Lawyer Insights

It's Time to Review Severance Agreements in Light of NLRB Ruling

By Amber Rogers and James La Rocca
Published in HR Daily Advisor | April 10, 2023


A recent decision by the National Labor Relations Board (NLRB) in *McLaren Macomb* has both union and non-union employers taking a second look at their severance agreements. In *McLaren Macomb*, the Board decided that an employer violated the National Labor Relations Act (NLRA) by offering furloughed employees severance agreements that contained confidentiality and non-disparagement provisions.

What Happened in *McLaren Macomb*

The employer operates a hospital with over 2,000 employees. In March 2020, the government issued COVID-19 regulations that limited the employer's operations. As a result of these restrictions, the employer terminated its outpatient services and eventually permanently furloughed 11 employees who happened to be represented by a union.

The employer offered the permanently furloughed employees severance agreements. Each severance agreement required the employee to keep the terms of the agreement confidential and prohibited the employee from disparaging the employer, related entities, and individual representatives.

The union representing the furloughed employees challenged the severance agreement in a proceeding before the NLRB with the support of the Board's general counsel. In assessing the legality of the severance agreement under the NLRA, the NLRB held that the mere offering of a severance agreement to employees is an independent violation if the agreement's terms have a reasonable tendency to interfere with, restrain, or coerce employees in exercising their NLRA rights, irrespective of any other circumstances. The Board then opined that the confidentiality and non-disparagement provisions were unlawful because they interfered with, restrained, or coerced employees in exercising their NLRA rights.

As to the confidentiality provision, the NLRB said that the provision broadly prohibited an employee from disclosing the agreement to any third-party, which would include the Board and other employees. The NLRB highlighted that it is against public policy to prohibit individuals from cooperating with the Board and that employees have the right under the NLRA to discuss their terms and conditions of employment with each other.

Regarding the non-disparagement provision, the NLRB faulted the provision for prohibiting an employee from making any statement that could disparage or harm the image of the employer, related entities, and individual employer representatives without any temporal limitation. The Board emphasized that "[p]ublic

statements by employees about the workplace are central to the exercise of employee rights under the [NLRA]."

In rendering its decision, the NLRB did mention that not every provision in a severance agreement that arguably interferes with NLRA rights is unlawful. The Board explained that the standard it set forth examines whether the relinquishment of NLRA rights is a permissible "narrowly tailored" one.

Why the Decision Matters to Your Organization

Whether your organization is unionized or not, there is a very good chance this decision applies. Most private sector employers in the United States are covered by the NLRA, irrespective of whether their workplaces are unionized. The NLRA provides both union and non-union employees with the right to engage in protected concerted activities and the right to refrain from such activities. Such activities include the right to discuss terms and conditions of employment with co-workers, publicly protest unfair working conditions, and join labor unions. Employees also have the right to file unfair labor practice (ULP) charges with the NLRB and cooperate in Board investigations.

There also is a very good chance that your organization's severance agreements contain language that may run afoul of the NLRA in light of the NLRB's decision in *McLaren Macomb*. It is not uncommon for an employer to include language in a severance agreement requiring the employee to keep certain information confidential, preventing the employee from disparaging the employer, and limiting the employee's right to pursue claims against the employer.

What Should Your Organization Do

Employers should carefully review severance agreements taking into consideration the *McLaren Macomb* decision, preferably with experienced labor counsel. Here are a few tips and takeaways.

- Before redlining your severance agreement, consider whether the employee at issue is a statutory employee under the NLRA to whom the decision in *McLaren Macomb* applies in the first place. As mentioned, the NLRA applies to most private sector employers in the United States and protects union and non-union employees alike, but not everyone is a statutory employee. For example, individuals who meet the definition of a statutory supervisor because they exercise independent discretion to take certain employment actions, such as hiring, disciplining, or discharging employees, are not statutory employees.

- Consider whether any language that arguably interferes with NLRA rights (e.g., confidentiality and non-disparagement provisions) is really needed. What's the risk the employee actually would engage in conduct the employer prefers that the employee not engage? And, if the employee engages in such conduct, how detrimental would it be to the employer? For example, confidentiality may not be important at all if the severance agreements are standardized, the severance agreements are provided in connection with a widely publicized reduction-in-force, and/or the employees do not have any confidential company information due to the nature of their job.

- Think about ways to narrowly tailor any potentially problematic language so that it could be upheld under *McLaren Macomb.* The decision in *McLaren Macomb* recognized that language in a severance agreement that interferes with NLRA rights can be lawful if narrowly tailored. Can confidential

information and disparagement be defined narrowly in the severance agreement so as to pass muster under *McLaren Macomb*?

• Consider disclaimers stating that nothing in the agreement interferes with the employee's NLRA rights. At a minimum, such disclaimers should make clear that the employee can exercise rights to engage in protected concerted activities, file ULP charges with the NLRB, assist others in filing ULP charges, and cooperate with a Board investigation. Whether these disclaimers ultimately can save the day will be determined, but they certainly would not do harm.

Conclusion

Prior to presenting an employee with a severance agreement, employers should review the severance agreement with the decision in *McLaren Macomb* in mind.

It's Time to Review Severance Agreements in Light of NLRB Ruling
By Amber Rogers and James La Rocca
Published in HR Daily Advisor | April 10, 2023

Amber Rogers *is a partner in the firm's Labor & Employment group in the firm's Dallas office. Amber's national practice assists clients with traditional labor relations and litigation, employment advice and counseling, and complex employment litigation. She can be reached at +1 (214) 468-3308 or arogers@HuntonAK.com.*

James La Rocca *is a senior attorney in the firm's Labor & Employment group in the firm's New York office. James represents employers in labor and employment matters, providing strategic advice and counsel to employers facing union organizing campaigns and representing their interests in representation cases and unfair labor practice proceedings before the National Labor Relations Board (NLRB). He can be reached at +1 (212) 309-1395 or jlarocca@HuntonAK.com.*

This content was originally published on HR Daily Advisor and is re-posted with their permission.
https://hrdailyadvisor.blr.com/2023/04/10/its-time-to-review-severance-agreements-in-light-of-nlrb-ruling/