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Employee Benefit Plan Review

National Labor Relations Board: Severance Pay Cannot Include Condition to Waive Rights Under National Labor Relations Act

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The decision of the National Labor Relations Board (the Board) in *McLaren Macomb*[1] reinstates a limit on the confidentiality, non-disclosure, and non-disparagement clauses that employers may include in severance agreements with most of their lower-level employees.[2] While the Board bills its decision as a return to the standard applied in earlier cases, this decision suggests that the Board will take a broader view of how such agreements infringe on employees' rights under Section 7 of the National Labor Relations Act (the Act).

Employers should review the language of their separation and severance agreements to ensure such agreements are not likely to be construed to limit or prohibit former employees from providing statements or evidence in an unfair labor practice investigation or other proceedings.

In addition, employers also need to ensure that the proscriptive language does not limit employees from exercising what the Board now considers other rights protected under Section 7 of the Act even if there is no indication that the former employee, current employees, or their union (if they are represented) are planning to file a complaint with the Board. Because of the six-month limitation on filing an unfair labor practice charge, this decision should not impact severance agreements that were executed prior to August 21, 2022 – but it is unclear whether the decision will be applied retroactively or whether the Board will view an employer's enforcement of a prior agreement as a new or continuing violation.

Prior Case Law

The Board's recent decision comes after a pair of decisions in 2020 limited the instances where the Board would find that confidentiality, non-disparagement or similar clauses in severance agreements violated the Act. Prior to those 2020 decisions, the Board had found unlawfulness under the Act in language found in a number of broad clauses that limited a former employee's ability to disclose information about their former employer.

For example, in Metro Networks, Inc.,[3] the Board held that the terms of severance agreements the employer offered (but were not accepted by) two terminated employees violated Section 8(a)(1) of the Act. The agreements required the employees to release the employer from all suits, causes of actions and the like that arose or may arise in the future regarding their

employment and their terminations, and the language referenced claims arising under the Act. The agreement form also contained a provision that prohibited the former employee from assisting others in their suits or charges against the employer except where required by law.

Finally, the agreement also contained nondisclosure provisions, which restricted the employee from disclosing information about their former employment and about the existence and content of the severance agreement except to immediate family, attorneys, accountants, or tax advisors.

The Board held in *Metro Networks* that these severance agreement provisions violated the Act because they prevented or created the perception that these individuals could not participate in the Board's investigation and prosecution of unfair labor practice charges. Further, because the Board relies on the voluntary participation of affiants and witness in its investigations of unfair labor practice allegation the language except where required by law did not save the agreement from being unlawful. Thus, because the agreement had the effect of restraining individuals from participating not just in filing their own charges but from participating at all in proceeding around charges filed by a union or other employees, the agreements were unlawful under the Act.

In other decisions that followed *Metro Networks*, the Board found that severance agreements violated Section 8(a)(1) because they conditioned acceptance of the severance package on the employees' agreement not to voluntarily: appear as a witness, provide documentary evidence, or otherwise assist in claims against the employer.

Then in 2020 the Board changed the standard for assessing when terms of a severance agreement violate the Act, holding that whether the agreement was unlawful depends on the circumstances surrounding the offer. In *Baylor University Medical Center*,[4] the Board held that an employer did not violate the Act when it asked but did not require employees to sign a severance agreement that included non-participation and confidentiality clauses because signing was voluntary, only occurred in the event of separation, and only pertained to post-employment activity.

Similarly, in *International Game Technology (IGT)*,[5] the Board again found that the employer's offer of a severance agreement that included a non-disparagement clause was not coercive or unlawful when it was included in a voluntary severance package presented to lawfully terminated employees. In both cases there was no other ongoing labor dispute that related to the reason the employees left their positions.

Impact of the *McLaren Macomb* Decision

In *McLaren Macomb*, the Board expressly overruled *Baylor* and *IGT* and announced it would return to analyzing such severance agreements and their provisions under the framework laid out in prior cases. The Board also specifically stated that the conduct of the employer was irrelevant to assessing the lawfulness of a severance agreement. Rather, the plain language of the severance agreement alone can be a violation. The clauses at issue in this case included a requirement of confidentiality as to the terms of the severance agreement, with limited exception to obtain legal counsel or tax advice, or where legally compelled by a court or agency. The agreement also contained a non-disclosure of information obtained during the course of employment and non-disparagement clauses.

The Board found that the broad language had the effect of chilling participation in Board proceedings, particularly because the Board proceedings rely on voluntary, not legally compelled, participation and thus, even this exception in the agreement was not sufficient to render it legal. Further, the Board held that the non-disparagement clause, which covered statements not just about the employer, but also its parent and affiliated entities, employees, agents and representatives was sufficiently over-broad that it could be construed to limit full and free participation in Board proceedings.

But the Board then went further, finding that the confidentiality provisions, in addition to interfering with participation in the Board's unfair labor practice investigations and prosecutions would also prevent former employees from discussing the terms of their severance agreement with other employees. The Board held that the confidentiality clause violated that Act because "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 [their] employment."

This shift away from analyzing the impact of these clauses solely based on how the language impacts former employees' ability to participate in the Board's unfair labor practice investigations and prosecution is a substantial shift in Board case law.

Based on the broad language in this decision, employers should review the language they use in severance and separation agreements and discuss with legal counsel whether that language should be modified.

Employers should also strategically consider with legal counsel whether they will seek to enforce non-disparagement and confidentiality language in pre-existing agreements in light of this decision.

Notes

1. McLaren Macomb, 372 NLRB No. 58 (Feb. 21, 2023).
2. The law only applies to employees that are covered by the National Labor Relations

Act. Supervisors, management and executive personnel are excluded from such coverage and employers need not change severance agreements for this group of employees.

3. Metro Networks, Inc., 336 NLRB 63 (2001).
4. Baylor University Medical Center, 369 NLRB No. 43 (2020).
5. International Game Technology, 370 NLRB No. 50 (2020).

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