PHILLIPS LYTLE LLP CLIENT ALERT
LABOR & EMPLOYMENT
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National Labor Relations Board Restricts Non-Disparagement and Confidentiality Clauses in Severance Agreements

In the case of *McLaren Macomb* (372 N.L.R.B. No. 58), the National Labor Relations Board (NLRB) held, on February 21, 2023, that it is illegal under the National Labor Relations Act (NLRA) for employers to offer non-supervisory employees severance agreements containing broad non-disparagement and confidentiality provisions which interfere with employees' rights under the NLRA. The NLRB's decision applies to all employers, both unionized and non-unionized. Therefore, all employers should be aware of the NLRB's rules about the use of such clauses in severance agreements.

THE CLAUSES AT ISSUE

The employer in *McLaren Macomb* terminated 11 unionized employees in June 2020 and offered them a severance agreement that contained provisions typically found in such agreements, including confidentiality and non-disparagement clauses, which stated as follows:

> **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.
>
> **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.

THE NLRB'S DECISION

The NLRB held that the employer's mere act of presenting the severance agreement with the confidentiality and non-disparagement clauses to the terminated employees was itself illegal because the clauses unlawfully restrained and coerced the terminated employees in the exercise of their rights under the NLRA. The NLRB found that the non-disclosure clause violated the NLRA because it prohibited the terminated employees from exercising their right to make statements about any labor issue or dispute, or term and condition of employment of the employer. The NLRB noted that under the NLRA employees have the right to critique their employer's policies and practices, subject only to the restriction that their statements not be disloyal, reckless or maliciously untrue.

Similarly, the NLRB found the confidentiality clause illegal because by prohibiting the terminated employees from disclosing the terms of the severance agreement, it impermissibly chilled their right under the NLRA to file an unfair labor practice charge with the NLRB and assist the NLRB in investigating the employer. The NLRB held that, as a matter of public policy, the terminated employees could not be forced to surrender their rights to obtain the monetary benefits of the severance agreement.

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EMPLOYER CONSIDERATIONS

Employers should review their severance agreements to determine whether they contain confidentiality and non-disclosure clauses similar to those found illegal in *McLaren Macomb*. However, not all such clauses will necessarily now be illegal. The NLRB's decision was based on the overly broad nature of the clauses at issue in *McLaren Macomb*, meaning that more narrowly tailored clauses may not be found to violate the NLRA. Employers wishing to use such clauses in their severance agreements will have to assess (a) how broadly they wish to make them and (b) the risk that they potentially violate the NLRA.

Employers may also consider including a disclaimer clause which provides that any confidentiality and non-disclosure restrictions do not interfere with the ability of the terminated employee to exercise his or her rights under the NLRA. The NLRB has very specific requirements for a valid disclaimer, so employers should exercise extreme care in using a disclaimer. Employers should also consider including a "savings clause" in their severance agreement to reduce the risk that a confidentiality or non-disclosure clause found to be illegal does not invalidate the entire severance agreement.

Lastly, because the NLRA does not cover supervisors, the NLRB's decision does not prohibit employers from continuing to include their standard confidentiality and non-disclosure clauses in severance agreements for terminated employees who qualify as supervisors under the NLRA. Supervisors excluded from the NLRA include not only traditional managers and executives, but any employee who has authority, among other things, to hire, fire, assign, suspend, discipline, adjust employees' grievances or effectively recommend such action.

Additional Assistance

For further assistance, please contact any of the attorneys on our Labor & Employment Practice Team or the Phillips Lytle attorney with whom you have a relationship. ■

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