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NLRB Finds Employer's Use of Confidentiality and Non-Disparagement Provisions in Separation Agreements Violated Federal Law

February 24, 2023

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The National Labor Relations Board (the Board) which enforces the National Labor Relations Act (the Act) ruled this week that confidentiality of the agreement and non-disparagement provisions in the separation agreements for 11 terminated employees of a Michigan hospital impermissibly infringed on the employees' rights under the Act.

The Board decision in *McLaren Macomb and Local 40 RN Staff Council, Office and Professional Employees, International Union (OPEIU), AFL–CIO*. Case 07–CA– 263041 represents a major development for private sector employers across the country - particularly because the confidentiality and non-disparagement covenants at issue are similar to what many companies include in their release agreements with departing employees.

In its opinion, the Board, now controlled by Biden Administration appointees, reversed two Trump-era Board decisions that essentially permitted the use of confidentiality and non-disparagement provisions in release agreements.

In its new opinion, the Board majority strongly criticized those prior Board decisions asserting that they were contrary to long-standing agency authority because merely "proffering" - in other words just presenting - a separation agreement to employees with a provision that violated the employee's rights under Section 7 of the Act was unlawful.[1] Section 7 of the Act guarantees nonsupervisory employees, among other rights, the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(a)(1) of the Act makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the Act.

The Board has long held that employer work rules or other written mandates that "chill" employees' exercise of their Section 7 rights may be unlawful. As the Board explained in its new decision, the prior Trump-era decisions viewed separation agreements as fundamentally different than work rules because release agreements were not "mandatory, pertained exclusively to post-employment activities and, therefore, had no impact on terms and conditions of employment." Those prior Board decisions also emphasized that there was "no

allegation that anyone offered the agreement had been unlawfully discharged or that the agreement was proffered under circumstances that would tend to infringe on Section 7 rights." However, the Board majority in *McLaren Macomb* declared that the absence of those aggravating circumstances did not matter in finding the separation agreement provisions unlawful because, in the view of the current Board, an employer violates the law by merely offering a separation agreement to an employee with provisions that result in a waiver of Section 7 rights.

In its opinion, the Board addressed why both the confidentiality of agreement and non-disparagement provisions in the McLaren Macomb agreement resulted in a waiver of Section 7 rights. With respect to the confidentiality provision, the Board explained that it "is axiomatic that discussing terms and conditions of employment with coworkers lies at the heart of protected Section 7 activity." Moreover, the Board emphasized that this right to communication is not limited to coworkers and that former employees continue to possess Section 7 rights.

As part of its explanation for why the non-disparagement provision infringed upon Section 7 rights, the Board observed "[p]ublic statements by employees about the workplace are central to the exercise of employee rights under the Act."

Notably, the terminated employees in *McLaren Macomb* were represented by a union and the Board found the employer violated the employees' union rights - such as by failing to notify the union in advance of the terminations and the proposed separation agreements. However, it is important to recognize that Section 7 rights apply to employees in both nonunion and union work settings and, therefore, the Board's conclusions concerning unlawful provisions in the separation agreement are a concern for all private-sector employers.

Unfortunately, the Board chose not to address whether a confidentiality or non-disparagement provision would be lawful if the employer included a disclaimer in the separation agreement explaining that the provisions do not impair employees' Section 7 rights. It appears conceivable that an appropriate disclaimer might prevent a finding that confidentiality or non-disparagement provisions violate the Act. Likewise, confidentiality or non-disparagement provisions that are more limited in scope and time may also be viewed as not violating the Act. However, because the Board did not address the issue of a potential disclaimer and did not indicate that more narrowly tailored provisions would be acceptable, these questions remain unanswered.

Nevertheless, employers who were unwilling to forgo confidentiality, non-disparagement and similar covenants in their separation agreements may want to consider a clearly worded disclaimer or more limited provisions - while at the same time recognizing there is currently no guarantee that such measures will be effective. In the meantime, risk adverse employers may choose to eliminate these covenants from their separation agreements with nonsupervisory employees. Businesses will need to weigh the risks involved in deciding the best approach for their organization.

In deciding next steps, businesses should remember Section 7 rights generally do not apply to management-level employees or other individuals who constitute "supervisors" under the Act.

Therefore, some employers may want to have different separation agreements for supervisory and non-supervisory employees. Businesses, in making these distinctions, however, need to bear in mind that the Board takes a strict view as to who qualifies as a "supervisor" and, for example, important sounding job titles alone will not make someone a "supervisor."

Finally, employers need to understand that the *McLaren Macomb* decision is almost certainly a harbinger of similar future developments from the Board. In other words, businesses should expect this Board to adopt more restrictive views of permissible employer practices and documents - including work rules.

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1. A remaining Trump appointee to the Board, who participated in those prior holdings, dissented from the majority decision in *McLaren Macomb*.