

NLRB RESUMES ATTACK ON CONFIDENTIALITY AND NONDISPARAGEMENT PROVISIONS

February 22, 2023

This week, the National Labor Relations Board overturned Trump-era precedent and returned to its previous hostility to confidentiality and nondisparagement provisions in agreements with employees. In *McLaren Macomb*, 372 NLRB No. 58 (Feb. 21, 2023), the Board found that two such provisions in a proposed severance agreement violated the National Labor Relations Act.

CONFIDENTIALITY

The confidentiality provision stated: *"The Employee acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction."*

The Board found the provision unlawful because it "would reasonably tend to coerce the employee from filing an unfair labor practice charge or assisting a Board investigation into the Respondent's use of the severance agreement, including the nondisparagement provision" and "bars the subject employee from providing information to the Board concerning the Respondent's unlawful interference with other employees' statutory rights." The Board also found the provision unlawful because it would prohibit employees from discussing the severance agreement with each other or with a labor union. According to the Board: "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."

NONDISPARAGEMENT

The nondisparagement provision stated: *"At all times hereafter, the Employee agrees not to make statements to Employer's employees or to the general public which could disparage or harm the image of Employer, its parent and affiliated entities and their officers, directors, employees, agents and representatives."*

The Board found this provision unlawful "on its face" because it would discourage employees from making public statements about the workplace to co-workers, labor unions, or the general public.

According to the Board:

Public statements by employees about the workplace are central to the exercise of employee rights under the Act. Yet the broad provision at issue here prohibits the employee from making any 'statements to [the] Employer's employees or to the general public which could disparage or harm the image of [the] Employer'—including, it would seem, any statement asserting that the Respondent had violated the Act (as by, for example, proffering a settlement agreement with unlawful provisions).

The Board also noted that the nondisparagement provision would “chill” employees from cooperating in a Board investigation or litigation for fear of losing their severance benefits. In short, found the Board, the provision would discourage employees from making any effort “to raise or assist complaints about the Respondent with their former coworkers, the Union, the Board, any other government agency, the media, or almost anyone else.”

CONCLUSION

Provisions like these are common in separation and release agreements, and are also found in many employment agreements. Therefore, employers should examine their agreements with employees and consult with experienced with labor counsel regarding any necessary revisions in light of the Board's renewed offensive against confidentiality and nondisparagement provisions.

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