



National Labor Relations Board Rules That Non-Disparagement and Confidentiality Provisions in Severance Agreements Violate Federal Law

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On February 21, the National Labor Relations Board (NLRB) ruled that employers violate federal labor law if they include non-disparagement and confidentiality provisions in employee severance agreements – expressly overruling two 2020 decisions by the Board to the contrary.

The Board's Ruling

The case before the Board involved a Michigan hospital's offer of severance pay to 11 union employees who were deemed non-essential employees and furloughed following the onset of the COVID-19 pandemic. (*McLaren Macomb*, 372 NLRB No. 58 (Feb. 21, 2023)). As a condition of receiving their severance pay, the employees were required to sign severance agreements releasing the hospital of all claims arising from their employment but also agreeing not to: (1) disclose the terms of the severance agreement; or (2) make statements to other employees or the general public which could "disparage or harm the image" of the hospital.

The NLRB's new Democratic majority ruled that both the non-disparagement and confidentiality provisions had a "reasonable tendency to interfere with, restrain, or coerce the exercise of employee rights under Section 7 of the Act" and were, therefore, unlawful. Section 7 of the National Labor Relations Act broadly applies to all employees – not just union employees – and protects employees' rights to organize, bargain collectively, and engage in other "concerted activity," which itself is interpreted broadly to cover activity involving two or more employees regarding the terms and conditions of employment, including expressing and publicizing concerns and complaints regarding their employers. In addition to deeming those provisions of the severance agreement unlawful, the Board ruled that merely offering severance agreements containing such provisions constitutes a violation of the Act.

Overturning Recent Precedent

In ruling that the inclusion of non-disparagement and confidentiality provisions in severance agreements violates the Act, the Board expressly overturned two of its own 2020 decisions to the contrary. In *Baylor University Medical Center* and *IGT d/b/a International Game Technology*, the Board ruled that similar confidentiality and non-disparagement provisions

were lawful since they are not mandatory and pertain only to post-employment activities and, therefore, do not affect an employee's terms and conditions of employment. Therefore, absent the severance agreements containing such provisions being offered under unlawful coercive circumstances, the provisions alone do not violate the Act.

The current Board criticized and rejected those prior decisions in *Baylor* and *IGT* as "flawed in multiple respects" and not in line with "longstanding precedent" and the "prior, well-established principle" that severance agreements are unlawful if they "have a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights." In reaching its decision, the Board pointed to the broad nature of the hospital's non-disparagement provision, which it determined could reasonably chill an employee's statements regarding the employer's violations of the Act, participation, and cooperation in Board investigations or litigation involving violations of the Act, and an employee's right to assist with complaints by their former co-workers – all of which is protected under Section 7. Similarly, the Board determined that the confidentiality provision's restriction on the disclosure of the terms of the severance agreement itself would reasonably interfere with those employees' rights to file charges for violations of the Act or assist in Board investigations into such violations related to the legality of those agreements. Therefore, the Board ruled that the mere proffering of severance agreements containing these terms has a reasonable tendency to restrain, coerce, or interfere with employees' Section 7 rights and constitutes a violation of the Act.

What Does This Mean for Employers?

Employers should revisit their severance agreements to determine whether they contain non-disparagement and confidentiality provisions that are now deemed unlawful. Under the Board's analysis, it remains possible that carefully crafted, narrow provisions that focus on activity unconnected with an employee's Section 7 rights still may be lawful and enforceable. However, following the NLRB's decision in *McLaren Macomb*, employers should exercise caution and seek legal advice when crafting those provisions and assessing the risks of including them in future severance agreements.

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