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Employers Beware – Your Confidentiality Provisions May Come Back to Bite You

BY BENJAMIN J. HINKS AND TIMOTHY P. VAN DYCK • FEBRUARY 23, 2023

For many employers, it is standard protocol to include non-disparagement clauses and confidentiality provisions in employee severance agreements. However, all employers should note that the National Labor Relations Board (the "Board") has recently issued a decision that dials back the Trump era Board rulings that allowed employers to utilize such provisions.

On February 21, 2023, the Board issued a decision in *McLaren Macomb*, 372 NLRB No. 58 (2023) in which it found that an employer violated Section 8(a)(1) of the National Labor Relations Act (the "Act") simply by offering severance agreements to furloughed hospital employees that prohibited them from making statements that could disparage the employer and from disclosing the terms of the agreement itself. That is, the employer conditioned receipt of severance benefits on the acceptance of such terms.

The Board found that the severance agreements were unlawful because they would require employees to broadly waive their rights under the Act. Specifically, it found that the non-disparagement and confidentiality provisions unlawfully interfered with, restrained, and coerced employees in the exercise of their Section 7 rights under the Act, which include the rights to self-organize, bargain collectively, and engage in other concerted activities. Moreover, the Board noted that "[p]ublic statements by employees about the workplace are central to the exercise of employee rights under the Act."

As noted above, the *McLaren Macomb* decision reverses the previous Board's decisions in *Baylor University Medical Center* and *IGT d/b/a International Game Technology,* issued in 2020*,* which found that offering severance agreements to employees with similar non-disparagement and confidentiality provisions was not unlawful, by itself. Moreover, the Board's ruling covers virtually all U.S. employers in unionized and non-unionized workplaces alike. That said, the new standard applies only to agreements presented to non-supervisory employees. As defined by Section 2(11) of the Act, a "supervisor" is an employee who exercises independent judgment and has authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline or to responsibly direct the work of other employees.

On a going forward basis, it will be curious to see what kind of an impact this new ruling will have on severance benefits that employers provide to departing employees; more to the point, one potential (and likely unintended consequence) may be whether this ruling could lead to employers taking a more uniform (and perhaps less generous) approach to severance. It is also unclear from this ruling what, if any, impact it will have on an employer's ability to resolve potentially sensitive employment disputes with their employees and condition such resolution on confidentiality and non disparagement. At least for now, those employers who do not yet have in place clear severance policies should consider implementing them. And for those employers who already have severance policies in place, they should ensure that such policies are adhered to uniformly, absent extenuating circumstances.

Bowditch's Employment & Labor practice group will closely monitor this issue and will provide updates as any new developments unfold.