Holland & Hart

NLRB Changes the Game for Confidentiality Provisions in Severance Agreements

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Insight — February 23, 2023

This week, the National Labor Relations Board (NLRB or "Board") issued a decision that could significantly shape the terms of severance agreements with departing employees. Under this decision, all employers are prohibited from including provisions that prohibit disparagement of the employer or prevent the employee from discussing the terms of the agreement. However, the opinion is certain to be challenged in the federal appellate courts.

Often, non-unionized employers do not think the National Labor Relations Act (NLRA or "the Act") applies to them. However, that is not true. Section 7 of the Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, **and to engage in other concerted activities for** the purpose of collective bargaining or other **mutual aid or protection.**"

On February 21, 2023, the NLRB issued a decision in *McLaren Macomb*,[1] applying Section 7 and finding that the employer violated Section 8(a)(1) of the NLRA by including confidentiality and non-disparagement provisions in severance agreements offered to a group of furloughed workers.[2]

The severance agreement at issue contained the following 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.[3]

The NLRB held that "an employer violates Section 8(a)(1) of the Act when it proffers a severance agreement with provisions that would restrict employees' exercise of their NLRA rights. Such an agreement has a

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reasonable tendency to restrain, coerce, or interfere with the exercise of Section 7 rights by employees, regardless of the surrounding circumstances."[4] The Board explained that "[w]hether the employee accepts the agreement is immaterial," because the employer's "proffer of the severance agreement . . . constitutes an attempt to deter the employee from assisting the Board."

The Board reasoned that the confidentiality and non-disclosure/non-disparagement provisions violated the NLRA because they restricted employees from making any statements to coworkers or the public and because the "agreement conditioned the receipt of severance benefits on the employees' acceptance of those unlawful provisions."[56]

Takeaways for Employers

- The NLRA applies to **all employers**, regardless of whether they have unionized or not.[7]
- The NLRA does not apply to certain categories of employees, including supervisors.
- Employers utilizing severance agreements—whether for one-off terminations or mass layoffs, reductions in force, or furloughs—should consult legal counsel ***before*** presenting them to employees. Developments under both the NLRA and in the laws of many states are recasting what employers can and/or must include in separation agreements.[8]
- It is likely that the Board will apply this decision as broadly as possible, including as to severance agreements that were executed before it was issued. Employers should recognize that such agreements may have limited enforceability, particularly as to confidentiality or non-disparagement provisions.

The members of the Labor & Employment Practice Group of Holland & Hart are available to discuss the NLRA's applicability to your business, your polices—and your severance agreements.

[1] *See McLaren McComb,* 372 NLRB No. 58 (2023).
[2] *Id.*
[3] *Id*.
[4] *Id.* at IV.
[5] *Id.* at V.
[6] *Id.* at VI.
[7] *Id.* at V.
[8] *Id.* at IV.