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EMPLOYER LAW BLOG

NLRB: Common Confidentiality and Non-Disparagement Terms Likely Violate the Law

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In late February, the National Labor Relations Board (NLRB) issued a groundbreaking decision in a case titled *McLaren Macomb* that calls into question the use of confidentiality and non-disparagement terms in, among other things, severance agreements and employment handbooks.

The NLRB concluded such terms are often overly broad and likely infringe upon and violate employee rights under the National Labor Relations Act (NLRA). This is a complete 180 from a pair of NLRB decisions in 2020, which affirmed the use of such terms as reasonable in the context of employee severance agreements.

The decision in *McLaren Macomb* is nonetheless nuanced in what it prohibits or finds likely to be unlawful. The NLRB started with the non-disparagement provision. Emphasizing that "[p]ublic statements by employees about the workplace are central to the exercise of employee rights under the Act," the NLRB took issue with the provision's broad prohibition on the employee from making any statements to other employees or the public which could disparage or harm the image of the employer. In its view, this broad prohibition went significantly beyond NLRB precedent, which only allows restrictions on employee speech that is so "disloyal, reckless or maliciously untrue as to lose the [NLRA's] protection."

The NLRB then turned to the confidentiality provision. This provision was fairly standard in terms of what is typically included in severance agreements. Yet, in analyzing the confidentiality provision, the NLRB took issue with the fact it would, among other things, "prohibit the subject employee from discussing the terms of the severance agreement with his former coworkers who could find themselves in a similar predicament facing the decision whether to accept a severance agreement." It reasoned: "[a] severance agreement is unlawful if it precludes an employee from assisting coworkers with workplace issues concerning their employer, and from communicating with others, including a union, and the Board, about his employment."

This sweeping reasoning by the NLRB will undoubtedly call into question some—if not many— confidentiality and non-disparagement provisions out there. It may also discourage employers from offering any severance to employees if they cannot lawfully secure a meaningful agreement on confidentiality and non-disparagement in exchange.

A few final words of caution: first, the NLRB made clear that the *mere offer* of a severance agreement with overly broad confidentiality and non-disparagement terms will violate the NLRA; the employee's acceptance of the same is immaterial to the finding of a violation.

Second, this decision applies to almost all private employers—whether they have unionized workforces or not; however, it likely will not impact certain employees, such as executives or supervisors, who do not qualify as "employees" under the NLRA. So employers will want to keep in mind the position and duties of the employee before extending any offer of a severance agreement with confidentiality or non-disparagement terms.

Time will tell whether an appeal of this decision follows and whether it succeeds. Continue to check back here for additional updates and information.