLRA. In light of this ruling, employers should carefully consider how to approach drafting new severance agreements, as this decision raises a number of issues (discussed below).

The Board Majority Returned to Prior Precedent

The employer furloughed employees without notifying or giving the union representative an opportunity to bargain over the changes. Further, the employer offered the laid-off employees severance agreements without bargaining with the union.

All four Board members agreed the employer violated the Act by not bargaining with the union over the layoffs or the severance agreement.

The Board majority (Chairman McFerran and Members Wilcox and Prouty), however, went further and expressly overruled *Baylor University Medical Center*, 369 NLRB No. 43 (2020) and *IGT d/b/a International Game Technology*, 370 NLRB No. 50 (2020) criticizing the decisions as focusing too sharply on the outside circumstances, such as whether the employer discriminated against the employee or exhibited animus, without analyzing the "specific language in the challenged provisions of the severance agreements."

Now, the **offer of an agreement, the provisions of which could waive an employee's Section 7 rights, violates Section 8(a)(1) of the Act**. In explaining its holding, the Board Majority stated:

> Where an agreement unlawfully conditions…severance benefits on the forfeiture of statutory rights, the mere proffer of the agreement itself violates the Act, because it has a reasonable tendency to interfere with or restrain the prospective exercise of Section 7 rights, both by the separating employee and those who remain employed.

The Board emphasized that whether an employee accepts a severance agreement is immaterial to the analysis, noting that if acceptance were required it would create an "obstacle to the effective protection of Section 7 rights."

Application of the New Standard

Applying this new standard to the severance agreement at issue, the Board evaluated the confidentiality and non-disparagement provisions.

The confidentiality provision stated:

6. **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.

The Board majority found that the confidentiality language restricted the furloughed employees' Section 7 rights because it prohibited employees from disclosing the terms of the agreement to any third party, which the majority concluded reasonably would coerce the employee from not filing an unfair labor practice charge or assisting a Board investigation into the Employer's use of the severance agreement.

The Board also found that the confidentiality provision prevented the furloughed employees from assisting their former coworkers who may also be determining whether they want to accept the severance agreement.

The non-disparagement provision stated:

7. **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.**

(Emphasis added).

The Board majority concluded this provision substantially interfered with the furloughed employees' Section 7 rights to make "statements to [the] Employer's employees or to the general public [including to the NLRB] which could disparage or harm the image of [the] Employer."

The Board took issue with several other aspects of the non-disparagement clause:

- The provision failed to limit the scope of the agreement to matters regarding past employment with the employer.
- The provision did not provide a definition of "disparagement" that comports with existing Board precedent—*i.e.,* defining "disparagement" as communications that are so "disloyal, reckless or maliciously untrue," so as to lose protection of the Act.
- The disparagement clause was overly broad in that it extended to the employer's "parents and affiliated entities and their officers, directors, employees, agents and representatives."
- The provision's term continued in perpetuity, which the Board found excessive.

Key Takeaways

We have seen this type of decision in the context of the Board's handbook cases, which have been addressed by this blog many times, including here, here, here, and here. In sum, the Board is returning to a standard that finds a hypothetical harm and then addresses it as a violation of the law.

As employers consider how to draft separation agreements in light of this ruling, this decision raises a number of issues, including:

- Whether a savings clause carving out NLRA issues, Section 7 activity, and/or charges before the NLRB will be sufficient to allow the inclusion of broad

confidentiality and non-disparagement provisions.

- The manner in which the NLRB applies this standard to confidentiality clauses and/or non-disparagement provisions that are more narrow in scope compared to the broad provisions at issue in this case.
- Whether the current ruling impacts existing separation agreements. The decision did not explicitly state that it would apply retroactively.
- Whether separation agreements with broad confidentiality and/or non-disparagement clauses are permissible if offered to the Union first, rather than directly to the employee.
- Whether an employee who seeks the advice and counsel of a lawyer—which is often a requirement of severance agreements—can effectively waive Section 7 rights.

It is also likely a harbinger of the manner in which the Board will rule in the still-pending *Stericycle* case (see our prior discussion here), which may result in the overturning of the *Boeing* standard that currently applies to the evaluation of the lawfulness of workplace rules.

As always, we will keep you posted as new developments occur.

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