

EMPLOYERS MUST EXAMINE THE SCOPE OF THEIR CONFIDENTIALITY AND NON-DISCLOSURE PROVISIONS POST NLRB DECISION

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The National Labor Relations Board (“NLRB”) recently ruled that overly broad non-disparagement and confidentiality provisions in a severance agreement are unlawful. The NLRB further ruled that, depending on the circumstances, it can be unlawfully coercive for an employer to even present such an agreement to an employee regardless of whether the employee signs it. This ruling, *McLaren Macomb and Local 40 RN Staff Council, Office and Professional Employees, International Union (OPEIU), AFL-CIO*, Case 07-CA-263041, 372 NLRB No. 58, February 21, 2023 (“*McLaren Macomb*”), is in alignment with previously long-settled precedence and reverts the standard back to what it was prior to 2020.

The National Labor Relations Act (the “Act”) protects workplace democracy. Specifically, the Act provides employees certain rights and protections, which includes the right to discuss the terms and conditions of their employment with coworkers, former employees, and other certain third parties to improve their employment terms and workplace conditions. It is unlawful for an employer to interfere with, restrain, or coerce employees in the exercise of such rights.

In the recent NLRB decision, the employer furloughed eleven non-supervisory employees and asked them to sign a Severance Agreement, Waiver, and Release (the “Agreement”). To receive their severance benefits, they had to sign the Agreement.

Along with requiring the employees to release the employer from any claims arising out of their employment or termination of their employment, the Agreement also contained the following provisions:

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1. **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 [their] 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.
2. **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.

In analyzing these provisions, the NLRB focused on the Agreement's broad restrictions on the employees and the lack of any subject matter limitation, time period limitation, or limitation on the audience of such communications. Specifically, the Agreement clearly prohibited the employees from pursuing any complaints against the employer and restricted the employees from assisting the NLRB in the NLRB's investigation into complaints against the employer.

As a result, the Agreement had "a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their rights" provided to them by the Act and was thus unlawful. Additionally, the mere presentment of the Agreement to the employees was unlawful and violated the Act (regardless of whether the employee signed it) due to the Agreement's coercive language. Notably, the NLRB did not examine the employer's actions surrounding the presentment of the Agreement because a showing of actual coercion is not required. Rather, the focus is merely on the terms of the Agreement and whether they are coercive.

It is vital that employers take a moment to review their confidentiality, non-disclosure, non-disparagement, and severance agreements to ensure the provisions are not overly broad and are not in conflict with the rights and protections provided by the Act or the standards set forth in *McLaren Macomb*, which will help ensure that the provisions are enforceable.

Please contact us if you have any questions about this or wish to explore refining and enhancing your company's confidentiality, non-disclosure, non-disparagement, or severance agreements.