Nondisparagement and Nondisclosure Provisions In Severance Agreements Can Violate Federal Labor Law

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The National Labor Relations Board ruled on February 21 that employers who include overbroa nondisparagement and nondisclosure clauses in severance agreements with departing employees may be committing an “unfair labor practice” in violation of federal labor law.

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The National Labor Relations Act

The National Labor Relations Act is the basic federal law that gives covered workers the legal right to engage in concerted activity for their mutual aid and protection, to form unions, and to bargain collectively with their employers over the terms and conditions of their employment (sometimes known as “Section 7 rights”). The Board is the federal agency that enforces the NLRA.

It is important to note that the NLRA protects the rights of non?union workers as well; even non?union workers, that is, have Section 7 rights under the NLRA. One of those is the right to discuss and even publicize the terms and conditions of employment; another is the right to participate in agency investigations into alleged violations of the Act.

The McLaren Macomb Case

In the case at issue (McLaren Macomb), the employer furloughed 11 workers, and offered to pa them certain severance compensation in exchange for waivers of claims. The severance agreements included broad nondisparagement clauses (“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”). The agreements also included confidentiality clauses (“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 cou or administrative agency of competent jurisdiction”).

The Board concluded that those clauses violated the Act by restricting the individuals from exercising their statutorily protected Section 7 rights.

First, the Board ruled that the nondisparagement clauses went too far. Federal labor law gives employees broad latitude to criticize their employers in discussions with other employees, and also protects the right of employees to convey their grievances to others. As the Board summarized, under Section 7 individuals have the right to raise complaints about their working conditions “with their former coworkers, the Board, any other government agency, the media, or almost anyone else.” The nondisparagement clauses prohibited such complaints, and so violated the law.

The Board ruled that the nondisclosure clauses also were overbroad. Section 7 of the NLRA generally permits workers to disclose and discuss the terms and conditions of their own employment, and it also permits workers to assist the Board in investigations into alleged unfair

labor practices. The nondisclosure clauses prohibited individuals from disclosing certain of the terms of their own employment (the terms of the severance agreements themselves), including in the process of assisting the Board, and therefore violated the individuals' Section 7 rights in that respect as well.

Under all of those circumstances, the Board concluded that the employer had committed an "unfair labor practice" by conditioning severance on the overbroad nondisparagement and nondisclosure clauses. The Board ordered the employer to reinstate the furloughed workers (with back pay), and to cease and desist from further use of such clauses.

Drafting Future Severance Agreements

Employers who wish to include nondisparagement and nondisclosure clauses in severance agreements with certain departing employees will need to take the McLaren Macomb case into consideration.

First, it can be important to note that the NLRA itself does not apply at all to certain classes of workers (such as supervisors, managers, public sector workers, and true independent contractors). Workers in those categories do not actually have Section 7 rights in the first place, and so employers who are offering severance agreements to workers in those categories need not be concerned about the Board's ruling.

Second, the Board's ruling rested in large part on its conclusion that the clauses in that case contained few exceptions, and therefore were overbroad. Employers who wish to use nondisparagement and nondisclosure clauses with covered employees may be able to craft exceptions and carve-outs to those clauses that would reduce the risk of overbreadth.

Finally, in other cases the Board also has noted the presence of "disclaimer" language in employer documents (to the effect that the document will not be construed to inhibit employees' Section 7 rights). Employers who wish to utilize nondisparagement and nondisclosure clauses with covered employees may consider including such disclaimer language in their severance agreements, to further reduce the risk of an unfair labor practice charge.

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We encourage employers who have specific questions about the NLRB's ruling on severance agreements, or about any employment law topics, to contact Don Johnsen at (602) 530-8437 or dpj@gknet.com.