STINSON

News & Insights

NLRB Ruling Renders Routine Confidentiality and Non-Disparagement Provision Unlawful

Alert

02.23.2023

By Stacey McClurkin Macklin, Stephanie Scheck and Matt Tews

Once again, the pendulum has swung, and this time, the National Labor Relations Board (NLRB or Board) has reversed Trump-era rulings that granted broad flexibility to employers in severance agreements. On Tuesday, the Board issued *McLaren Macomb*, 372 NLRB No. 58 (Feb. 21, 2023) and ruled that a severance agreement (and potentially *any* agreement, including litigated settlement agreements) violates the National Labor Relations Act (NLRA) whenever the terms tend to interfere with employees' rights to organize or engage in concerted activity for their mutual aid and protection. That is not new; but what is new is that the NLRB ruled that simply by including overbroad confidentiality or non-disparagement provisions, an employer interferes with these rights and violates the NLRA. Under *McLaren*, any private employer governed by the NLRA—whether unionized or non-unionized—will violate the NLRA by merely offering severance agreements with these types of provisions.

The core facts in *McLaren* are simple and straightforward, and are likely similar to thousands of separations that occur at other employers every year. *McLaren*, a hospital, furloughed 11 employees and contemporaneously presented them with standard severance agreements, including routine non-disparagement and confidentiality provisions. The confidentiality provision prohibited employees from making statements about the terms of the agreement to any third person outside of a spouse or professional advisor, or unless legally compelled by a court or administrative agency. The non-disparagement provision prohibited employees from making statements that may disparage or harm the hospital's image, or the image of its parent or affiliated entities and their officers, directors, employees, agents and representatives. Overruling its Trump-era case law (*Baylor University Medical Center*, 369 NLRB No. 43 (2020) and subsequently upheld in *IGT d/b/a International Game Technology*, 370 NLRB No. 50 (2020)), the Board held that both the non-disparagement and confidentiality provisions unlawfully

restrained and coerced the furloughed employees in the exercise of their Section 7 rights (e.g. the right to engage in concerted activity for their mutual aid and protection).

In *McLaren,* the Board overruled its recent Trump-era case law because, according to it, those cases failed to recognize that merely offering an agreement with such provisions have a reasonable tendency to interfere with, restrain or coerce the exercise of rights under Section 7 of the Act. Specifically, the Board found the non-disparagement provision unlawful because it broadly prohibited employees from making any statements to other employees or the general public which could disparage or harm the image of the employer, including statements asserting the employer had violated the NLRA; failed to hew closely enough to previously-established NLRA definitions of disparagement; theoretically applied to any employee conduct regarding any labor issue, dispute or term and condition of employment; restricted disparagement of too broad a list of entities and individuals; and lacked a temporal limitation.

The Board found the confidentiality provision unlawful for similar reasons, and because it broadly prohibited the employees from disclosing terms of the agreement to "any third person"; barred the employees from providing information to the Board that was an unlawful interference with other employees' statutory rights; and prohibited employees from discussing the terms of the severance agreement with his former coworkers.

In short, while the Board took issue with the broad scope of the specific non-disparagement provision at issue in *McLaren* and road-mapped potential ways to draft a narrowly-tailored, lawful, non-disparagement provision, its rationale for striking down the confidentiality provision was *much* broader and suggests the Board will take an exacting review of *any* confidentiality provision. In addition, while the facts of *McLaren* related specifically to *severance agreements*, the Board *could* – and in footnotes suggests it *will* – apply its reasoning broadly to *all agreements, including litigated settlement agreements*.

WHAT SHOULD COMPANIES DO NOW?

Companies maintaining severance agreements with non-disparagement and confidentiality provisions would be wise to review them and evaluate the purpose and the value of those provisions. For example, in instances where there is a group layoff where all employees are receiving a severance pursuant to a formula, a confidentiality provision may not be as important. Companies may also consider whether they are likely to enforce a non-disparagement provision and whether the value of including such a provision outweighs the risk that the agreement is found unlawful.

When the inclusion of a non-disparagement provision is important, companies may consider language that mirrors existing precedent to enhance enforceability. When a confidentiality provision is deemed necessary, an employer may want to consider adding clear disclaimer language that the provision does not prohibit protected, concerted activity under the NLRA.

NLRB Ruling Renders Routine Confidentiality and Non-Disparagement Provision Unlawful

The bottom line is that the NLRB's *McLaren* decision highlights the importance of carefully crafting severance and separation agreements, carefully considering the value of including these heavily scrutinized provisions, and more generally keeping up to date on the rapid changes occurring in labor law under the current NLRB.

CONTACTS

Stephanie N. Scheck

Matthew C. Tews

RELATED CAPABILITIES

Banking & Financial Services

Business Litigation

Corporate Finance

Health Care & Life Sciences

Labor, Employment & Benefits