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NLRB Reverts to Prior Policy Restricting Employee Nondisparagement and Confidentiality Provisions

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On February 21, 2023, the National Labor Relations Board (NLRB) returned to long-standing precedent that an employer may not offer severance conditioned on an employee's agreement to broad nondisparagement and confidentiality provisions. Such an offer violates Section 7(a) of the National Labor Relations Act (NLRA), irrespective of whether the employee actually enters into the agreement.

The decision reflects a growing trend among federal and state authorities to curtail an employer's ability to enter into agreements with employees containing confidentiality and nondisparagement provisions. The NLRB frequently reverses law upon the change of presidential political parties, and this decision is in line with the **enumerated issues** on which the current NLRB general counsel is seeking to return to law made or reestablished under the Obama-era NLRB.

Section 7(a) of the NLRA

Under Section 7 of the NLRA, an employee has the right to self-organize, join or assist labor organizations and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. These "Section 7 rights" apply to union and nonunion employees alike, but certain workers – such as supervisory employees – are not covered by the NLRA and generally do not have Section 7 rights. Whether an employee is a supervisor for purposes of the NLRA is fact-dependent and based on the employee's authority to hire, fire, discipline or responsibly direct the work of other employees.

McLaren Macomb, 372 NLRB No. 58 (2023)

In *McLaren Macomb*, the NLRB analyzed whether a Michigan-based hospital impinged on Section 7 rights by offering a severance agreement to permanently furloughed union employees. The board took issue with the following provisions, which are often included in severance agreements:

- **Confidentiality** – "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."
- **Nondisclosure** – "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 agreement also provided for substantial monetary and injunctive sanctions against the employee in the event that the employee breached the nondisparagement or confidentiality provisions. Importantly, the severance agreement had no carve out for Section 7 protected activity.

Before analyzing the legality of the provisions, the board contrasted its historic approach to confidentiality and nondisparagement clauses with two 2020 Trump-era NLRB rulings. A hallmark distinction between NLRB views of the two political parties is whether the language of an agreement or policy alone is sufficient to justify a violation of law versus a factual situation that actually implicates the provision and results in a violation. The 2020 rulings held that, absent circumstances that could render proffers of severance agreements coercive, "the mere action of offering" agreements with confidentiality and nondisparagement provisions did not constitute a violation of the NLRA. Here, the board expressly overruled the circumstances-driven approach and held that the mere proffer of an agreement that "has a reasonable tendency to restrain, coerce or interfere with the exercise of Section 7 rights by employees" is unlawful, regardless of the surrounding circumstances.

Turning to the nondisparagement clause, the board noted that the provision:

- Appeared to prohibit an employee from making any statement asserting that the hospital had violated the NLRA.
- Was not limited to matters regarding past employment with the hospital.
- Provided no definition of "disparagement."
- Extended to statements relating to the hospital's parents and affiliated entities and their officers, directors, employees, agents and representatives.
- Lacked any time limitation.

As a result, the board found the nondisparagement provision imposed a "clear chilling tendency on the exercise of Section 7 rights," including to assist fellow employees and cooperate with the board's investigation and litigation of unfair labor practices.

The board then scrutinized the confidentiality provision, observing that the clause prohibited an employee from disclosing the terms of the agreement "to any third person." Such a provision would preclude an employee from disclosing the existence of an unlawful provision contained in an agreement and prohibit the employee from discussing the terms of the severance agreement with former coworkers, the union or the board.

After finding that the hospital violated the NLRA, the board ordered the hospital to cease and desist from presenting the nondisparagement and confidentiality provisions to the furloughed employees and to post a notice for 60 days stating that it would not violate the NLRA by doing so again.

Implications moving forward

Employers (with both unionized and nonunionized employees) should revisit any nondisparagement or confidentiality clauses included in form separation agreements presented to non-supervisory employees. Given the brief respite of the 2020 rulings, many employers likely already include carve outs for NLRA-protected activity in their separation agreements. With reasonable modifications to these carve outs, nondisparagement and confidentiality clauses could potentially coexist with an employee's Section 7 rights. Without such a carve out, an overbroad confidentiality or nondisparagement clause would likely render a severance agreement unlawful. Employers may also consider removing confidentiality and nondisparagement provisions altogether or applying them only to supervisory employees.

Contact your Cooley employment counsel to discuss which approach is right for you.

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