CLIENT ALERTS & INSIGHTS

NLRB Bars Confidentiality and Non-Disparagement Provisions in Severance Agreements

FEBRUARY 28, 2023

Authors: W. Eric Baisden, Adam Primm

In a ruling on February 21st, the National Labor Relations (NLRB or "Board") revoked employers' ability to require their employees to keep the terms of severance packages confidential and to not disparage the company as part of severance agreements. The Board's sole Republican member dissented.

The case, *McLaren Macomb*, 372 NLRB No. 58, involved a Michigan hospital that laid-off several employees in June 2020 amid the COVID-19 pandemic. The affected employees were presented with severance agreements which broadly precluded them from making statements that could disparage or harm the hospital's image, its parent and affiliated entities and their officers, directors, employees, agents, and representatives, and further precluded them from disclosing the terms of the agreements to any third-party, subject to narrow exceptions. Last week's ruling holds that such provisions unlawfully restrain rights guaranteed to employees by the National Labor Relations Act (NLRA or the "Act").

McLaren Macomb overturns a pair of Trump-era decisions which held that such provisions were lawful. The case revives "nearly a century of settled law" that it says those two prior decisions ignored. "It's long been understood by the Board and the courts that employers cannot ask individual employees to choose between receiving benefits and exercising their rights under the National Labor Relations Act," said Board Chairwoman Lauren McFerran in a statement. The decision "upholds this important principle and restores longstanding precedent."

The new rule is likely to face legal challenge and whether the Board will be aggressive in enforcing it is, at least for now, an open question. But given that the rule concerns workers' rights under the Act, it is important to note that it only applies to workers covered by the Act. This means that workers that the Act specifically excludes from its coverage, such as supervisory employees (with limited exceptions), government employees, and independent contractors, are not within the rule's scope and severance agreements executed with such workers are not affected.

For employers who employ workers covered by the Act and who wish to balance the interests of maintaining severance term confidentiality while being compliant with the new rule, it is also worth noting that the severance agreements at issue in *McLaren Macomb* neither contained a disclaimer provision nor did the Board address whether such a provision would have saved them**.** Accordingly, employers may want to consider including a disclaimer in their agreements explaining that the agreements will not interfere with applicable workers' rights. While not an airtight shield to potential risk flowing from the new rule, such a disclaimer could include the following language: "*Nothing in this agreement is intended or shall be interpreted to restrict the employee's rights under Section 7 of the National*

Labor Relations Act, including to prevent the employee from discussing employee's wages and other terms and conditions of employment as permitted by the National Labor Relations Act."

For particularly risk-averse employers, they may opt to stop including confidentiality and non-disparagement provisions in their severance agreements entirely, particularly in jurisdictions where such provisions are already prohibited. And for employers who are concerned about whether past severance agreements potentially expose their operations to unfair labor practice charges, keep in mind that the Board's procedural rules prohibit employees from bringing such charges that fail to relate back to unlawful conduct that occurred within the past six months, effectively limiting risk to those agreements executed within that timeframe and forward. Further, a charge filed on a past severance agreement based on the Board's revived rule may be seeking retroactive application of the rule. If a severance agreement was executed at a time when confidentiality and non-disparagement provisions were lawful, that itself could serve as a potential defense against a charge.

All told, employers should seek counsel to discuss how *McLaren Macomb* may impact the way they craft their severance agreements.

For more information, please contact a member of Benesch's Labor & Employment Practice Group.

Eric Baisden at ebaisden@beneschlaw.com or 216.363.4676.

Adam Primm at aprimm@beneschlaw.com or 216.363.4451.