NLRB Prohibits the Use of Confidentiality and Non-disparagement Provisions in Severance Agreements

On February 21, 2023, the National Labor Relations Board ("Board") ruled that an employer violated its employees' rights under federal law by offering severance agreements that included standard confidentiality and non-disparagement provisions.

By way of background, Section 7 of the National Labor Relations Act ("NLRA") protects the rights of non-management employees to engage in "concerted activity" for the purpose of mutual aid and protection. "Concerted activity" is a broad term and can encompass almost any conduct aimed at arguably improving the terms and conditions of employment. Concerted activity certainly applies to most forms of employee communications relating in any manner to working conditions. This is where a confidentiality or non-disparagement provision may be seen as problematic for employers, because Section 8 of the NLRA makes it illegal for an employer to interfere with or restrain the employee's right to engage in concerted activity. Importantly, the NLRA's Section 7 rights apply in both a union *and* non-union setting.

Against this backdrop comes the recent Board decision in *McLaren Macomb*. In *McLaren*, the respondent hospital decided to terminate 11 non-essential employees who had been on temporary furlough due to COVID-19 restrictions. All 11 employees were offered severance packages in exchange for signing a severance agreement. The severance agreements each included the following fairly standard confidentiality and non-disparagement provisions:

6. 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.*

7. 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.*

Although every employee signed the severance agreement, a complaint was lodged with the Board claiming various alleged violations of the NLRA. As part of its ruling, the Board found that the severance agreements, *inter alia*, violated the employee's Section 7 rights to engage in concerted activity under the NLRA. Prior to *McLaren*, the existing Board position on this issue was that confidentiality or non-disparagement provisions in severance agreements were problematic only if accompanied by other illegal activity, such as being used to cover up the illegal firing of an employee. In pivoting from its existing position, the Board explained:

Section 7 rights are not limited to discussions with coworkers, as they do not depend on the existence of an employment relationship between the employee and the employer, and the Board has repeatedly affirmed that such rights extend to former employees. It is further long-established that Section 7 protections extend to employee efforts to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee employer relationship. Such non-disparagement and confidentiality provisions interfere with, restrain, or coerce employees' exercise of Section 7 rights.

The Board found the confidentiality provision violated Section 7 because it precluded employees from "disclosing even the existence of an unlawful provision contained in the agreement" and prohibited the

employee “from discussing the terms of the severance agreement with his former coworkers who could find themselves in a similar predicament facing the decision whether to accept a severance agreement.” In addressing the rights of employees to make disparaging statements about their employer, the Board stated:

Public statements by employees about the workplace are central to the exercise of employee rights … the broad provision at issue here prohibits the employee from making any ‘statements … which could disparage or harm the image of [the] Employer… the ban expansively applies to statements not only toward the Respondent but also to ‘its parents and affiliated entities’ … has no temporal limitation but applies ‘[a]t all times hereafter.’ The end result is a sweepingly broad bar that has a clear chilling tendency on the exercise of Section 7 rights by the subject employee.

Going forward, employers in both union and non-union settings should be mindful of *McLaren* and consider possible strategies to mitigate the risks associated with inclusion of these standard provisions in future agreements. First, keep in mind that while Section 7 applies in the non-union setting, it does not apply to all employees. Second, having such a provision is risky even if you do not try to enforce it. Remember that in *McLaren*, it was held illegal to even offer the severance agreement containing the offending provisions. Third, consideration should be given to a disclaimer. Employers are familiar with disclaimers in employee handbooks such as “nothing in this policy is intended to interfere with, restrain, or prevent concerted activity as protected by the National Labor Relations Act” or disclaimers in covenants not to sue such as “nothing in this provision prohibits employee from communicating, cooperating or filing a charge with the EEOC”. *McLaren* did not address the issue head on, but certainly a well-drafted disclaimer might make the offending provisions less vulnerable to attack.

The Employment & Labor Practice Group at Partridge Snow & Hahn is fully updated on *McLaren* and related issues and available to answer your questions.

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