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A Workplace Law Update

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NLRB Narrows Permissible Terms in Severance Agreements

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The National Labor Relations Board ("NLRB") has ruled that that including certain non-disparagement and confidentiality provisions in severance agreements violates the National Labor Relations Act ("NLRA").

In *McLaren Macomb* (Case 07-CA-263041), the employer permanently furloughed eleven employees and contemporaneously presented each of them with a "Severance Agreement, Waiver and Release." The severance agreements contained provisions that broadly prohibited the employees from making oral or written statements disparaging the hospital and from disclosing the terms of their severance agreement.

The NLRB held that the non-disparagement and confidentiality provisions unlawfully restrained the employees from exercising their right to engage in protected activity. Specifically, the NLRB stated that the restrained protected activity could include the employees' ability to make public and private statements about their terms and conditions of employment, assist co-workers with workplace issues, and engage with the NLRB to bring an unfair labor practice charge or assist in an investigation. The NLRB expressly confirmed that the NLRA's protections extend to former employees and stressed that severance agreements must be narrowly tailored to protect against infringement of any rights protected by the NLRA.

Lessons to Learn:

- *McLaren's* restrictions apply to both union and non-union employees.
- Language could be added to a severance agreement excepting NLRA protected activity from the agreement's confidentiality provisions.
- Employers concerned about disparagement should revisit their form separation agreements and tailor them to address the specific concerns involved. If, for example, an employee has sensitive confidential information, the confidentiality concern should be specifically defined and addressed rather than relying on a blanket disclosure restriction.

- Severance agreements should be framed using terms excluded from the NLRA's protection rather than "disparagement". Employees' right to engage in protected activity does not extend to communications that are defamatory, reckless, or maliciously untrue.

- Enforcement of pre-existing confidentiality and non-disparagement clauses which the NLRB considers "overbroad" may risk unfair labor practice ("ULP") charges and could result in an award of monetary damages. While the NLRA does not provide for monetary penalties, the NLRB's General Counsel currently has a policy of seeking monetary relief that is directly attributable to a ULP, including attorney's fees and costs. This means that attempts to enforce overbroad confidentiality and/or non-disparagement clauses could result in ULP charges in which the NLRB seeks to reimburse the employee for attorney's fees incurred defending against the employer's enforcement proceeding.

Overall, *McLaren* limits the effectiveness of current boilerplate language in many separation agreements, but it does not prevent employers from tailoring provisions to effectively address specific concerns that may cause actual harm.

Employers that want to discuss the terms of their separation agreements or a specific situation with an employee can contact any member of **Bodman's Workplace Law Group**. Bodman cannot respond to your questions or receive information from you without first clearing potential conflicts with other clients. Thank you for your patience and understanding.

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