NLRB reverses course to establish new restrictions on severance agreements

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On February 21, the National Labor Relations Board (NLRB) ruled that overbroad nondisparagement and nondisclosure provisions in severance agreements are an "unfair labor practice" in violation of Section 7 of the National Labor Relations Act (NLRA). The ruling in McLaren Macomb is a reversal of two previous decisions—Baylor University Medical Center and IGT d/b/a International Game Technology—that have been relied upon by employers for the past three years.

What are Section 7 rights?

When most employers think of the NLRA, they think of unions and union-related activity. It's important to note, however, that the NLRA protects the rights of union and nonunion workers alike when it comes to Section 7.

Section 7 of the Act is a basic federal law that protects the rights of covered workers to engage in protected concerted activities, to form unions, and to engage in collective bargaining activities with their employers over the terms and conditions (e.g., wages, leave policies, etc.) of their employment.

Who are covered workers?

Not all workers are protected workers under Section 7. It doesn't apply to supervisors, managers, public-sector workers, or workers properly classified as independent contractors. The McLaren Macomb ruling only applies to those protected workers covered by Section 7.

What happened in the McLaren Macomb case?

In the McLaren Macomb case, a hospital offered a severance agreement in connection with its furlough of 11 employees. The agreement contained a nondisparagement and nondisclosure clause containing the following language:

Nondisparagement: "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."

Nondisclosure: "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."

In overruling its prior decisions, the Board found that the nondisparagement and nondisclosure clauses violated Section 7 of the NLRA by restricting the furloughed employees from exercising their rights to discuss their terms and conditions of employment with their former coworkers. The Board also affirmed that Section 7 rights extend to discussions with a wide range of third parties and aren't just limited to coworkers.

What are the next steps?

Employers that are presenting severance agreements to departing employers should consider several factors when deciding whether to include nondisparagement and nondisclosure provisions.

First, you should consider whether the departing employee receiving the severance agreement is a covered employee. If they are a covered employee, you need to revise your nondisparagement and nondisclosure provisions to include carve outs and exceptions that would reduce the risk the Board would find them to be overbroad, as it did in McLaren Macomb.

Employers that have specific questions about the NLRB's recent ruling on severance agreements or other related employment issues should contact an experienced employment law attorney to ensure your workplace is in compliance with employment laws.

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