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NLRB Prohibits Non-Disparagement and Confidentiality Clauses in Most Severance Agreements

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Earlier this week, the National Labor Relations Board (NLRB) ruled that language in a severance agreement that restricts an employee's ability to criticize their employer or to reveal terms of the agreement that the employer might wish to treat as confidential is unlawful under the National Labor Relations Act (the NLRA or the Act). The NLRB case, *McLaren Macomb*, reversed two prior decisions that the NLRB issued in 2020 that permitted employers to include non-disparagement and confidentiality provisions in severance agreements.

As a reminder, the NLRA applies to both union and nonunion workplaces, and the Act protects any employee who is not a public sector employee, agricultural or domestic worker, independent contractor, worker employed by a parent or spouse, employee of an air or rail carrier, or supervisor. Generally, a "supervisor" under the NLRA is someone with the right to control the terms and conditions of another worker's employment (such as to hire, transfer, promote, discipline, or effectively recommend such action) and whose exercise of authority requires the use of independent judgment.

Facts of the Case

McLaren Macomb involved a Michigan teaching hospital that offered 11 permanently furloughed union employees the opportunity to receive severance if they signed the hospital's form of severance agreement. Among other terms, the agreements contained provisions that (1) prohibited employees from making disparaging comments about the employer and (2) treated the terms of the agreement as confidential.

The NLRB found that the non-disparagement and confidentiality clauses violated the NLRA. Section 7 of the 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," as well as the right "to refrain from any or all such activities." According to the NLRB, whether the employee accepts the agreement is immaterial; proffering the agreement with terms that violate the Act is itself a violation.

In *McLaren Macomb,* the NLRB held that a severance agreement is unlawful if "it precludes an employee from assisting coworkers with workplace issues concerning their employer, and from communicating with others, including a union, and the Board, about his employment." Limiting an employee from being able to criticize their former employer or to assist other employees in exercising their rights violates the NLRA. Of note, employees are not protected under the NLRA if their communication is "so disloyal, reckless, or maliciously untrue to lose the Act's protection."

What Should Employers Do Now?

The obvious question for employers is what confidentiality and non-disparagement language, if any, they should include in their severance agreements going forward. As to previously executed agreements, employers may defend such agreements since they were drafted at a time when the law permitted such language. Still, a risk exists that an employee who previously

signed an agreement with such language could seek to have the NLRB invalidate it.

Going forward, employers that are more risk averse might consider eliminating or significantly reducing the scope of their non-disparagement and confidentiality provisions. Of note, the agreement in *McLaren Macomb* did not include a disclaimer that preserved employees' rights under Section 7. While the NLRB did not conclusively hold that such a disclaimer would have avoided the employer's violation, such language might be useful if the employer clarified that employees may still participate in Section 7 activity, assist others in doing so, or otherwise cooperate with the NLRB under the Act. Another option might be for employers to include a time limitation on a non-disparagement clause or state that employees may not disparage their employer in a manner that is disloyal, reckless, or maliciously untrue.

In *McLaren Macomb*, the employer terminated the 11 employees and offered them severance without the involvement of their union; as a result, the NLRB ordered that the employer must reinstate the employees, among other remedies. By contrast, in most situations a private employer without a union might simply wish for various business reasons to include non-disparagement and confidentiality language in its separation and general release agreements. In that situation, even if including such language is deemed an unfair labor practice in violation of Section(a)(1) of the Act, it is unclear whether the entire release agreement or just the applicable terms would be invalidated. In general, under the NLRA, an employer that commits an unfair labor practice may be required to compensate an employee for all direct or foreseeable pecuniary harm the employee suffered as a result of an employer's unfair labor practice. It is an open question what damages or harm an employee subject to such restrictions actually has suffered if the employer has not taken any steps to enforce the agreement against the employee.

At this juncture, it is clear that the NLRB decision poses more questions than it answers. As is common NLRB practice, it is likely the NLRB's General Counsel will issue advisory memos in the near future offering more concrete examples of language that is and is not permissible under the Act.

If you have any questions about non-disparagement or nondisclosure clauses, please contact any member of the Lowenstein Sandler Employment Counseling & Litigation practice group.

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