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NLRB Restricting Provisions in Severance Agreements: *McLaren Macomb*

In the 2023 case of *McLaren Macomb*, a hospital found itself under scrutiny by the National Labor Relations Board for confidentiality and non-disparagement terms that many would consider standard in severance agreements. The NLRB's decision significantly limits an employer's ability to propose severance agreements with "broad" confidentiality and non-disparagement provisions to its employees. But – is the NLRB taking it too far?

The case centered around allegations of unfair labor practices when McLaren Macomb included certain provisions in severance agreements offered to furloughed employees. The NLRB examined whether these severance agreements violated rights under NLRA Section 7, which applies to all employees, whether represented by a union or not. The severance agreements in question contained non-disparagement (i.e., prohibiting employees from making statements that would harm the employer) and confidentiality clauses that could have prevented employees from speaking out about their experiences, including concerns related to working conditions or union activity. The union argued that these clauses were overly broad and could have prohibited employees from exercising their NLRA rights. The NLRB agreed.

The Board held that "broad" confidentiality and non-disparagement provisions were unlawful as they tend to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights (i.e., organizing a union, striking, discussing wages, etc.). They further held that employers who even present such provisions to employees may be engaging in unlawful labor practice based on the same. The NLRB's General Counsel issued a memorandum stating that confidentiality clauses "that have a chilling effect that precludes employees from assisting others about workplace issues and/or from communicating with the Agency, a union, legal forums, the media or other third parties are unlawful." The memo further goes on to discuss that non-disparagement agreements containing "all disputes, terms and conditions, and issues, without a temporal limitation and with application to parents and affiliates and their officers, representatives, employees, directors and agents" will likely be found unlawful as well. The General Counsel did concede that these agreements, ***if narrowly tailored or justified***, "may be considered lawful."

The NLRB wants to retroactively apply this decision. The NLRB recommends that employers notify applicable employees that these provisions are null and void. Further, this decision is part of General Counsel Abruzzo's larger plan of attack to make the NLRA relevant to a broad class of employees, including guidance and recommendations she's made for the Board to take action on items like noncompete agreements, non-solicitation clauses, cooperation agreements, etc.

What should employers do in response?

Companies should seek counsel to discuss this decision and specific parameters of the limitations, and not just blindly follow the NLRB decision, which many consider an overreach. Some key points for employers to keep in mind:

- Analyze your separation, severance, and settlement agreements containing similar confidentiality and non-disparagement provisions.
- Include a severability provision in all agreements.
- Consider talking to legal counsel to form narrowly tailored agreements/provisions in light of this decision.

If your company has any questions or concerns regarding severance agreements or confidentiality/non-disparaging provisions, we at Lehr Middlebrooks Vreeland & Thompson, P.C. are happy to help. Please contact McKenzie Meade at (205) 323-9279 or mmeade@lehrmiddlebrooks.com.