NLRB Limits Confidentiality and Non-Disparagement Clauses in Severance Agreements

Related Attorneys

Michael J. Shoenfelt

Samia A. Shaheen

Related Services

Labor and Employment

Labor Relations

CLIENT ALERT | 2.23.2023

On February 21, 2023, the National Labor Relations Board (NLRB) issued its decision in *McLaren Macomb*, which ruled that an employer violates Section 8(a)(1) of the National Labor Relations Act (NLRA) when it includes provisions in severance agreements that restrict or have a tendency to interfere with workers' organizing rights. Specifically, the NLRB was reviewing the employer's use of confidentiality and non-disparagement clauses. This ruling affects employees in both unionized and non-unionized workplaces.

NLRB's Prior Decisions

In 2020, the Trump-era NLRB issued two decisions holding that non-disparagement and confidentiality provisions in severance agreements were lawful.

In *Baylor*, the NLRB held that the "mere proffer" of a severance agreement with restrictive confidentiality and non-disparagement provisions was not unlawful. This was because the provisions were not mandatory and only applied post-employment, and therefore had no impact on terms and conditions of employment. Likewise, in *IGT*, the NLRB found that an employer's non-disparagement provision was lawful because it was entirely voluntary, did not affect the employee's pay or benefits, and was not proffered coercively.

McLaren Macomb Shifts Back to 'Long-Standing Precedent'

In *McLaren Macomb*, the severance agreement prohibited employees from making statements that could disparage or harm the employer, its parent and affiliated entities, and their officers, directors, employees, agents, and representatives. The agreement further prohibited employees from disclosing the terms of the agreement to any third person. Former employees who breached the non-disparagement and confidentiality terms would be subject to penalties.

The NLRB held that these non-disparagement and confidentiality provisions were unlawful, reasoning that such broad terms would deter employees from filing unfair labor practices, assisting in NLRB investigations, and providing information to the NLRB concerning unlawful interference with other employees. The NLRB further emphasized that prohibiting employees from discussing severance terms may impair the employee's former coworkers from seeking support should they also find themselves considering a severance package.

The NLRB expressly overruled the 2020 *Baylor* and *IGT* decisions, and reverted to earlier precedent that prohibits employers from using provisions in severance agreements that have a "reasonable tendency to interfere with, restrain, or coerce the employee's rights under Section 7 of the NLRA." Significantly, the NLRB held that the mere "proffering" of a severance agreement with confidentiality and non-disparagement provisions that restrict employees' rights under the NLRA itself constitutes an unfair labor practice.

What Happens Next?

The full impact of this decision has yet to be seen, and it's possible that the employer may appeal. Employers should review their severance agreement language for employees with Section 7 rights in light of the NLRB's stance that overly restrictive confidentiality and non-disparagement provisions are unlawful, and evaluate whether it is possible to amend those provisions to mitigate risk in light of *McLaren Macomb*. Contact your Vorys attorney with questions about the impact of *McLaren Macomb* and practical suggestions for updating your severance agreements.