Insights

Hush Money? Standard Severance Agreement Provisions May Violate Employees' NLRA Rights

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Overview

On February 21, 2023, the National Labor Relations Board (the "NLRB") issued a **decision in *McLaren Macomb*** which reversed its own precedent with respect to non-disparagement and confidentiality provisions in severance agreements. The NLRB's recent decision reinstates prior precedent which bars broadly constructed non-disparagement and confidentiality (of the terms and conditions of the agreement) provisions in severance agreements that require employees to waive protected rights under Section 7 of the **National Labor Relations Act** (the "NLRA").

Section 7 of the NLRA guarantees covered employees the right to organize, bargain collectively, and engage in protected, concerted activities, including discussing wages and terms and conditions of employment. Further, Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer to interfere with, restrain, or chill the exercise of covered employees' protected rights.

McLaren Macomb

In *McLaren Macomb*, a Michigan hospital permanently furloughed 11 union employees during the COVID-19 pandemic and offered a severance payment to the employees in exchange for signing a severance agreement. The severance agreement contained standard non-disparagement and confidentiality provisions. In addition to other findings, the NLRB declared the provisions unlawful, holding that a severance agreement violates the NLRA if the terms of the agreement tend to interfere with the free exercise of employee rights under the NLRA. Further, the NLRB held that simply offering employees a severance agreement containing such provisions violates the NLRA, as the offer itself is an attempt to deter employees from exercising their rights under Section 7.

The decision includes the confidentiality and non-disparagement provisions the NLRB found violative:

> Confidentiality Agreement. 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.**

> Non-Disclosure. At all times hereafter, the Employee promises and agrees not to disclose information, knowledge or materials of a confidential, privileged, or proprietary nature of which the Employee has or had knowledge of, or involvement with, by reason of the Employee's employment. **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 agreements at issue did not contain a disclaimer stating the employer had no intent to interfere with employees' NLRA rights. In theory, the NLRB may have ruled differently if the severance agreement contained a clear disclaimer that nothing in the agreement was intended to restrict or chill employees' rights as protected by the NLRA.

The NLRB decision orders the employer to cease and desist from violative actions and take 11 affirmative actions, including reinstatement of all furloughed employees. As of this writing, a window remains for the employer to seek federal appellate review of the decision.

Takeaways for Employers

- Employers should confirm which members of their workforce are covered by Section 7 of the NLRA. Most private sector employees, except for agricultural laborers and most supervisors,[1] are protected by the NLRA. Government employees and independent contractors are not. Both unionized and non-unionized employees are covered.
- The NLRB decision serves as a reminder that employers cannot interfere with covered employees' rights under the NLRA, such as rights to discuss wages, hours, and terms and conditions of employment. While the decision holds that overly broad non-disparagement and confidentiality clauses violate the NLRA, it is less clear as to how the decision applies to existing severance agreements or other waiver and release documents more broadly.
- Employers should review and consider revising severance agreement templates containing provisions affected by this decision and should be mindful of the decision when drafting, offering, and entering into new severance agreements. Employers may consider adding disclaimer language preserving employees' Section 7 rights when including non-disparagement and confidentiality provisions.
- Employers should also look to further guidance from the NLRB and legal counsel for answers on how this decision relates to existing severance agreements and how the decision impacts the way in which such agreements should be drafted moving forward.

Our attorneys will continue to monitor guidance from the NLRB related to this decision, severance agreements, and employee rights under the NLRA. If you have questions about this decision or how it may impact your organization moving forward, please contact **Virginia A. Talley**, **Shelley M. Jackson**, or another member of our **Labor and Employment Law Practice**.

[1] A supervisor is “any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” 29 U.S.C. § 152 (11).