CLIENT ALERTS & INSIGHTS

Severance Agreement Confidentiality Provisions Under Fire, Employer Surveillance, and a Roadmap for Profanity in the Context of Union Activity: the Labor Law Landscape in March 2024

APRIL 1, 2024

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Severance Agreements

In early 2023, the National Labor Relations Board's (NLRB or "Board") decision in *McLaren Macomb*, 372 NLRB 58, 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 (see alert here).

In the first widely reported dispute on this issue post-*McLaren Macomb*, on March 20, 2024, following an investigation by the NLRB's Region 19 (based in Seattle) and a finding of probable cause, a complaint was filed with the Board alleging that SpaceX's severance agreements violate the National Labor Relations Act ("NLRA" or the "Act") under *McLaren Macomb*. According to the complaint, the severance agreements require employees to agree to "not make any oral or written derogatory or negative comment about the company concerning your employment with the company or separation of employment." The complaint also alleges that the severance agreements unlawfully restrict employees who sign them from "provid[ing] assistance to any current, former, or future SpaceX employee" with respect to their future claims against the company, unless required to do so under a subpoena or court order.

As we previously addressed, in the wake of *McLaren Macomb*, limitations on speech in severance agreements should, at a minimum, be accompanied by unequivocal disclaimer language declaring that the limitations are not intended and should not be interpreted as restricting employees' rights under the Act. Despite its recent aggressive activity, the Board has not yet taken issue with severance agreements containing these explicit carveouts-which, according to the complaint against SpaceX, were noticeably absent from its severance agreements.

A hearing in this matter has been set for October 29, 2024, and will proceed on that date before an administrative law judge ("ALJ") unless a settlement agreement is reached (and approved by Region 19's Regional Director) in the interim. Either party could then appeal the ALJ decision to the full NLRB. We will continue to provide updates as this case develops.

Employer Surveillance

In a scathing opinion, the U.S. Court of Appeals for the D.C. Circuit overturned a Board decision that concluded that the employer's mere act of texting a pro-union employee and instructing him to

uncover his company truck's camera violated the Act by interfering with, restraining, or coercing his engagement in union activities. The Board relied on precedent demonstrating that it is an unfair labor practice for an employer to create the impression that it is monitoring employees in their pro-union activity (precedent which was punctuated in a memorandum by the Board's General Counsel, Jennifer Abruzzo, in October 2022).

However, the D.C. Circuit sided with the employer. It reasoned that the company's policy, which applies to all employees, provides that employees could be monitored at any time, without warning, and for any reason. That policy, according to the court, gives employees "every reason to expect to be watched while on the job-and, without more, no reason to assume that any particular instance of monitoring reflects an attempt by the company to weed out or suppress union activities."

In reaching its conclusion, the court sharply criticized the Board for focusing its analysis "not on the statutory text-the 'authoritative source of the Law'-but on its own constructions of (its own constructions of) the Act." Ultimately, the court concluded that the argument accepted by the Board "stretches Board precedent so far that not even 'fidelity to [the] logic' of those prior decisions can sustain the Board's finding."

Given the current NLRB's and GC Abruzzo's aggressive and union-friendly mission under the Biden Administration, this rebuke from the D.C. Circuit provides some reason for optimism for employers.

Profanity in the Context of Union Activity

Finally, on Thursday, March 22, Equal Employment Opportunity Commission ("EEOC") Chair Charlotte Burrows announced that the EEOC and NLRB intend to issue joint guidance to help employers understand the appropriate (and lawful) course of action when an employee uses profane speech in the course of union activity. The outer bounds of an employer's permissible response are currently in limbo in light of the Board's decision in *Lion Elastomers*, 372 NLRB 83 (2023), which significantly limits an employer's ability to discipline profane conduct if that conduct occurs in the context of union activity. This issue has been in flux in recent years-*Lion Elastomers* was itself a substantial shift from a 2020 decision that more readily permitted employers to discipline profanity (see alert here).

In *Lion Elastomers*, Board Member Kaplan's dissent criticized the majority for failing to set forth a standard that could be reconciled with employees' protections against abusive conduct under the EEOC. Now, Board Member Kaplan's prognostication has been realized, and employers faced with abusive employee conduct in the context of union activity are between a rock and a hard place: discipline the employee engaging in abusive conduct and risk facing an unfair labor practice charge under the NLRA, or do nothing and risk facing a claim of discrimination or harassment under Title VII. Board General Counsel Jennifer Abruzzo asserted that even under *Lion Elastomers*, Title VII and the NLRA can be "harmonized." That remains to be seen. But the intent to issue joint guidance to clarify the apparent contradiction may be another sign of a softening NLRB that has been hyper-aggressive under President Biden and GC Abruzzo. Notably, however, this "softening" has come from external influences like the D.C. Circuit and the EEOC and not from within the NLRB, which may indicate that the current path of the NLRB is not in line with the broader consensus.

These are the most recent developments in the ever-changing federal labor law landscape, and employers should remain abreast of new developments to understand what actions they can and cannot take under this volatile area of the law.

To learn how these developments can affect your business, contact a member of Benesch's Labor & Employment Practice Group.

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