It's Time to Review and Update Your Severance Agreements, Again – NLRB Says So

Labor & Employment Law Update

By Beverly Alfon on February 22, 2023

Dust off your severance agreement template, again. This applies to all private employers – whether you have a unionized workforce or not.

Yesterday, the National Labor Relations Board (Board) issued a decision in *McLaren Macomb*, ruling that the mere act of offering a severance agreement with terms that have "a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights" under the National Labor Relations Act can constitute an unfair labor practice – regardless of other employer conduct or external circumstances (e.g., employer motive, employer animus against Section 7 activity, or whether or not the employee accepts the agreement).

Although this latest shift is just one in a long line of flip-flopping Board positions due to the partisan, labor-friendly change in control of the Board, it is now the legal standard and compliance is a must.

In *McLaren Macomb*, the Board specifically found that the confidentiality and non-disparagement provisions in the separation agreements that the employer offered to furloughed employees were unlawful, and the mere act of offering the agreement with these unlawful terms was in and of itself, an unfair labor practice under the Act.

The specific language at issue in *McLaren Macomb* and the Board's findings and reasoning regarding the same are summarized here:

> **Confidentiality -** The Board found the confidentiality clause to be unlawful because it broadly prohibited the employee from disclosing the terms of the agreement "to *any* third person." In sum, "[a] severance agreement is unlawful" if it precludes an employee from assisting coworkers with workplace issues concerning their employer, and from communicating with others, including a union, and the Board, about his employment." So, although the clause did not specifically prohibit the employee from disclosing the terms to the Board, former coworkers, or his union – it did

not "narrowly tailor" the language to "respect the range of [the employee's Section 7 rights]" by making clear that the confidentiality limitations did not extend to the employee's right to disclose the terms of the agreement to the Board or his Union, or the rights of the employee's "former coworkers to call upon him for support in comparable circumstances."

Non-Disparagement - The Board found the non-disparagement clause to be unlawful because it prohibited the employee from making any "statements to [the] Employer's employees or to the general public which could disparage or harm the image of [the] Employer, its parents and affiliated entities and their officers, directors, employees, agents and representatives." It did not limit this prohibition to matters regarding past employment with the employer. It did not exclude any statement asserting that the employer violated the Act. It did not have a time limitation, but instead applied "[a]t all times hereafter." It did not exclude "efforts to assist fellow employees, which would include future cooperation with the Board's investigation and litigation of unfair labor practices with regard to any matter arising under the NLRA at any time in the future[…]" It also did not exclude communications with the employee's "[…]former coworkers, the Union, the Board, any other government agency, the media, or almost anyone else."

Waiver/Release of Claims

The Board relied on the long-standing principle that employers cannot ask individual employees to choose between receiving benefits (in this case, under a severance agreement) and exercising their rights under the National Labor Relations Act. So, although not specifically discussed in the *McLaren Macomb* decision, the Board's reasoning requires some evaluation of the waiver/release language contained in severance agreements. For example, following the Board's reasoning in *McLaren Macomb*, an employer cannot broadly stop a former employee from bringing an unfair labor practice charge against it for presenting a severance agreement with unlawful terms, even if the employee accepts the agreement. Employers should consider adding "disclaimer" language to the waiver/release that makes clear that the employee is not prohibited from filing a charge or complaint with any government agency or participating in any investigation or proceeding conducted by a government agency, etc., but perhaps bookend that language with the understanding that in consideration of the severance benefits, the employee is waiving monetary relief related to those claims.

So, now what?

In light of the Board's recent decision, make sure that the confidentiality, non-disparagement, and waiver/release of claims clauses in your severance agreement templates are updated to "narrowly tailor" the extent of the limitations that you are trying to impose on the departing employee.