It's Time to Revise Confidentiality and Non-Disparagement Provisions

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The National Labor Relations Board ("NLRB") recently restricted employers' ability to use broad confidentiality and non-disparagement language in severance and other agreements.

Background and Findings

In its February 21, 2023, *McLaren* decision, the NLRB held that an employer violates the National Labor Relations Act ("NLRA") when it offers an employee a severance agreement that has a "reasonable tendency" to interfere with, restrain or coerce employees in the exercise in their NLRA rights. NLRA rights include an employee being able to discuss the terms and conditions of employment or report potential violations of the NLRA to the NLRB. Although many employers assume that the NLRA only applies to unionized workforces, the statute actually provides these rights to non-management personnel at non-unionized workplaces as well.

The *McLaren* severance agreement contained two problematic provisions. First, the confidentiality provision prohibited the employees from disclosing the existence and terms of the agreement "to *any* third party." The NLRB found that this provision would reasonably tend to coerce the employees from discussing the agreement with their union representatives, filing an unfair labor practice, or assisting the NLRB with an investigation. It would also impair other employees' rights to call upon the employees for support in deciding whether to sign a similar agreement. And second, the non-disparagement provision prohibited the employees from making negative comments to their coworkers, the general public, and potentially the NLRB. The NLRB found that this clause would chill the employees' NLRA rights to file NLRB charges or assist the NLRB in an investigation. Consequently, the NRLB found both provisions unlawful. Notably, the NLRB considered the mere act of *offering* the unlawful provisions to the employees to be an independent violation of the NLRA (even if the employees had not accepted the agreements, or if the employer did not intend on enforcing the unlawful provisions).

Takeaways for Employers

Given the *McLaren* decision, it is a good time for employers to take stock by doing the following.

Review form agreements.

Employers should take this opportunity to review their severance agreements as well as other agreements that contain confidentiality and non-disparagement provisions. Employers should ask whether confidentiality and non-disparagement provisions are necessary and, if they are, whether they are narrowly tailored.

Include a disclaimer.

The NLRB hinted that a disclaimer in the severance agreement, stating that nothing in the agreement restricts employees' rights under the NLRA, might have saved the provisions at issue in *McLaren*. Employers should consider inserting such disclaimers with or near any confidentiality and non-disparagement provisions.

Include a severability provision.

While it is unlikely that the *McLaren* decision invalidated the severance agreements in their entirety, the decision highlights the importance of including a "severability" provision providing that, in the event that any provision is found to be invalid, the remainder of the agreement is still enforceable.

Continue to monitor.

As administrations change, so does the composition of the NLRB. This case is just one example of the NLRB's reversal to a pre-Trump era rule. And, this case is subject to appeal and could be reversed or modified later. So, employers should continue to monitor this decision.

Retroactive?

Finally, it is unclear whether the *McLaren* decision applies retroactively. Fortunately for employers, the NLRA has a six-month statute of limitations (i.e., deadline to file charges) and, so, any non-compliant agreements will become a non-issue soon.

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