NLRB holds that Severance Agreements with Confidentiality and Non-Disparagement Provisions Violate Section 7 of the NLRA

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On February 21, 2023, the National Labor Relations Board issued a pivotal decision drastically affecting the use of severance agreements in both union and non-union workplaces.

Bottom line: The NLRB's ruling in *McLaren Macomb* found that confidentiality and non-disparagement provisions in severance agreements violate the National Labor Relations Act by restricting employees' rights to discuss the terms of their agreements and the conditions of their former employers' workplaces.

The NLRB's ruling calls into question the use of severance agreements containing confidentiality and non-disparagement provisions and the enforceability of all existing severance agreements that contain such clauses.

WHAT HAPPENED?

As the COVID-19 pandemic spread across the country, government regulations required Michigan hospital McLaren Macomb to stop

performing elective and outpatient procedures and to prohibit nonessential employees from working inside the hospital. Due to these regulations, McLaren Macomb was forced to temporarily (and later permanently) furlough 11 members of its unionized staff. The hospital presented each of the furloughed employees with a severance agreement containing the typical release of claims language, along with standard confidentiality and non-disparagement provisions.

When the permissibility of such provisions was submitted to the NLRB, the hospital argued that the confidentiality and non-disparagement clauses complied with the standard set by Trump-era NLRB rulings. The NLRB opinion did not disagree with the hospital's analysis—instead, it simply overruled the relevant prior rulings, holding that confidentiality and non-disparagement provisions violate workers' rights under Section 7 of the NLRA by impermissibly "chilling" employees' rights to collectively join together to discuss and improve their working conditions.

By expressly overruling recent, more employer-friendly rulings in a 3-1 decision, the NLRB returned to its prior Obama-era position that severance agreements offered to covered workers violate the NLRA if the provisions interfere with workers' rights to organize, discuss, and share information regarding workplace conditions.

WHAT EMPLOYERS CAN EXPECT POST-*MCLAREN MACOMB*:

The *McLaren Macomb* decision immediately calls into question employers' use of confidentiality and non-disparagement clauses in severance agreements and the enforceability of severance agreements entered into prior to yesterday's ruling.

In striking down the clauses in the *McLaren Macomb* case, the NLRB took issue with the hospital's failure to limit the overly broad wording of the non-disparagement and confidentiality provisions. It noted that the provisions were

not sufficiently limited as to time or place and did not narrow the prohibited communications or "disparagement" to avoid violating a workers' Section 7 rights to communicate freely with a wide range of third parties, including government officials, regarding the terms and conditions of employment. Thus, it seems the NLRB has opened the door to allow for lawful confidentiality and non-disparagement provisions in limited circumstances.

As for existing agreements, the Board's rules require employees to bring charges of unlawful labor practices within six months of the violation, which would suggest that any potentially-impermissible severance agreements signed more than six months ago are not subject to challenge, as long as an employer does not take any affirmative action to enforce an impermissible provision. If an employee files an NLRB claim regarding a severance agreement offered prior to the *McLaren Macomb* ruling, an employer could argue against retroactive enforcement of the new standard because the NLRB permitted such provisions at the time the agreement was provided to the employee.

WHAT EMPLOYERS CAN DO RIGHT NOW:

We expect the NLRB to issue General Counsel advisory memos in the next few months to provide guidance in crafting lawful confidentiality and non-disparagement provisions in employee severance agreements.

If an employer's business needs require confidentiality and non-disparagement provisions in its severance agreements, such provisions should be narrowly tailored, especially regarding employee's continued right to freely participate in the exercise of Section 7 rights. For instance, a narrowly drafted non-disparagement clause that is limited to an employee not disparaging a company's products or services could potentially withstand the NLRB's scrutiny. Further, the severance agreement should expressly permit the employee

freedom to file and support the filing of unauthorized labor practices charges with the NLRB, as well as clearly stating that the separation agreement does not prevent the employee from bringing a regulatory or governmental agency charge, or from participating or cooperating in a regulatory or governmental investigation, or otherwise assisting the government in workplace investigations.

Even post-*McLaren Macomb,* it is possible that narrowly-tailored confidentiality and non-disclosure provisions could survive an NLRB challenge. However, the remaining provisions may be significantly less valuable to an employer, requiring careful re-consideration of the monetary value of any offered severance agreement.

We closely monitor labor and employment agency decisions that affect our clients' operations and will continue to provide updates and insights in the coming months. If you have questions about the issues raised in this article, please contact one of our labor and employment attorneys listed on Phillips Murrah's Labor and Employment Practice Group.

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Lauren Barghols Hanna's state and federal litigation practice is focused on labor and employment law. As a part of her employment practice, Lauren counsels and represents management in all phases of the employment relationship, including litigation matters involving discrimination, retaliation, harassment and wrongful discharge claims, whistleblower claims, claims related to employment agreements and theft of trade secrets, workplace investigations, wage and hour (FLSA) claims, and other disputes arising from the workplace. She also works with employers in crafting appropriate employment policies and

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