LABOR AND EMPLOYMENT LAW
INFORMATION MEMO
MARCH 7, 2023

The NLRB's Latest Decision Restricts the Use of Broad Confidentiality and Nondisparagement Clauses in Severance Agreements

On Feb. 21, 2023, the National Labor Relations Board (NLRB or Board) issued its decision in *McLaren Macomb*, 372 NLRB No. 58 (2023), where it held that severance agreements with broad confidentiality and/or nondisparagement provisions impermissibly chill and restrain employees' exercise of rights protected by Section 7 of the National Labor Relations Act (NLRA). The decision applies in both union and non-union workplaces. The decision is significant in that it overruled prior Board precedent and signals the Board's unwillingness to enforce or otherwise accept severance agreements, or key provisions of those agreements, that bind signatory employees' confidentiality and nondisparagement obligations that the Board considers to be too broad. The Board's decision would not apply to supervisors, managers, or individuals not otherwise subject to Section 7 of the NLRA.

The Board previously analyzed whether an employer violates Section 8(a)(1) of the NLRA when it offers union employees severance agreements. Prior to *McLaren Macomb*, the Board held in *Baylor University Medical Center*, 369 NLRB No. 43 (2020), and reiterated in *IGT d/b/a/ International Game Technology*, 370 NLRB No. 50 (2020), that an employer could lawfully include confidentiality and nondisparagement provisions in severance agreements.

In *Baylor*, the Board strayed from an independent examination of the language contained in the agreement and focused on the circumstances under which the agreement was presented to employees. In that case, the Board held that a proffer of a severance agreement containing confidentiality, non-assistance and nondisparagement provisions would not interfere with NLRA rights to the extent that signing the agreement is not mandatory, the restrictions applied to post-employment activities and the employee was lawfully separated from employment and otherwise did not allege an unfair labor practice. The Board took a similar approach in *IGT*, where it cited to *Baylor* and determined that a nondisparagement provision in a severance agreement was lawful where the agreement was "entirely voluntary, [did] not affect pay or benefits that were established as terms of employment, and [had] not been proffered coercively."

The Board's decision *in McLaren Macomb* expressly overruled *Baylor* and *IGT*. The Board forcefully announced its "return to the prior, well-established principle that a severance agreement is unlawful if its terms have a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, and that the employer's proffer of such agreements to employees is unlawful."

In *McLaren Macomb*, a unionized teaching hospital in Michigan permanently furloughed 11 union employees. It presented those employees with a severance agreement and general release that included relatively standard confidentiality and nondisparagement provisions. The Board, returning to its traditional approach of examining the language of the severance agreement, held that the confidentiality and nondisparagement provisions contained in the agreements violated Section 8(a)(1) of the NLRA.

The “Non-Disclosure” provision provided that the employee “promises and agrees not to disclose information, knowledge or materials of a confidential, privileged, or proprietary nature” known to the employee due to employment. It also included nondisparagement terms requiring that 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 representative.”

The “Confidentiality” provision provided that the employee “acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person,” except to a spouse, or as necessary to legal or tax advisors or pursuant to a legal administrative order. According to the Board, the agreement also provided the hospital with the right to pursue “substantial monetary and injunctive sanctions” should an employee violate the severance agreement.

With respect to the nondisparagement provision, the Board found that because “[p]ublic statements by employees about the workplace are central to the exercise of employee rights under the Act,” the nondisparagement provision violated employees’ Section 7 rights. The Board objected to how broad the hospital’s nondisparagement provision was because it was “not even limited to matters regarding past employment with the [Hospital],” and would ultimately “encompass employee conduct regarding any labor issue, dispute, or term and condition of employment of the Hospital.” The Board also took issue with the fact that the provision contained no temporal limitation and similarly applied to the hospital’s parents, affiliated entities and their officers, directors, employees, agents and representatives. The Board stated that the nondisparagement clause acted as a “sweepingly broad bar that has a clear chilling tendency on the exercise of Section 7 rights by the subject employee.” The Board went on to say that this chilling tendency would negatively impact future cooperation with Board investigation and litigation of unfair labor practices, and efforts by furloughed employees to raise or assist complaints about the Hospital with their former coworkers, the Union or the Board.

Similarly, the Board found the confidentiality provision to be overly broad because it prohibited employees from disclosing the terms of the agreement to “*any* third person.” The Board reasoned that such a broad provision would preclude employees from “disclosing even the existence of an unlawful provision contained in the agreement,” which “would reasonably tend to coerce the employee from filing an unfair labor practice charge or assisting a Board investigation into the Respondent’s use of the severance agreement.” Moreover, the Board held that the confidentiality provision would, in practice, prohibit employees from discussing the existence or terms of the severance agreement with others, including union representatives or former coworkers who are presented with similar agreements.

The Board found the nondisparagement and confidentiality provisions to be unlawful and ordered the Hospital to “cease and desist” from presenting employees with a severance agreement. The Board ultimately held that conditioning the benefits under a severance agreement on the forfeiture of statutory rights plainly has a reasonable tendency to interfere with, restrain, or coerce the exercise of those rights, unless it is narrowly tailored to respect the range of those rights.

Under the Board’s new rule, merely “proffering” a severance agreement containing unlawful confidentiality and nondisparagement provisions violates the NLRA because conditioning the receipt of benefits on the “forfeiture of statutory rights plainly has a reasonable tendency to interfere with, restrain, or coerce the exercise of those rights.” Based on this new standard, an employer’s argument

that it has done nothing to enforce confidentiality and/or nondisparagement clauses, despite including such provisions in a severance agreement, is likely not a viable defense. Accordingly, the proffer of an agreement with unlawful terms to an employee with Section 7 rights is enough to result in an unfair labor practice.

Neither the confidentiality nor the nondisparagement clauses at issue contained any language that was designed to preserve or protect employees' Section 7 rights under the NLRA. While the Board hinted in a footnote that there might be a way to lawfully offer employees a "narrowly tailored" severance agreement containing those clauses, it refused to explain how that could be accomplished and simply noted "we are not called on in this case to define today the meaning of a 'narrowly tailored' forfeiture of Section 7 rights in a severance agreement."

As has become common, there was a dissenting opinion in this case by Board Member Kaplan. The dissent argued that the standard set forth in *Baylor* and *IGT* is faithful to the NLRA and adequately addresses the issue of these clauses in severance agreements.

It remains to be seen whether the Board's decision will be appealed and subject to review by a federal court. However, employers should note that while the Board's new rule does apply to both union and non-union employees, it does not apply to public sector employees or individuals who are not deemed employees with Section 7 rights under the NLRA, such as executives, managers, supervisors and independent contractors. Employers are encouraged to review their standard agreements, specifically any nondisparagement and confidentiality provisions currently contained in those agreements. Employers should consult with counsel as to whether such provisions are necessary and if so, how those provisions should be drafted to prevent a violation of Section 8(a)(1).

For more information on the information presented in this information memo, please contact Peter A. Jones, Patrick V. Melfi, Gianelle M. Duby, any attorney in Bond's labor and employment practice or the Bond attorney with whom you are regularly in contact.

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