NLRB Rules that Employers Cannot Offer Severance Agreements With Confidentiality and Non-Disparagement Clauses

By: Cody Weyhofen and Katie Conklin

On February 21, 2023, the National Labor Relations Board (the "Board") ruled in *McLaren Macomb*, 372 NLRB No. 58 (2023) that confidentiality and non-disparagement clauses typically found in severance agreements are unlawful if they interfere with an employee's Section 7 rights under the National Labor Relations Act (the "NLRA") to organize, bargain collectively, and engage in concerted activities that affect terms and conditions of employment.

Employers Subject to the NLRA

The NLRA applies to most private sector employers, including manufacturers, retailers, private universities, and health care facilities.

The NLRA does *not* apply to federal, state, or local governments; employers who employ only agricultural workers; or employers subject to the Railway Labor Act.

Old Rule

In the past, an employer could lawfully offer employees severance agreements containing (1) confidentiality/non-disclosure clauses requiring the existence and contents of the agreement to be kept confidential by the employee, including, but not limited to, the amount of severance pay; and (2) non-disparagement clauses prohibiting the employee from disparaging or making negative statements about the employer, and its officers, directors, employees, agents, and representatives.

New Rule

In *McLaren Macomb*, the Board examined whether the employer violated the NLRA by offering severance agreements to a group of permanently furloughed employees. The severance agreements at issue 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 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.
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> **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 found the confidentiality and non-disparagement provisions unlawful because they interfered

with, restrained, and coerced employees in the exercise of their Section 7 rights under the NLRA. Specifically, the Board found that the confidentiality provision was unlawful because it tended to coerce employees from filing unfair labor practice charges, assisting the Board in an investigation, and prohibited employees from discussing the severance agreement with union representatives or other employees seeking to unionize. Similarly, the Board found that the non-disparagement clause was unlawful because "[p]ublic statements by employees about the workplace are central to the exercise of employee rights under the Act." For a severance agreement to contain a *lawful* confidentiality or non-disparagement provision, the Board explained that the provision must be "narrowly tailored." Furthermore, the Board did not provide any further guidance on what constitutes a "narrowly tailored" provision.

Notably, the Board's decision in *McLaren Macomb* does *not* apply to confidentiality and non-disparagement provisions in severance agreements for supervisors. Under the NLRA, employees are considered to be "supervisors" if they have the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline other employees, or have responsibility to direct them or adjust their grievances with the use of independent judgment.

Preparing for Compliance

The Board's ruling introduces a variety of questions for employers, including the enforceability of already-existing severance agreements and how to ensure future severance agreements are "narrowly tailored." Because federal and state laws regarding the enforceability of severance and employee release agreements are complex and constantly changing, we recommend a legal review of every such agreement.

We will continue to monitor the latest developments and legal requirements in this area of law. If you have any questions concerning the Board's ruling, please do not hesitate to contact Seigfreid Bingham's Employment Law attorneys for further information concerning compliance for your specific situation.

This article is intended to provide only general information and does not constitute legal advice. Readers with legal questions should consult the authors, Cody Weyhofen (CWeyhofen@sb-kc.com) and Katie Conklin (kconklin@sb-kc.com), or the shareholders in Seigfreid Bingham's Employment Law Group, including John Vering (jvering@sb-kc.com), John Neyens (johnn@sb-kc.com), Mark Opara (mopara@sb-kc.com), Brenda Hamilton (bhamilton@sb-kc.com), Shannon Cohorst Johnson (sjohnson@sb-kc.com), Julie Parisi (jparisi@sb-kc.com), Christopher Tillery (ctillery@sb-kc.com), or your regular contact at Seigfreid Bingham at 816-421-4460.