Your Previously Used Employment Forms Need Attention!

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On February 21, 2023, the National Labor Relations Board ("NLRB") issued a decision turning the issue of severance agreements with employees on its head. I am not being dramatic; this was big news for the employment law world for two reasons: First, keep in mind that the NLRB is the body that enforces the National Labor Relations Act ("NLRA" or "the Act"). Second, contrary to public option, the NLRA and, therefore, the NLRB decisions also apply, in many instances, to non-unionized workforces.

The *McLaren Macomb* decision held that employers violate the NLRA when they offer employees severance agreements that require employees to broadly waive their rights under the Act. By doing so, the NLRB overturned decades of prior precedent to hold that non-disparagement and confidentiality provisions commonly used in severance agreements are broadly unlawful when imposed on employees (as opposed to managers or supervisors.

In addition to obtaining a release of claims, maintaining confidentiality, and obtaining an agreement not to disparage are the main reasons that employers enter into most severance agreements. Employers do not want the terms of a severance agreement broadcasted and also don't wish to be disparaged by the departing employee.

The *McLaren Macomb* case involved a hospital in Michigan that permanently furloughed eleven union employees and offered each of them a severance agreement. Each agreement at issue in the *McLaren* decision contained the following provisions:

- **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 spouses, or as necessary to professional advisors for purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction."
- **Non-Disparagement:** "At all times hereafter, the Employee agrees not to make statements to Employer's employees or 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."

Historically speaking, these are incredibly common terms to be included in a severance agreement with an employee. Not any longer according to the NLRB. The decision specifically highlighted two things: First, the NLRB noted that the confidentiality provision broadly prohibited employees from disclosing *any* information regarding the terms of the severance agreement. Thus, the NLRB reasoned that such a provision could prevent an employee from discussing the terms of the severance agreement with co-workers and it could "reasonably tend to coerce the employee from filing an unfair labor practice charge or assisting [an NLRB] investigation into the [employer's] use of the severance agreement." Accordingly, the NLRB determined that the inclusion of this provision constituted an unfair labor practice and violated federal labor law. Second, the NLRB held "[p]ublic statements by employees about the workplace that are central to the exercise of employee rights under the [NLRA]" and, therefore, the non-disparagement provision violated an employee's rights under Section 7 of the Act because it prevented employees from making statements that the employer engaged in unfair labor practices and could potentially discourage an employee from cooperating with an NLRB investigation. Moreover, the NLRB found the provisions to be so onerous and the penalties so severe, that merely proposing a severance agreement containing those terms violates the NLRA, regardless of whether the employee accepts the agreement or not; pretty harsh!

Understandably so, this decision has caused a major shake-up amongst employment attorneys. Realizing the ripple effects of the decision, on March 22, 2023, the NLRB issued detailed guidance for employers. Here are the takeaways that employers should be aware of:

Retroactive

- *McLaren* has "retroactive application" in that it applies to severance agreements signed before February 21, 2023. In addition, the six-month statute of limitations to bring an unfair labor practice charge relating to an overly broad severance agreement would be construed as a continuing violation by virtue of the employer's maintaining and/or enforcing a previously entered severance agreement containing unlawful provisions.

Supervisors

- Supervisors are not protected under the NLRA. Therefore, agreements with supervisory employees may contain these provisions.
- The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Severability

- Generally, the voidability of a severance agreement with overly broad provisions would be decided on a case-by-case basis. However, the NLRB's Regional offices generally make decisions based solely on the unlawful provisions and would seek to have those voided out as opposed to the entire agreement.

Employee Request

- These employee protections under the NLRA cannot be waived even if the employee knowingly requests or consents to an overly broad confidentiality or non-disparagement provision.

Confidentiality

- Confidentiality agreements may still be lawful, so long as they are narrowly-tailored to restrict dissemination of proprietary or trade secret information for a period of time based on legitimate business justification.

Non-Disparagement

- Non-disparagement agreements may still be lawful so long as they are narrowly-tailored and limited to employee statements about the employer that meet the definition of defamation as being maliciously untrue, such that they are made "with knowledge of their falsity or with reckless disregard for their truth or falsity."

The bottom line is that recycling severance agreements that have been attorney-approved in the past is no longer a good practice and could result in potential legal liability on behalf of the employer which could lead to voided out agreements.

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