Legal Update Article

Labor Board Reinstates Standard Restricting Employee Severance Agreements

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February 23, 2023

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Labor Relations

The National Labor Relations Board has returned to its pre-2020 standard restricting certain confidentiality and non-disparagement clauses in departing employees' severance agreements. *McLaren Macomb*, 372 NLRB No. 58 (2023).

Prior to the ruling, the Board held that severance agreements, by themselves, were not unlawful, with the Board focusing on the voluntary circumstances of the agreement's proffer rather than the language of the agreement.

Now, an employer violates Section 8(a)(1) of the National Labor Relations Act if a severance agreement requires employees to "broadly waive their rights" under the Act, including prohibiting employees from disparaging their employer and disclosing terms of the agreement.

Background

Under long-standing precedent, severance agreements were unlawful if they had a reasonable tendency to interfere with, restrain, or coerce employees' exercise of their Section 7 organizing and bargaining rights. As a result, employers were generally prohibited from offering severance pay to departing employees in exchange for them signing off on broad release language, such as terms that prohibit them from pursuing charges under the Act. Severance agreements also could not prohibit employees from publicly discussing working conditions or participating in Board investigations.

In 2020, the Trump Board reversed precedent in a series of two cases and determined employers generally did not violate the Act by offering departing employees separation agreements requiring confidentiality, non-disparagement, and non-participation in claims against the employer. *Baylor University Medical Center*, 369 NLRB No. 43 (2020); *IGT d/b/a Int'l Game Tech.*, 370 NLRB No. 50 (2020). In the established two-part test, a severance agreement would violate the Act if:

1. It required the employer proffering the agreement to have discharged the employee in violation of the Act or it committed another unfair labor practice (ULP) discriminating against employees; and
2. The employer "harbored animus" toward the exercise of Section 7 activity.

In those cases, the Trump Board distinguished voluntary separation agreements from work rules or policies that establish conditions of employment. It explained that the agreements were entirely voluntary, pertained only to postemployment activities, did not affect pay or benefits that were established as terms of employment, and had not been proffered coercively. As a result, it ruled, such provisions would not tend to interfere with, restrain, or coerce employees exercising their Section 7 rights in violation of Section 8(a)(1) of the Act.

However, upon her appointment to Board General Counsel (GC) under the Biden

Administration, GC Jennifer Abruzzo promptly issued her first memorandum highlighting cases the Board should reexamine. This included confidentiality and non-disparagement provisions in separation agreements, as well as clauses prohibiting departing employees from participating in third-party claims against the employer in return for severance pay.

Board Reinstates Standard

The issue in *McLaren Macomb* centered on whether the employer violated Section 8(a)(1) of the Act by offering severance agreements to 11 permanently furloughed union employees. The severance agreements "broadly prohibited them from making statements that could disparage or harm the image of the [employer] and further prohibited them from disclosing the terms of the agreement." For example, the agreements contained provisions regarding the following:

- Required confidentiality about the terms of the agreement and prohibiting disclosure to any third person "unless legally compelled to do so by a court or administrative agency …";
- Prohibited the employees from disclosing "information, knowledge or materials of a confidential nature" of which the employee had by reason of employment and prohibiting statements "to employees or to the general public which could disparage or harm the image" of the employer.

In its analysis, the Board focused on the language of the agreements and whether they broadly required the employees to waive their rights or whether the provisions would prohibit employees from participating in or cooperating with the Board regarding investigations or litigation related to ULPs.

First, the Board found the employer violated the Act by proffering severance agreements that conditioned severance benefits on the employees' acceptance of unlawful provisions. Second, the confidentiality and non-disparagement provisions also violated the Act, the Board found, by interfering with the employees' Section 7 rights. The Board noted the importance of employees' right to make public statements about the workplace, including through communication channels such as newspapers and social media. The provisions also tended to coerce the employees away from participating in a Board investigation, filing a ULP charge, or communicating with their union about the terms of the agreement, it said. As a result, the Board held, a broad provision barring employees from making any statements to fellow employees, the Board, or the general public that could disparage or harm the employer, including whether the employer violated the Act, is by itself unlawful.

The Board also questioned the relevance of the employer-animus factor of the Trump Board's analysis. Instead, the Board held that the test of a Section 8(a)(1) violation regarding interference, restraint, or coercion rests on whether the employer conduct reasonably tends to interfere with employee rights under the Act — not the employer's motive or whether the coercion succeeded or failed.

Lastly, the Board found the employer also violated Sections 8(a)(5) and (1) of the Act by failing to give the union notice of the permanent furloughs or providing the union with an opportunity to bargain. The employer did not give the union notice of the severance agreements.

Implications

The Board's decision returns to the traditional standard of analyzing the effect of a severance agreement and whether the provisions unlawfully restrain and coerce employees in the exercise of their Section 7 rights. Agreements that condition the receipt of severance benefits on the restriction or forfeiture of the rights under the Act or other statute will be unlawful as having a reasonable tendency to interfere with or restrain protected activity. As a result, employers proffering severance agreements wherein pay is contingent on employees signing away rights under the Act will be carefully scrutinized to protect against coercion.

Employers will need to ensure severance agreements are narrowly tailored to avoid prohibiting an employee's ability to participate in Board charges or investigations. Likewise, wide-ranging limitations or bans regarding non-disparagement or confidentiality must avoid restricting the filing of ULPs and other labor disputes or otherwise prohibiting employees from communicating terms and conditions of employment with other employees or outside third parties. Employee comments that are reckless or maliciously untrue remain outside the scope of the Act's protections.

Please contact your Jackson Lewis attorney with questions about this case or other legal developments.