Private Employers Take Note: Overbroad Non-Disparagement & Confidentiality Restrictions in Severance Agreements Run Afoul of the National Labor Relations Act

March 30, 2023 | Brian M. Casaceli | Articles

As many employers well know, it is customary to include non-disparagement and confidentiality provisions in severance agreements that prohibit departing employees from (i) making disparaging, critical, or otherwise detrimental comments concerning the employer and (ii) disclosing information concerning the substance, terms, or existence of the severance agreement and/or the discussions or negotiations relating to the severance agreement.

A recent decision from the National Labor Relations Board ("Board"), however, makes clear that overly broad non-disparagement and confidentiality provisions run afoul of private sector employees' rights under the National Labor Relations Act ("NLRA"). In light of the Board's recent decision, private sector employers are well-advised to review their existing non-disparagement and confidentiality restrictions in their severance agreements to ensure compliance with the NLRA.

A Precedent-Altering Decision from the Board

In the case – *McLaren Macomb*, 372 NLRB No. 58 (2023) – the employer offered severance agreements to 11 permanently furloughed employees. In addition to releasing claims against the employer, the severance agreements contained broad non-disparagement and confidentiality provisions. The non-disparagement provision restricted employees from making statements to the employer's employees or to

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the general public "which could disparage or harm the image of the [e]mployer...." The confidentiality restriction prohibited employees from disclosing the terms of the severance agreement to any third party, other than the employee's spouse or professional advisor, or unless compelled to do so by law. In exchange for signing the severance agreement, employees were offered monetary consideration.

In its analysis, the Board considered whether these two provisions ran afoul of an employees' rights under Section 7 of the NLRA, which protects employees' rights to engage in "concerted activities for the purpose of... mutual aid or protection...," including the right to discuss the terms and conditions of employment. Section 7 of the NLRA also protects current and former employees' rights to "improve their lot as employees through channels outside the immediate employee-employer relationship" by communicating with third parties on a range of issues impacting the employment relationship. Against this backdrop, and analyzing the plain language of the non-disparagement and confidentiality provisions referenced above, the Board held that each provision had a reasonable tendency to interfere with, restrain, or coerce employees' Section 7 rights and, therefore, was unlawful.

The Board's General Counsel Issues Guidance on McLaren Macomb

After receiving many inquiries to her office, the Board's General Counsel recently issued a memorandum with guidance on the scope and effect of the *McLaren Macomb* decision, a copy of which can be found **here**. Although the memorandum does not carry the force of law, it does provide significant insight into how the Board might handle a case asserting Section 7 violations due to overbroad severance agreement provisions. Some of the more salient points from the General Counsel's memorandum are as follows:

- The decision does not outlaw severance agreements; rather, the decision restricts employers from utilizing overly broad provisions in severance agreements that have an adverse impact on employees' rights to engage in concerted activity protected by Section 7 of the NLRA.
- Even if an employee does not sign a severance agreement containing an overbroad restriction, an employer violates the NLRA merely by

proffering a severance agreement containing overbroad non-disparagement and/or confidentiality provisions.

- Except under limited circumstances, supervisory employees generally fall outside the scope of the Board's decision.
- If confronted with a severance agreement containing overbroad provisions, the Board is not likely to move to strike the entire severance agreement. Rather, the Board would likely seek to have the unlawful provisions severed.
- The decision has retroactive application and applies to overbroad provisions currently existing as part of severance agreements. Thus, if, for example, an employer entered into a severance agreement in June 2022, and tried to enforce an overbroad confidentiality clause in April 2023, such action would be unlawful.

What Should Employers Do Now?

In light of *McLaren Macomb*, employers should review their non-disparagement and confidentiality provisions in severance agreements to ensure compliance with the Board's decision. In addition, for situations in which an employer suspects a former employee of violating a non-disparagement or confidentiality provision in a severance agreement that pre-dates *McLaren Macomb*, we recommend that the employer seek advice of legal counsel prior to initiating any action to enforce the non-disparagement and/or confidentiality provisions.

Should you have any questions concerning the *McLaren Macomb* decision or would like assistance reviewing and/or revising your current severance agreement model, please contact any member of the Labor & Employment Group.

